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Research Report

Legal and systematic issues in the interim economic partnership agreements: Which way now?

Issue Paper, No. 2

Provided in Cooperation with:

International Centre for Trade and Sustainable Development (ICTSD), Geneva

Suggested Citation: Ochieng, Cosmas Milton Obote (2009) : Legal and systematic issues in the interim economic partnership agreements: Which way now?, Issue Paper, No. 2, International Centre for Trade and Sustainable Development (ICTSD), Geneva

This Version is available at:

<https://hdl.handle.net/10419/70321>

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ICTSD EPAs and Regionalism Series



Legal and Systematic Issues in the Interim Economic Partnership Agreements



Which Way Now?

By Cosmas Milton Obote Ochieng
Lancaster University, UK



International Centre for Trade
and Sustainable Development

Issue Paper No. 2

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Published by

International Centre for Trade and Sustainable Development (ICTSD)

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Acknowledgments

This paper was commissioned under the ICTSD Programme on EPA's and Regionalism. An initiative supported by SIDA (Sweden); the Department for International Development (U.K.); the Ministry of Foreign Affairs of Netherlands (DGIS); and the Organisation Internationale de la Francophonie (OIF). ICTSD is grateful for their support.

This study was commissioned by the ICTSD's Regionalism.

We are grateful to the participants of the ICTSD workshop on 'Non Tariffs Barriers on EPA's,' held in Limbe, Cameroon, 26-27 June, 2009.

For more information about ICTSD's Programme on EPAs and Regionalism visit our web site at <http://www.ictsd.org>

ICTSD welcomes feedback and comments on this document. These can be forwarded directly to El Hadji Diouf: ediouf@ictsd.ch

Citation: Ochieng C.M.O, (2009). *Legal and Systematic Issues in the Interim Partnership Agreements: Which Way Now?* International Centre for Trade and Sustainable Development, Geneva, Switzerland. International Centre for Trade and Sustainable Development, Geneva, Switzerland.

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ISSN 2071-5952

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LIST OF ABBREVIATIONS AND ACRONYMS

ACP	African, Caribbean and Pacific
ACWL	Advisory Centre on WTO Law
CAFTA-DR	Central American Free Trade Agreement--Dominican Republic
CARIFORUM	Caribbean Forum
CEMAC	Communauté Économique et Monétaire de l'Afrique Centrale (Monetary and Economic Community of Central Africa)
CPA	Cotonou Partnership Agreement
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EAC	East African Community
EBA	Everything But Arms
EC	European Commission
ECOWAS	Economic Community of West African States
EPA	Economic Partnership Agreement
EPA DS	European Partnership Agreement dispute settlement
ESA	Eastern and Southern Africa
EU	European Union
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalized System of Preferences
ICTSD	International Centre for Trade and Sustainable Development
LDC	Least developed country
MFN	Most favoured nation
OECD	Organization for Economic Cooperation and Development
PACP	Pacific states of the ACP
RPT	Reasonable period of time
RTA	Regional Trade Agreement
SADC	Southern Africa Development Community
SAT	Substantially all trade
SDT	Special and differential treatment
TDCA	Trade, Development and Cooperation Agreement (EU-South Africa)
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
USDA	United States Department of Agriculture
WTO	World Trade Organization
WTO DS	World Trade Organization Dispute Settlement

FOREWORD

Regional trade agreements (RTA) have become a distinctive feature of the international trading landscape. Their number has increased significantly in recent years, as World Trade Organization (WTO) member countries continue to pursue these agreements. Some 200-odd agreements have been notified to the WTO but their number may be actually higher, as some agreements are never notified to the multilateral bodies and many more are under negotiation. As a result, more and more trade is now covered by such preferential deals, prompting many analysts to suggest that RTAs are becoming the norm rather than the exception.

Many regional pacts contain obligations that go beyond existing multilateral commitments, and others deal with areas not yet included in the WTO, such as investment and competition policies, as well as labour and environment issues. Regional and bilateral agreements between countries at different stages of development have become commonplace, as have attempts to form region-wide economic areas by dismantling existing trade and investment barriers, an objective that figures prominently in East Asian countries' trade strategies.

Yet the effects of RTAs on the multilateral trading system are still unclear, as is their impact on trade and sustainable development. RTAs represent a departure from the basic non-discrimination principle of the WTO, and decrease the transparency of global trade rules, as traders are subject to multiple, sometime conflicting requirements. This is particularly the case in relation to rules of origin, which can be extremely complex and often vary in agreements concluded by the same countries. Also, the case that WTO-plus commitments enhance sustainable development is far from proven, and it is not readily apparent whether RTAs enhance trade rather than divert it.

However, developed and developing countries alike continue to engage in RTA negotiations, and this tendency seems to have been intensified recently due to the slow pace of progress in the multilateral trade negotiations of the Doha Round. Countries feel the pressure of competitive regional liberalisation and accelerate their searches for new markets. Thus, while most countries continue to formally declare their commitment to the multilateral trading system and to the successful conclusion of the Doha negotiations, for many bilateral deals are taking precedence. Some countries have concluded so many RTAs that their engagement at the multilateral levels is becoming little more than a theoretical proposition.

Thus, gaining a better understanding of the workings of RTAs and their impact on the multilateral trading system is a key concern of trade analysts and practitioners. Current WTO rules on regional agreements, mainly written in the late 1940s, do not seem well equipped to deal with today's web of RTAs. Economists dispute whether RTAs create or divert trade, and political scientists try to explain the resurgence of RTAs by a mix of economic, political and security considerations. In some cases, the fear of losing existing unilateral non-reciprocal trade preferences provides the rationale for launching RTA negotiations, as is the case of the Economic Partnership Agreement (EPA) negotiations between the European Union and its former colonies in Africa, the Caribbean and the Pacific (ACP). Many worry about the systemic impact of RTAs and dispute whether they should be considered "building blocks" to a stronger and freer international trading system or rather "stumbling blocks" that erode multilateral rules and disciplines.

There are many interpretations of the dynamic relationship between RTAs and the WTO. The fact remains, however, that RTAs are here to stay. If anything, they will continue to increase in number in the coming years. They are already an integral part of the international trade framework, and influence the behaviour of governments and traders. They co-exist with the multilateral trading

system and impact it in manners that have yet to be fully understood. Regional rules often replicate multilateral disciplines, but sometimes go beyond them by going deeper into some commitments, with implications for sustainable development that need to be highlighted. And it may well be that some regional disciplines might be able to find their way into the multilateral framework.

It is for these reasons that ICTSD has decided to initiate a research, dialogue and information programme whose main purpose is to contribute to filling in these knowledge gaps and gaining a better understanding of the evolving reality of RTAs and their interaction with the multilateral trading system.

This issue paper, titled "*Legal and Systemic Contested issues in Economic Partnership Agreements (EPAs) and WTO Rules: Which Way Now?*", and written by Dr Cosmas Milton Obote O'chieng, is a contribution to this process. The paper provides a legal analysis of some systemic issues regarding the relationship between the WTO and EPAs. Some of these issues include the following:

- The application of the Most Favourable Nation Clause, Article XXIV of GATT and its relationship with EPAs,
- The effects of the "standstill" clause on bound or applied tariff rates applied to ACP countries by WTO members,
- The political and legal effects of the "Non-Execution Clause" in EPAs;
- The articulation of the dispute settlement mechanisms of EPAs and their interactions with the WTO one.

The paper concludes with a series of legal recommendations that could be useful to all stakeholders in understanding the stakes involved in the EPA negotiations.

We hope that this paper, together with the others in this series on regional agreements, will clarify some of the many questions posed by RTAs, and help promote a better understanding of the workings of RTAs and how the deals interact with the multilateral trading system.



Ricardo Meléndez-Ortiz
Chief Executive, ICTSD

EXECUTIVE SUMMARY

This study was commissioned by the Regionalism and Services Department of the International Centre for Trade and Sustainable Development (ICTSD) to examine contested issues in the interim Economic Partnership Agreements (EPAs) between the European Union (EU) and the African, Caribbean and Pacific (ACP) countries. The study examined the legal and developmental implications of five fundamental provisions of the EPAs: interpretation of General Agreement on Tariffs and Trade (GATT) Article XXIV, particularly the understanding of ‘substantially all trade’ (SAT) and ‘reasonable period of time’ (RPT); clauses on ‘most favoured nation’ (MFN) treatment; ‘standstill’; ‘dispute settlement’; and ‘non-execution’.

The findings of this study are based on textual analyses of the EPA of the Caribbean Forum (CARIFORUM), and the interim EPAs of the East African Community (EAC), the Southern African Development Community (SADC), countries in Eastern and Southern Africa (ESA), countries of the Pacific ACP (PACP), the Economic Community of West African States (ECOWAS), and the Monetary and Economic Community of Central Africa (CEMAC).

The interim EPAs have been ‘initialled’ and contain ‘rendez-vous’ clauses allowing for further negotiations of some items whilst the CARIFORUM is a fully concluded EPA.

The study finds that all the EPAs contain more restrictive legal provisions than necessary for World Trade Organization (WTO) compatibility or desirable in terms of the development, financial and trade needs of ACP countries. Where WTO compatibility is required (e.g. compliance with GATT Article XXIV), in several respects, the EPAs are relatively more restrictive than many pre-existing Free Trade Agreements (FTAs) involving the EU, the United States of America (US) and others, for example: the Trade, Development and Cooperation Agreement (TDCA) between the EU and South Africa, and EU-Chile, EU-Mexico, US-Australia, Thailand-Australia, Thailand-New Zealand and Canada-Chile FTAs. The EPA clauses on MFN treatment and standstill are not only legally WTO-plus, but constitute the first time the EU is employing these provisions in its trade relations with developing countries. The TDCA and EU-Chile, EU-Mexico and EU-Morocco FTAs contain no such provisions.

The WTO-plus provisions of EPAs and their restrictive interpretations of WTO rules pose serious systemic challenges to the multilateral trading system, particularly the purposes and functions of the Enabling Clause and the underlying principle of ‘special and differential treatment’ (SDT). Overall, the legal design of the EPAs undermines that principle and diminishes the ‘policy space’ or ‘flexibility’ available to ACP EPAs in dealing with challenges inherent in their levels of economic development such as the need for infant industry protection, revenues from trade taxes, etc. Specifically, the EPA MFN clause threatens to undermine the role of the Enabling Clause in governing South-South trade. It also imposes unnecessary constraints on trade relations between ACP countries and other industrialized countries.

The study makes six recommendations.

1. African, Caribbean and Pacific countries should seek the elimination of the MFN clause in the final negotiations on full EPAs. Failing that, ‘major trading economies’ in the MFN provisions should be redefined to exclude developing countries. Any definition of major trading economies that includes developing countries potentially conflicts with the purposes and functions of the Enabling Clause in governing South-South trade.

2. The Economic Partnership Agreement standstill clause is a WTO-plus provision. It would be in the development, financial and trade interests of ACP countries to seek its elimination in the final negotiations on full EPAs. A second best alternative in this respect would be for the ACP countries to freeze their tariffs at bound rather than applied levels and freeze tariffs relating only to products committed for liberalization as opposed to all products as provided for in some interim EPAs.
3. Consistent with many other FTAs (e.g. EU-Chile, EU-Czech, EU-Morocco, EU-South Africa, US-Australia, US-Morocco) and, in the interests of their development, trade and financial needs, ACP countries should consider excluding any sensitive sectors or products from liberalization commitments. These should be defined in both 'static' (short term, e.g. food security, infant industry protection) or 'dynamic' (long term, e.g. industrial or national development) terms. This could be considerably more than their present exclusions in interim EPAs.
4. For purposes of compliance with GATT Article XXIV, 80 percent liberalization by ACP countries (either in regional groupings or as individual countries in bilateral EPAs) within 15 years would appear to suffice for compatibility with GATT Article XXIV, if the EU liberalizes 100 percent of its trade with any given ACP country configuration at the outset. This would amount to 90 percent coverage of the trade between the parties in 15 years. All the interim EPAs and the CARIFORUM EPA provide for at least 80 percent liberalization within 15 years by the ACP bloc and 100 percent immediate liberalization by the EU, barring transitory periods for rice and sugar. Any liberalization commitment by the ACP group beyond the 80 percent 15-year mark would appear deeper than legally necessary compared to many prevailing FTAs. In the interests of their development, trade and financial needs, these countries could seek indefinite phase-out periods for liberalization commitments beyond the 80 percent 15-year watershed or subject such commitments to tariff reduction rather than elimination. This would be consistent with other North-South FTAs, particularly those involving the US.
5. Economic Partnership Agreement dispute settlement (EPA DS) should be no stricter than WTO dispute settlement (WTO DS). Developing countries face considerable challenges utilizing the WTO DS system. A more stringent system than the WTO's would only make things worse for the ACP countries. They could consider choice of forum provisions in EPA dispute settlement systems with the WTO system as a potential alternative option. This could enhance the symmetry of the EPA DS mechanism given the economic disparities between the EU and the ACP regions.
6. If ACP countries choose to conclude agreements on services and investments, it would be in their development, trade and financial interests to demand special and differential treatment as provided by the General Agreement on Trade in Services (GATS) Article V in respect of services. As GATS provides for MFN treatment in Regional Trade Agreements (RTAs), it would also be in their interests to consider the items they might exempt from MFN provisions of the GATS. The ACP countries would also benefit from an MFN clause with both pre- and post-establishment provisions as inspired by GATS Article II.

1. INTRODUCTION

The recently initialled or concluded Economic Partnership Agreements between the EU and a number of the ACP countries (40 out of 76) are the successors to the Lomé/Cotonou preferences scheme that governed EU-ACP countries' trade between 1975 and 2007. The Lomé Conventions were a special form of the EU's Generalized System of Preferences (GSP). They put ACP countries at the top of the pyramid of preferences granted by the EU to developing countries from 1975 to 2001, when the Cotonou Partnership Agreement (CPA) replaced them. A temporary WTO Waiver granted until 31 December 2007 allowed the CPA to extend most of the Lomé provisions in the intervening period as 'Cotonou preferences'.

Through the CPA, the EU and the ACP group committed to the establishment of new WTO-compatible trade arrangements by 1 January 2008. These are the EPAs. They differ from the Lomé/Cotonou regime in two important respects. Firstly, whilst the Lomé/Cotonou regimes were non-reciprocal preferential market access agreements in favour of the ACP regions, EPAs are FTAs and embody reciprocity in EU-ACP country trade in line with the provisions of GATT Article XXIV on FTAs and customs unions. Secondly, unlike Lomé, EPAs contain provisions for concluding agreements on services, which would bring them under the jurisdiction of GATS Article V (Abass, 2004; Ochieng, 2007).

The differences between the Lomé/Cotonou and the EPA trade regimes are captured in articles outlining their founding principles. Article 7 of the first Lomé Convention (Lomé 1) established the principle of non-reciprocity in trade between the EU and the ACP group of countries:

In view of their present development needs, the ACP shall not be required, for the duration of this Convention, to assume, in respect of imports of products originating in the Community, obligations corresponding to the commitments entered into by the Community in respect of imports of the products originating in the ACP States.

This principle was included in successive Lomé Conventions. Articles 36.1 and 37.7 of the CPA introduce the principle of reciprocity in trade between the EU and ACP countries. Article 36.1 (on modalities) states:

the Parties agree to conclude new World Trade Organization (WTO) compatible trading agreements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade.

Despite introducing the principle of reciprocity in trade, the CPA provided for SDT for all ACP countries. Article 35.5 of the CPA states:

Parties reaffirm their attachment to ensuring special and differential treatment for all ACP countries and to maintaining special treatment for ACP least developed countries (LDCs) and to taking due account of the vulnerability of small, landlocked and island countries.

Article 37.7 states:

Negotiations shall take account of the level of development and the socioeconomic impact of trade measures on ACP countries, and their capacity to adapt and adjust their economies to the liberalisation process. Negotiations will therefore be flexible as possible in establishing the duration of a sufficient transitional period, the final product coverage, taking into account sensitive sectors, and the degree of asymmetry in terms of timetable for tariff dismantlement, while remaining in conformity with WTO rules then prevailing.

Article 41.2 underlines the "need for special and differential treatment to ACP suppliers of services."

The CPA's provisions on reciprocity and SDT reflect the parties' intention to establish WTO-compatible trade arrangements without

jeopardising the development, financial and trade interests of ACP countries. This intention might have been clear as the various Articles of the CPA on EPAs illustrate, but it was also fraught with tension similar to that inherent within the WTO between the principle of reciprocity and SDT. This tension has been at the heart of the differences between the EU and ACP countries over the negotiations of the EPAs since 2002. These differences reflect divergent perspectives over what type of EPAs would meet WTO compatibility without constraining the development, financial and trade needs of ACP countries.

The compatibility of the EPAs with WTO rules has been of paramount importance because the evolution of the EPAs was partly influenced by the legal challenges to the Lomé preferences through the European Community banana disputes of the 1990s (see WTO 1997a, 1997b for Panel and Appellate Board Rulings, respectively). WTO rulings on these disputes (WTO, 1997a, 1997b) cast doubt on the compatibility of aspects of the preferences with WTO rules and when the Fourth Lomé Convention expired in 1999 (it had been signed on 15 December 1989 for a period of 10 years) the EU-ACP bloc had to seek a WTO waiver to allow the continuation of the preferences under the CPA trade regime whilst they sought a more permanent and WTO compatible trading arrangement. This waiver was granted on 14 November 2001 on the sidelines of the Doha Ministerial Conference (hence the 'Doha Waiver').

It is within this legal context (i.e. European Community banana disputes) that Article 37 (6) of the CPA provided for the establishment of WTO compatible trade agreements between the EU and six regional groupings of ACP countries by 1 January 2008, which became known as EPAs. After some contestation (not yet entirely resolved, as discussed in the rest of this article), WTO compatibility came to be understood by the EU, and a majority of ACP countries, as compliance with Article XXIV of GATT (on Regional Trade Agreements here used interchangeably with Free Trade Agreements).

A section of the ACP group opposed to FTAs between developed and developing countries contested this interpretation and maintained that WTO compliance could also be achieved through a non-reciprocal trade agreement based on the Enabling Clause.

Legally, a non-reciprocal trade arrangement compatible with WTO rules was possible and the CPA provided for such an alternative under Article 37.7. Developmentally, however, the EU and others questioned the benefits of another non-reciprocal trade arrangement with the ACP countries. Trade preferences like those that would be possible under the Enabling Clause have increasingly come under severe criticism regarding their developmental impacts. These range from the increasing impact of preferences erosion as a result of multilateral and unilateral trade liberalization; exclusion of import-sensitive products and competitive-need products from beneficiary countries; restrictive rules of origin; and political conditionality to short-termism, as a result of, among others, graduation of certain products, sectors or countries (Grossman and Sykes, 2005; Hoekman and Proswe, 2005).

For these reasons, FTAs between the EU and ACP regions (i.e. EPAs) were not only dictated by legal considerations. Economically, there were those like the EU who held that FTAs between the EU and ACP countries would enhance competition and economic efficiency within ACP economies by getting rid of economically inefficient protectionism (World Bank, 2008). Of course, for sceptics of FTAs between developed and developing countries, the criticisms of non-reciprocal trade preferences might be valid, but that does not mean that they must necessarily be replaced by FTAs. They could as well be reformed to address many of their shortcomings.

The Cotonou Partnership Agreement accommodated both schools of thought by making provisions for both EPAs and non-reciprocal alternatives to EPAs. In effect, EPAs would be the main instrument for the pursuit of durable WTO-compatible trade relations between the

EU and the ACP regions whilst non-reciprocal regimes (e.g. some form of generalized system of preferences) could serve as an alternative to those countries unwilling to sign on to EPAs. Whilst Article 36.1 of the CPA provides for the EPAs to be established under GATT Article XXIV (i.e. as FTAs), at least three other Articles of the CPA seek to moderate this through SDT provisions, including an option for non-reciprocal alternatives for non-least developed countries (LDCs) unwilling to sign on to EPAs. Articles 35.5, 37.7 and 41.2 assert the primacy of development-orientation of the EPAs through explicit provisions for SDT including, notably, a commitment by the EU to provide non-reciprocal trade alternatives to non-LDCs in the ACP regions that are unwilling to conclude EPAs (Article 37.7).

Article 35.5 of the CPA provides for the parties to ensure SDT for all ACP countries and to take due account of the vulnerability of small, landlocked and island countries. Article 37.7 provides for EPA negotiations to consider the level of development and socio-economic impact of trade measures on ACP countries, and their capacity to adapt and adjust their economies to liberalization. It also provides for the EU to offer alternatives to EPAs for non-LDCs in the ACP bloc that are unable or unwilling to conclude EPAs. Such an alternative already existed for LDCs in the ACP bloc in the form of the EU's 'Everything But Arms' (EBA) preferential scheme. As already mentioned, Article 41.2 provided for SDT in favour of ACP suppliers of services.

The CPA is, of course, a cooperation agreement and is best examined under the Vienna Convention on the Law of Treaties. Its provisions cannot be held to be on a par with the legal provisions of the WTO and that is not the intention of this study. However, because the CPA provides the framework for the negotiations of the EPAs, it offers a relevant context within which the contested issues within the EPAs can be understood. This is the overall context within which the provisions of the CPA are discussed throughout this study.

The CPA provided for the EPAs to be negotiated and concluded between 2002 and 2007. However, fundamental disagreements over their design and scope prevented the conclusion of all but one regional EPA - the CARIFORUM EPA between the EU and all Caribbean countries - within this timeframe. The ACP countries' basic contestation was that the EU's EPA proposals were legally WTO-plus and in several respects were inconsistent with the provisions of the CPA - either going beyond what was provided for by the CPA or failing to meet provisions (usually SDT) of the CPA.

These disagreements, here referred to as 'first-generation disagreements' centred on the meaning of WTO compatibility, in particular, the interpretation of GATT Article XXIV on SAT and RPT; flexibility or in respect of SDT; whether to conclude agreements only on trade in goods or whether to conclude agreements on services and 'Singapore issues'; whether to conclude agreements with regional groups of countries or to adopt variable geometry, multiple speed approaches; and whether to seek another WTO waiver to allow more time for negotiating EPAs (African Union, 2008; Ochieng, 2007; Stevens et al, 2008; WTO 2002a, 2004a, 2005).

Differences on these perspectives within the ACP bloc and between the ACP regions and the EU meant that none of these options was seriously considered before the expiry of the Doha Waiver. For example, some ACP countries (e.g. the Caribbean) had no problems concluding agreements on services and investment whilst others had serious questions. Some African countries favoured a variable geometry multiple approach to negotiations, whilst others preferred negotiating under established regional economic community structures, etc. (ACP-EC, 2003; Ochieng, 2007). Further, the EU always held that any discussion on alternatives would make sense only after serious deliberations on the scope and design of the EPAs. Parallel discussions on alternatives risked diverting resources (both human and time) from the EPA negotiations.

Whilst the EU had long preferred negotiating the EPAs on a regional rather than bilateral basis (i.e. with regional groupings of ACP countries as opposed to individual ACP states), as 2007 drew to a close, it changed tact and opted to negotiate with any country or group of countries willing to do so. Ultimately, a two-tier system for concluding the EPAs emerged: a fully completed EPA with the CARIFORUM and initialling interim or provisional EPAs with individual and/or groups of ACP countries as follows:

- a) East African Community (EAC): Burundi, Kenya, Rwanda, Tanzania and Uganda;
- b) SADC: Botswana, Lesotho, Mozambique, Namibia and Swaziland;
- c) ESA: Comoros, Madagascar, Mauritius, Seychelles and Zimbabwe;
- d) PACP: Papua New Guinea and Fiji;
- e) Ghana EPA: in the interim, a bilateral EPA with the EU with the expectation that other ECOWAS members would join in the future;
- f) Côte d'Ivoire EPA: in the interim, a bilateral EPA with the EU with the expectation of future ECOWAS expansion;
- g) Cameroon EPA: in the interim, a bilateral EPA with the EU with the expectation that other members of CEMAC would join later.

Out of the 76 ACP countries, 40 agreed to either conclude or initial an EPA. Among those that did not conclude an agreement were:

- LDCs (Angola, Benin, Burkina Faso, Cape Verde, Chad, Central African Republic, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea Bissau, Kiribati, Liberia, Malawi, Mali, Mauritania, Niger, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Sudan, Togo, Tuvalu, Vanuatu, Zambia); and
- non-LDCs (Congo, Cook Islands, Federation of Micronesia, Gabon, Marshall Islands, Nauru, Nigeria, Niue, Palau and Tonga).

The LDCs that did not conclude or initial an EPA automatically reverted to the EU's EBA initiative to which they were eligible. This initiative offers duty free and quota free access to the EU market for all products from LDCs except arms. The non-LDCs faced losing their preferential access to the EU on terms they had enjoyed through the Lomé and Cotonou preferences. Of the 14 non-LDCs in Africa, 10 initialled interim EPAs (Botswana, Cameroon, Côte d'Ivoire, Ghana, Kenya, Mauritius, Namibia, Seychelles, Swaziland and Zimbabwe).

However, some like Gabon and Nigeria refused to conclude or initial an EPA falling back instead on the spirit of Article 37.7 of the CPA and asking the EU to provide them an equivalent alternative - the EU's GSP+ scheme (available to selected non-LDC developing countries). The EU's GSP+ scheme is arguably preferentially more favourable than its standard GSP scheme available to all developing countries, but was less favourable than the Cotonou preferences or the EBA initiative (Stevens et al, 2008; World Bank, 2008).

Following the expiry of the Cotonou preferences, Gabon, Nigeria and other non-LDCs in the ACP bloc that had refused to initial or conclude an EPA were re-assigned to the EU's standard GSP scheme. The EU declined their requests for admission to the GSP+ scheme on the grounds that Gabon did not meet the ILO Convention on Minimum Age for Admission to Employment criterion, whilst Nigeria had not ratified the United Nations Convention on the Prevention and Punishment of the Crime of Genocide and, therefore, failed the EU's human rights criterion.

A country's degree of trade dependency on the EU (based on a combination of natural resource endowments, structure of exports and level of economic development - whether an LDC or

not) appears to have significantly influenced the decision to initial or conclude an EPA. The EU remains the most important trading partner for many ACP countries:

It is still by far the largest single market for Africa's non-oil exports, absorbing 51% (\$24 billion) of the total in 2006, a share that is six times the 8% share of Africa's second largest market (the US) for its non-oil exports. (World Bank 2008, vii.)

An earlier World Bank (2007, 2) study found that Cotonou preferences for 13 of the 14 African non-LDCs amounted to, "3.9 percent of their exports to the EU or EUR 782 million in 2005". If these countries were to revert to the EU's standard GSP, the study estimated that the value of their preferences would fall to 0.5 percent of their exports or a loss of 670 million euros:

The fall would be substantial for all countries but particularly high in the case of Mauritius, the Seychelles, and Swaziland where the value of preferences would fall from about 23, 16, and 50 percent respectively to nearly zero. For Kenya, a shift to GSP preferences would reduce preferences from 9.7 to 3.9 percent. (World Bank, 2007, 2.)

The study also found that EPAs (with Cotonou rules of origin) could increase the value of preferences of these countries to 4.5 percent of exports:

a notional gain of EUR 107 million. If EPAs were concluded with simple rules of origin, however, preferences could be much higher because this could make several export products competitive in the European market. For example, less restrictive rules of origin for apparel products in the US under AGOA have led to an increase in clothing exports from about USD 250 million in 2000 to more than USD 800 million in 2004. (World Bank, 2007, 2.)

However, if EPA rules of origin were based on the Cotonou preferences, they would provide only a marginal increase in preferences (World Bank, 2007).

The rules of origin effectively determine the substantive level of preferential market access. The rules of origin in all the EPAs are subject to further negotiations, but presently they embody only modest improvements on the Cotonou rules. The EPA rules of origin are similar to the Cotonou rules of origin except in textiles, clothing, fisheries and certain agricultural products where modest improvements have been made (Oxfam 2007; Naumann, 2008).

However, the EPA rules of origin can be seen as less favourable than the Cotonou rules in two respects. Firstly, EPA rules of origin are constrained by the fact that under Cotonou rules, 'cumulation' applied to all 76 ACP countries. With only 40 ACP signatories to EPAs (the rest being consigned to the less favourable rules of origin of the EU's EBA initiative and standard GSP), the cumulation effect has been accordingly diminished (Naumann, 2008).

Secondly, some of the EPA rules of origin, most notably the CARIFORUM, are symmetrical. That is, they apply to production and trade in both directions - trade from CARIFORUM states to EU states and vice versa. The CARIFORUM argue that asymmetrical rules of origin would not have any beneficial effect, considering the availability of materials and production facilities in the EU. Given their unique local and resource endowments, this might be the case for the CARIFORUM, but it could be detrimental to the development efforts of some African countries. It runs counter to the argument of two Oxford economists that Africa might benefit from trade regimes that specifically protect them from Asian manufactures through, among others, creative rules of origin. It is not clear that symmetrical rules of origin between Africa and the EU would achieve this objective (Collier and Venables, 2007; Collier, 2007).

The interim EPAs provide for reciprocal liberalization of trade in goods between the EU and signatory ACP states. All but the fully completed CARIFORUM EPA contain rendez-vous clauses calling for continued negotiations towards full EPAs within one and a half years. Until full EPAs replace them or ACP countries that have initialled them withdraw, they are WTO-legal and will govern trade between the EU and signatory states (Bartels, 2008). Some of them came into force in 2008 whilst others are scheduled to enter into force between 2009 and 2011. Except for the CARIFORUM EPA, many of the first generation disagreements remain within the interim EPAs. These disagreements have been compounded by second-generation disagreements that arose during the initialling of the EPAs in late 2007. The latter centre on specific legal clauses that the EU introduced into the

interim EPAs which are neither required nor provided for by WTO law or the CPA and which the ACP countries deem detrimental to their development, trade and financial needs: MFN clause, standstill clause, non-execution clause and dispute settlement mechanisms.

The rest of this article examines the contested issues in detail. Section 2 examines the tariff liberalization commitments in the EPA texts to determine the interpretation of GATT Article XXIV, especially the concepts of substantially all trade and reasonable period of time. Section 3 assesses the legal basis and development implications of the MFN clause. Section 4 examines the legal basis and development implications of the standstill clause, whilst Section 5 assesses the provisions on dispute settlement. Section 6 analyses the non-execution clause and Section 7 concludes.

2. WTO COMPATIBILITY: GATT ARTICLE XXIV ON 'SUBSTANTIALLY ALL TRADE' AND 'REASONABLE PERIOD OF TIME'

GATT Article XXIV sets out the requirements for Free Trade Agreements and customs unions as encompassing the elimination of duties and other restrictive commercial regulations on substantially all trade within a reasonable period of time (GATT, 1994). The exact specifications of this Article are notoriously ambiguous to the extent that only one FTA (the Czech Republic-Slovakia) has been found by a GATT/WTO Working Party to satisfy Article XXIV although none has been found to be incompatible with it (Srinivasan, 2005).

There is no consensus among scholars and policy-makers on what is meant by substantially all trade and/or how this is to be determined or calculated. Similarly, it is unclear what constitutes a reasonable period of time. A 1994 Understanding on the Interpretation of Article XXIV attempted, unsuccessfully, to provide some clarity to these terms. The 1994 Understanding explained that RPT should exceed 10 years only in 'exceptional cases', but failed to define what constitutes an exceptional case. In respect of SAT, the preamble to the Understanding stated that the trade expansion to which regional agreements contribute:

is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector is excluded. (GATT, 1994.)

This put some pressure on the practice of excluding certain sectors from FTA liberalization commitments, but did not necessarily outlaw them.

Due to the ambiguity of GATT Article XXIV, SAT and RPT have been interpreted variously in different FTAs. Unsurprisingly, the definition of these terms was at the centre of the disagreements between the EU and the ACP countries in the EPA negotiations. Prior to EPAs, pre-existing FTAs embodied interpretations of substantially all trade ranging from 80 to

90 percent of trade between the parties or 90 to 95 percent of the combined tariff lines of parties, whilst reasonable period of time ranged from 10 to 20 years, with countries excluding entire sectors, significant portions of sectors, range of products or tariff lines from their liberalization commitments (Scollay and Gynberg, 2005). Examples of variations in reasonable period of time include: Thailand-Australia (20 years), Thailand-New Zealand (20), US-Australia (18), Canada-Chile (18), Korea-Chile (16), Canada-Costa Rica (15), EU-Morocco (12), EU-South Africa (12), US-Bahrain (10), US-Singapore (10) and US-Morocco (9).

During the first phase of EPA negotiations (2002-2007), ACP countries argued for a need to reform Article XXIV to accommodate North-South FTAs by making explicit provisions for SDT in favour of developing countries - similar to provisions of GATS Article V on economic integration agreements between developed and developing countries. The EU held that such flexibility was already inherent in Article XXIV (WTO, 2005). The EU called this 'asymmetrical liberalization': the EU could liberalize 100 percent of its trade with given ACP groups of countries immediately an EPA came into effect whilst the ACP group could liberalize up to 90 percent of their trade with the EU over a relatively longer period of time - initially proposed by the EU as up to 15 years.

In its initial proposal, the EU interpreted substantially all trade to mean 90 percent of trade between the parties and reasonable period of time as not exceeding 15 years. The ACP countries countered that de facto flexibility in Article XXIV was neither legally secure nor sufficient in scope to assure the SDT they required. Among others, they proposed an understanding of reasonable period of time and exceptional case as constituting anything between 18 and 25 years. They also sought to introduce development thresholds into the substantially all trade requirement (WTO,

2004a). That is, instead of liberalization schedules based on pre-determined timeframes and product coverage, they would be based on objectively verifiable development indicators.

The EU appeared supportive of elements of the ACP countries' position through its Second Submission to the WTO:

Existing rules fail to create fair and equitable treatment between different types of RTAs based on their developmental impact and promotion of developing countries participation in world trade. For example, while preferential tariff and partial liberalization agreements among developing countries fall under the Enabling Clause, ambitious and full-fledged RTAs, such as Free Trade Agreements between developed and developing countries are subject to the stricter requirements of GATT Article XXIV. Yet, North-South RTAs have at least as high a development impact as any of those falling under the Enabling Clause, and it is difficult to see why the substantive requirements should be radically different. (WTO, 2005, 81.)

However, when it came to the initialling of interim EPAs (or the conclusion of the CARIFORUM EPA), the EU reverted back to its initial interpretation of substantially all trade and reasonable period of time. The SADC EPA provides for 100 percent liberalization by value by the EU as of 1 January 2008 (with transition periods for rice and sugar) and 86 percent liberalization by value by Botswana, Lesotho, Namibia and Swaziland. Liberalization of 44 sensitive tariff lines is envisaged by 2015 and of three further lines by 2018. The tariff liberalization commitment for Mozambique is 80.5 percent of trade, most of which is liberalized at entry into force with 100 additional tariff lines to be liberalized by 2018. Some agricultural products are excluded from liberalization commitments based on either food security or infant industry concerns (SADC, 2008).

The East African Community EPA provides for 100 percent liberalization by value by the EU as of 1 January 2008 (with transition periods for rice and sugar) and 82 percent liberalization by value by the EAC, with 80 percent liberalization within 15 years and the remainder in 25 years. The liberalization commitments cover 100 percent of EU tariff lines and 74 percent of EAC tariff lines. On the basis of infant industry protection, EAC countries have excluded some agricultural products, wines and spirits, chemicals, plastics, wood-based paper, textiles and clothing, footwear and glassware.

Similarly, the Eastern and Southern Africa EPA provides for 100 percent liberalization by value by the EU as of 1 January 2008 (with transition periods for rice and sugar). Comoros and Madagascar will each liberalize 80 percent of their imports from the EU, the Comoros will liberalize 21.5 percent within five years and 59.1 percent progressively until 2022, whilst Madagascar will liberalize 37 percent within five years and 43.7 percent progressively until 2022. Mauritius will liberalize 95.6 percent of its imports from the EU by 2022, whilst the Seychelles will liberalize 97.5 percent by 2022. Zimbabwe is committed to liberalizing 80 percent by 2022 (EC, 2006).

Countries in Eastern and Southern Africa have excluded several products from liberalization commitments out of the need to protect sensitive products or industries. For example, Mauritius has excluded live animals and meat, edible products of animal origin, fats, edible preparations and beverages, chemicals, plastics and rubber, leather articles and fur skins, iron and steel, and consumer electronics. The Seychelles has excluded meat, fisheries, beverages, tobacco, leather articles and vehicles, whilst Zimbabwe has excluded cereals, beverages paper, plastics and rubber, textiles and clothing, footwear, consumer electronics and vehicles.

The EU-Côte d'Ivoire EPA provides for 100 percent liberalization by value by the EU as of 1 January 2008 (with transition periods

for rice and sugar). It allows for 80.8 percent liberalization by Côte d'Ivoire within 15 years. It covers 100 percent of EU tariff lines and 88.7 percent of Côte d'Ivoire's tariff lines. The EU-Ghana EPA, on the other hand, provides for 100 percent liberalization by the EU and 80.48 percent liberalization of EU imports in value and 80.01 percent in tariff lines over 15 years by Ghana. Both Ghana and Côte d'Ivoire have excluded certain, mainly agricultural products, from liberalization on the grounds of food security and infant industry. The EU-Cameroon EPA provides for 100 percent liberalization by value by the EU as of 1 January 2008 (with transition periods for rice and sugar). Cameroon is committed to at least 80 percent liberalization in 15 years, but is excluding some products, mainly agricultural, again on the grounds of food security (Stevens et al, 2008, 12-14).

Finally, the CARIFORUM EPA provides for a general moratorium on its tariff liberalization commitments on all products for the first three years of the EPA. This moratorium is extended for 10 years in the case of revenue-sensitive items, such as gasoline, motor vehicles and motor vehicle parts. A review clause is provided to address the special development needs of Antigua and Barbuda, Belize, Dominica, Grenada, Guyana, Haiti, Saint Lucia, Saint Christopher and Nevis, and Saint Vincent and the Grenadines.

A keen analysis reveals that in all the EPAs, ACP countries must liberalize at least 80 percent of their trade with the EU within 15 years. Given that the EU is liberalizing 100 percent of its trade with ACP countries at the onset of specific EPAs, this implies that 90 percent of the trade between the EU and ACP countries would have been liberalized within 15 years. This suggests that the EU is adopting an interpretation of GATT Article XXIV, which holds that WTO compatibility is met provided that coverage of substantially all trade is achieved within the 10-year period, regardless of whether the transition period extends beyond 10 years for some products (WTO 2002b). This is consistent with the EU's initial interpretation of GATT

Article XXIV as encompassing 90 percent of the trade between the parties within a period not exceeding 15 years. The five-year discrepancy from this definition on the part of the ACP countries might be viewed as the EU's understanding of exceptional case in respect of North-South FTAs.

Based on prevailing practice, it can be argued that for the purposes of compliance with GATT Article XXIV, this coverage and period of time suffices – 80 percent liberalization by the ACP countries within 15 years combined with 100 percent immediate liberalization by the EU or 90 percent liberalization of trade between the parties within 15 years. Any commitments by ACP countries beyond 80 percent after the 15-year mark can be viewed as deeper than legally necessary.

This would be consistent with interpretation of GATT Article XXIV in other FTAs. It is difficult to assess whether one FTA is more or less favourable than the other because of differences in coverage of goods, services and 'Singapore issues', excluded sectors, products and transition periods. Nonetheless, 80 percent liberalization of the ACP countries' trade within 15 years is no more or less favourable than the implicit definition of substantially all trade and reasonable period of time embodied in the following FTAs: Thailand-Australia (20 years), Thailand-New Zealand (20), US-Australia (18), Canada-Chile (18), Korea-Chile (16), Canada-Costa Rica (15), EU-Morocco (12), EU-South Africa (12), US-Bahrain (10), US-Singapore (10) and US-Morocco (9). The US-Morocco FTA may have one of the shortest reasonable periods of time in North-South FTAs, but it also excludes a significant number of products from liberalization commitments. In general, exclusions play a significant role in determining the depth of liberalization commitments and are relatively more expansive in other FTAs compared to the EPAs:

With the exception of US bilateral relations with Mexico and Chile, all

other US bilateral FTAs fall short of full liberalization for both parties. Products that were excluded, or phased-out over more than 20 years in one or more agreements include sugar, some dairy items, beef, wheat, poultry, eggs, margarine, ethanol, potatoes and onions. In addition, US bilateral FTAs establish quantity or price-based special safeguards for certain agricultural products. In a few cases, parties have agreed to extend, or review the possibility of extending, the application of the special agricultural safeguards beyond the transition period (Hufbauer and Baldwin, 2005, 21.)

Whilst USA-based FTAs generally tend to eliminate barriers on substantially all the merchandise trade of the partners, they invariably tend to either nearly exclude agriculture entirely (e.g. the USA-Canada FTA, later to become the North American Free Trade Agreement or NAFTA) or to include extended phase-outs for sensitive agricultural products (e.g. the USA-Australia FTA), which undermines their substantially all trade credentials. The EU prefers to exclude specific products rather than sectors. For example, the list of excluded products in the Trade Development and Co-operation Agreement was long and included sugar products and other confectionery, biscuits, dairy products, breads and prepared foods.

In some of its FTAs, such as the TDCA, EU-Chile, EU-Czech Republic, EU-Lithuania and EU-Morocco, the EU has committed only to tariff reductions rather elimination or made no commitments at all in respect of certain products, notably fish, cheese and some wines. These undermine the substantially all trade credentials of some of the EU-based FTAs. Considering that EPAs have relatively few of these exclusions, 90 percent liberalization of trade between the parties within 15 years would constitute an equivalent if not deeper liberalization commitment than many FTAs when based on prevailing practice.

An analysis by Robert Scollay and Roman Grynberg (2005, 3) of 15 FTAs (North-South and North-North) found that under different interpretations of substantially all trade and reasonable period of time, the compatibility of many FTAs with GATT Article XXIV varies:

If the SAT requirement must be met within the first ten years of the implementation period, and if SAT is defined as inclusion of 95% of the combined tariff lines of both partners, then the Singapore-Japan, EU-South Africa and Canada-Costa Rica FTAs fail to meet this definition. If the 95% definition is applied to each member on an individual basis, then non-compliance in each of these agreements is limited to Japan, South Africa and Costa Rica respectively. If the definition is relaxed to 90% of the combined tariff lines of both partners, then only the EU-South Africa FTA fails to meet this definition. If the 90% definition is applied to each member on an individual basis, then South Africa in the EU-South Africa FTA and Costa Rica in the Canada-Costa Rica FTA still remain short of compliance with this definition. If no time limit is imposed for meeting the SAT requirement, only the Singapore-Japan FTA on a combined basis, and within that FTA Japan on an individual basis, fail to meet SAT defined as 95% of tariff lines. A definition based on 90% of tariff lines would however be met on both bases even in this agreement. Thus none of the agreements analysed would fail to comply with SAT defined as 90% of tariff lines.

The compatibility of all the EPAs will vary more or less as the above FTAs under the same criteria (none of them would fail to comply with SAT defined as either 90 percent of tariff lines or 90 percent of trade between the parties). Compared to many FTAs, the EPAs appear to commit ACP countries to relatively deeper liberalization commitments, the longer transition periods notwithstanding. This might impact on their development, financial and

trade needs by constraining their policy space in dealing with fluctuations in world markets and tax revenues, and in protecting their infant industries, among others.

More importantly, what the ACP countries gain through asymmetrical liberalization, they appear to lose through the standstill and MFN clauses (see sections 3 and 4 for the discussion). There is no need to make much of this asymmetrical liberalization. For many ACP countries, the EU's immediate and complete liberalization of its markets makes little or no difference. All members of the EBA initiative in the ACP group (33 of the ACP LDCs, eight of which have initialled the EPAs in Africa) already enjoyed duty free and quota free access to the EU. The remaining ACP countries either already enjoyed GSPs in many relevant EU products or faced significant supply-side constraints and will be hard pressed to take any advantage of further opening of the EU market (Brenton and Manchin, 2003; Grossman and Sykes, 2005; UNCTAD, 2003). The cost to the EU of 100 percent liberalization is at best minimal, at worst negligible.

Given their levels of economic development, an argument can be made for greater use of

'exclusions' by ACP countries than is presently the case. For example, in recognition of the economic asymmetry between the parties, the European Free Trade Association-Chile FTA allows indefinite phase out periods for a wide range of products including organic chemicals, fertilizers, tanning products, cosmetics, plastics and rubbers, raw fur skins, bricks and other ceramic products, glassware, some articles of iron and base metals, some electrical and mechanical appliances, vehicles and vehicle parts, etc. in favour of Chile (Hufbauer and Baldwin, 2005, 21). Similarly, US bilateral FTAs, with the exception of Chile and Mexico, do not provide full elimination of agricultural barriers. Under the US-Canada FTA, certain agricultural products remain indefinitely subject to reduced tariff rates. Likewise, in the USA-Israel FTA, reduced tariffs remain on about 220 lines for dairy products and peanuts (Hufbauer and Baldwin, 2005, 2).

There are no indefinite phase-outs in the EPAs although all EPA initialling ACP countries make some exclusions. However, as already mentioned, these are product- rather than sector-based and appear to have been premised on static rather than dynamic considerations, with the possible exception of Mauritius.

3. THE MOST FAVOURED NATION CLAUSE

Free Trade Agreements are, by definition, legal exceptions to GATT Article 1 on most favoured nation treatment. GATT Article 1 provides that WTO Members must grant immediate and unconditional MFN treatment to the products of other members with respect to customs duties and import charges, internal taxes and regulations, and other trade-related matters (GATT, 1994). Members can only derogate from Article 1 in two exceptional cases: under GATT Article XXIV to form FTAs and customs unions (in which at least one partner is a developed country) and the Enabling Clause in respect of GSP schemes for developing countries or South-South FTAs.

Whilst not a requirement of the WTO, the use of the MFN clause in FTAs is not uncommon. Of the 20 Regional Trade Agreements reviewed by the Organization for Economic Co-operation and Development (OECD) in 2008, only five did not have an MFN clause. Notable North-South FTAs with the MFN clause include the North American Free Trade Agreement, the Central American-Dominican Republic Free Trade Agreement, Japan-Mexico, Thailand-Australia and USA-Morocco.

However, Economic Partnership Agreements represent the first time that the EU is including the MFN clause in its FTAs, at least with the developing world (FTAs between the EU-Chile, EU-Mexico and EU-South Africa contain no such clause). The inclusion of the MFN clause in the EPAs is both legally and developmentally problematic. Legally, it is WTO-plus - it is neither necessary under GATT Article XXIV on which the EPAs are predicated nor under GATS Article V in the case of agreement on services because GATS Article V, unlike GATT Article XXIV, explicitly provides for special and differential treatment for developing countries which would cover any non-discriminatory obligations of GATS Article II (on MFN treatment in the GATS).

The MFN provision does not appear in the entirety of the Cotonou Partnership Agreement. Nonetheless, the MFN clause is included in all the EPAs texts (Articles 19, 70 and 79 in the CARIFORUM EPA, Article 28 in the SADC EPA, Article 15 in the EAC EPA, and Article 16 in the ESA region EPA). It is identical in all the texts with a slight twist in the CARIFORUM EPA. In all the EPAs, the MFN clause stipulates that any more favourable tariff preferences granted to any "major trading economies" (defined as economies accounting for a share of world merchandise exports above 1 percent) shall automatically be granted to any party of the EPA. In the CARIFORUM EPA, the MFN clause transfer is not automatic, but subject to joint agreement between the parties (CARIFORUM, 2008). The EPA MFN clause also provides that the EU shall automatically transfer any more favourable treatment it might offer any third party partners in future FTAs to ACP countries regardless of the share of world trade of the third party partners.

There is a fundamental difference between the function of the MFN clause in the multilateral system and in regional trade. In the former, the clause prevents trade discrimination in the global trading system (i.e. compels equal treatment among trading partners except where permitted through derogation). In the latter, the clause protects commercial or mercantilist interests of individual parties to given FTAs, but falls short of Pareto superiority (globally welfare enhancing) and even its defenders only make the case for it on "second best" grounds:

The multilateral MFN ensures that all parties to the global trade agreement are given non discriminatory treatment... the MFN Clause in an RTA has a value for investors not only as a standard to prevent any discriminatory vis a vis other investors but also if it can create a liberalization dynamic. (OECD, 2008, 290.)

As argued elsewhere in this article, the case for trade liberalization as inherently beneficial is contested (see, for example, Chang 2002). The EU justifies the inclusion of the MFN clause in the EPAs with two additional arguments, one predicated on its interests, the other allegedly on the interests of ACP countries. Regarding the former, the EU argues that the MFN clause protects it against potentially less favourable treatment by ACP countries in future FTAs with third country partners. "It is difficult to say that Europe should let our partner countries treat our economic adversaries better than us. We are generous but not naïve" (EU Development Commissioner, Louis Michel, quoted in Stevens 2008, 58). In respect of the latter, the EU argues that the EPA MFN clause protects the ACP countries from aggressive market demands from developed and economically advanced developing countries such as BRICs (Brazil, Russia, India and China). That is, the knowledge that any more favourable treatment that they may exert from the ACP countries will automatically be accorded to the EU might prevent economically advanced countries from taking advantage of the ACP countries' relatively weak bargaining position.

There are a number of problems with these arguments. While persuasive, the mercantilist argument has the distinct drawback that the EU's mercantilist's interests are unlikely to align or be consistent with the ACP countries' development, financial or trade interests. The ACP countries' argument for protection is less persuasive and problematic at several levels. For one, if they viewed the EPA MFN clause as protecting them against aggressive market interests of third parties, they would not be as strongly opposed to it as they are. Secondly, if they need protection from more developed countries, such as BRICS, and if the MFN clause is to protect them from such countries, who or what is to protect them from the EU's own mercantilist interests or is the EU devoid of such interests?

Thirdly and more importantly, the Enabling Clause governs South-South FTAs but, by

including some developing countries in its definition of major trading economies the EPA MFN clause poses a serious challenge to the purposes and functions of the Enabling Clause and the smooth functioning of the multilateral WTO system. For example, 2006 figures show that the EPA MFN definition of major trading economies included a number of developing countries including Brazil, China, India, Indonesia, Malaysia and Mexico. This explains why even before the interim EPAs had been signed, Brazil with the support of several other developing countries, protested the inclusion of the MFN clause in the EPAs (ICTSD, 2008). The protests by third party developing countries are significant because it was a third party developing country challenge to the Lomé Preferences that led, at least in part, to their collapse and to the establishment of the EPAs under GATT Article XXIV rather than under the Enabling Clause. The European Union's share of world merchandise exports was 10 percent in 2006. If it were looking for countries with a similar export level, a figure close to this would be reasonable and would still include China, but would exclude Indonesia, Malaysia and Mexico, for example.

Most favoured nation clauses in FTAs come in various forms. In many FTAs, the MFN clause applies to chapters on investment and services only (in part because of the requirements of GATS Article 11 although in others it also applies to trade in goods or trade in goods, services and investment (Bossche, 2004; OECD, 2008; Stoler, 2007). Many MFN provisions that have been inspired by GATS Article II cover both pre- and post-RTA establishment (e.g. Australia-New Zealand, Chile-Korea, Japan-Australia, Thailand-Australia FTA. Some are broad in scope and seek to compel non-discrimination by covering the entirety of the FTA, such as the EFTA-Singapore MFN clause, which provides for each party to receive the same benefits that its counterpart affords any future FTA partners. The USA-Morocco MFN clause is limited to market access and provides that, in the event that Morocco grants any other trading partner in its future FTAs better market access than that

granted to the US, Morocco is under obligation to grant the same treatment to the USA under the USA-Morocco FTA.

The EPA MFN clause does not cover the entirety of the agreements. It is limited to trade in goods except in the CARIFORUM MFN clause, which encompasses services and investment. Overall, the EPA MFN clause constrains the trade policy options of ACP countries by locking them into giving the EU any more favourable treatment that they might give to third party major trading partners, which might include relatively advanced developing countries. This is potentially significant as many ACP countries, especially in Africa are increasingly expanding their trade and investment relationships with countries such as China and India.

Considerable literature questions the economic value of the FTA MFN clause where national treatment is provided (as is the case with EPAs). The United Nations Conference on Trade and Development (UNCTAD) (2004) and OECD (2008) have both argued, for example, that the only case where the FTA MFN clause might be more advantageous than national treatment is where foreign incentives are granted to foreign but not domestic investors. In cases where foreign investors are favoured over domestic companies, the MFN clause can be more favourable than national treatment for it will ensure that an FTA partner of the country extending incentives to third party foreign investors extends the same to its FTA partner.

The EPA MFN clause might enhance ACP countries' dependency on trade with the EU

by increasing the transaction costs of trade negotiations with third party partners. It is not clear that this is a good thing. Free Trade Agreements between ACP countries and other industrialized countries might serve to diminish any 'trade diversion' effects that the EPAs might entail. Trade diversionary effects of North-South FTAs should not be under-estimated. A recently unclassified United States Department of Agriculture (USDA) Foreign Agricultural Service study found that following the establishment of the EU-Morocco FTA, USA exports to Morocco fell by 52 percent from 1999 to 2001, but grew by 13 percent between 2003 and 2004 following the establishment of the USA-Morocco FTA, which gave the USA essentially the same preferences as those given to the EU (USDA, 2005).

Developed countries are increasingly interested in FTAs with developing countries. For example, the Central American Free Trade Agreement-Dominican Republic (CAFTA-DR) includes the USA and the Dominican Republic, an ACP member with an EPA. The USA has similarly been exploring opportunities of an FTA with the Southern African Customs Union since at least 2003. As a result of the inclusion of the EPA MFN clause, third party developed countries now have to weigh the cost implications of entering into FTAs with ACP countries with EPAs and they are also more likely to demand such MFN clauses themselves. Considering the limited provisions for SDT in the EPAs this might not portend well for ACP countries' development, financial and trade needs.

4. THE 'STANDSTILL' CLAUSE

The standstill clause binds ACP countries' tariffs at applied rather than bound tariffs at the time of entry into force of the interim EPAs (see for example, Article 23 of the SADC EAC EPA and Article 13 of the EAC EPA). There are significant variations between the EPAs regarding the standstill clause. In CARIFORUM, SADC and the PACP regions' EPAs, standstill applies only to products committed for liberalization (CARIFORUM, 2008; SADC, 2008). The tariffs are bound at applied rates immediately the interim EPAs come into force whether or not the product is scheduled for immediate liberalization or 15 years later. In the EAC and ESA EPAs, the standstill clause applies to all trade between the parties. No distinction is made between goods committed for liberalization and excluded goods (EC, 2006; EAC, 2008).

Both forms of standstill are neither legally (WTO) necessary nor desirable from the development, financial and trade perspectives of ACP countries. Legally, the WTO only requires tariffication (converting all import restrictions that did not take the form of tariffs, e.g. quotas into tariffs and binding them at bound rates) from developing countries. Least developed countries, the majority of which are part of the ACP group, have no obligations under the WTO to make commitments to reduce tariffs or subsidies (Bilal and Lui, 2009, 3; Oxfam 2007).

In terms of the development, financial and trade needs of ACP countries, it makes little sense to freeze the tariffs at applied rather than bound rates or to apply the applied rates immediately EPAs come into effect. This point was powerfully brought home by the food crisis that was unraveling at the time the interim EPAs were being initialled. As a result of increasingly high world food prices and growing famine in many parts of Africa in 2007 and 2008, many countries had reduced their import duties on food items to zero (applied rates) although they were still bound at very high levels. Freezing these rates at

this level would essentially displace local food production in Africa, confining the continent to even more vulnerability to food insecurity. It is less surprising that, in October 2008, the EU was forced to allow an increase of duties on cereal imports within the SADC region as local food production improved.

Freezing ACP countries' tariffs at applied rather than bound tariffs undermines the ability of ACP countries to adjust to changing economic circumstances, especially fluctuations in world markets. Subjecting all trade between the parties to the standstill clause essentially erases any benefits that might arise from the much vaunted "asymmetrical liberalization" as discussed in Section 2. The African, Caribbean and Pacific countries' bound rates may be high but that does not make them insignificant. The process of tariffication was not costless for many developing countries and the WTO gave them until 2005 to carry it out. Having only recently completed the exercise, there is no compelling economic reason for them to ignore their bound tariffs and freeze everything at applied levels.

The EU argues that the chief benefit of the standstill clause is trade liberalization. For the EU, anything that achieves trade liberalization is beneficial in and of itself. This proposition, although shared by the World Bank (2007), among others, has been refuted numerous times. Firstly, there is little evidence that trade liberalization in and of itself promotes economic development (Rodrik, 2001; Singh, 2003; United Nations Economic Commission for Africa, 2004). In any case, individual ACP countries should make this determination. For example, both Mauritius and the Seychelles committed to liberalize over 95 percent of their trade with the EU in their interim EPAs based on their development, financial and trade needs. It is fair to assume that ACP countries seeking lower thresholds are making similar determination in good faith. Their opposition

to the standstill clause should be understood in this context as it is inextricably linked to tariff liberalization commitments.

Some of the EPAs (e.g. the CARIFORUM EPA) not only cover services but also provide for a standstill clause in services whilst others provide for future negotiations on services (e.g. SADC). The standstill clause in services in the CARIFORUM EPA prohibits any EPA signatory country from introducing any new policies inconsistent with GATS Articles XVI and XVII that would restrict service suppliers of other parties in terms of access to their markets, or that would discriminate in favour of national services suppliers over foreign services suppliers. This provision constrains the ACP countries' policy space in the development of their national services sectors.

Trade in services falls under GATS and any services agreement within EPAs would have to comply with GATS Article V (counterpart to GATT Article XXIV). As with GATT Article

XXIV, GATS Article V does not provide for the standstill clause and its inclusion in the EPAs is not legally necessary. More importantly, unlike GATT Article XXIV, GATS Article V (3a) explicitly provides for special and differential treatment in favour of developing country parties to an FTA.

The EU has demonstrated more flexibility or sensitivity to ACP countries' arguments on the standstill clause than on any other contested issue discussed here. Following an outcry from several African countries, a number of modifications have been made to the EPA standstill clause. For example, CEMAC (Cameroon) has a provision to halt tariff reduction unilaterally for a maximum period of one year. The SADC standstill clause does not apply to goods excluded from liberalization commitments and all the African EPAs except the ESA region allow for the temporary introduction/increase of export duties in exceptional circumstances (Stevens et al, 2008).

5. THE EPA DISPUTE SETTLEMENT MECHANISMS

The dispute settlement mechanisms included in all interim EPAs and the CARIFORUM EPA (e.g. Articles 54, 55 ESA EPA; Articles 38, 39, EAC EPA, Part 111 SADC EPA, Title V, Ghana EPA) are very similar. Mostly, they are relatively restrictive modifications of WTO dispute settlement and reflect the EU's vision of reform. The EPA dispute settlement mechanisms are detailed and judicially rather than politically or diplomatically inclined (Karli, 2008). Accordingly, they reinforce or do little to diminish the 'upstream' and 'downstream' constraints to developing countries' utilization of the WTO DS (Alavi, 2007; Karli, 2008; Hoekman and Mavroidis, 2000).

Robert Hudec (1993, 353) has summarised the experience of developing countries with the multilateral dispute settlement mechanism in the history of GATT/WTO:

The quantitative analysis of individual country performance makes it pretty clear that the GATT dispute settlement system is, at the margin, more responsive to the interests of the strong than to the interests of the weak. The evidence for this hypothesis occurs in all phases of performance - in the rates of success as complainants, in the rates of noncompliance as defendants, in the quality of the outcomes achieved, and in the extent to which complainants are able to carry complaints forward to a decision. Perhaps the most important finding in this regard is the very substantial difference in the rates of withdrawal before a ruling is made, suggesting that the weaker countries encounter significantly greater barriers at the outset of the process.

Busch and Reinhardt (2000) concur with Hudec and find that WTO reforms, by adding several thousand pages of new treaty text, several new stages of legal activity per dispute (e.g. appeals, compliance reviews and compensation arbitration), a growing body of case law and permissible delays in complying

with adverse rulings, have compounded the hurdles facing developing countries in WTO DS. Broadly, these hurdles can be divided into two: (a) many developing countries lack the human and financial resources to effectively participate in the increasingly judicial and lengthy system; and (b) because of the nature of their economies and their economic dependency on developed countries, many developing countries (especially the smaller ones) are unlikely to benefit from the remedial measures of WTO DS.

The WTO DS system (Article 19) provides for the cessation of a violation as a remedy, i.e. the violating country taking measures to comply with its WTO obligations. It also provides for 'suggestions' or 'recommendations' on ways in which offending Members can comply and for consequences in the event of failures to comply within specified periods of time. Such consequences include compensation and suspension of concessions or other obligations. Compensation entails the losing party providing the winning party with new market access or a mutually agreed alternative, i.e. monetary payments. Within the WTO DS, suspension of concessions is automatic and does not require the consent of the losing party. It usually entails the imposition of tariffs by the winning party on relevant products or sectors of the losing party (Alavi, 2007; Karli, 2008).

Retaliatory trade measures (e.g. suspension of concessions and other obligations) have long been considered an unviable option for developing countries wronged by large industrial countries. For example, if Mauritius were to suspend concessions and obligations to the EU as a result of the EU's breach of some trade obligation, it is Mauritius that would suffer greater economic damage from such suspension. This renders suspension of concessions an ineffective remedy for many developing countries, as recently demonstrated by the *Antigua and Barbuda - USA Gambling* case. Despite losing the case, the USA has been slow to implement

the decision within a reasonable period of time but the economic costs to Antigua and Barbuda of suspending concessions to the US are prohibitive:

The 'mere passage of rules and procedures, whether bilateral or multilateral, does not in some magical way mute the exercise of power... to win a case in law is not necessarily to win in terms of one's economic interests. What matters to the preservation or extension of an individual's economic interests ultimately rests on that individual's bargaining power. Rules and the enforcement of rules ultimately remain matters that are bargained for amongst states. (Drahos, 2005, 14.)

It is as a result of these constraints that there have been calls and proposals for special and differential treatment in favour of developing countries within the WTO Dispute Settlement Understanding (DSU). Within the WTO DSU, SDT is mostly procedural (i.e. developing countries may choose a faster procedure, request longer timeframes, or legal aid from the WTO Secretariat) and is provided for at different stages of the WTO DS process. Article 4.10 of the DSU provides for SDT in the consultations phase of the dispute settlement and requests Members to give special attention to the problems and interests of developing countries. For example, if the object of the consultations is a measure taken by a developing country Member, the parties may agree to extend the regular periods of consultation. If, at the end of the consultation period, the parties cannot agree that the consultations have concluded, Article 12.10 of the DSU grants the Dispute Settlement Body chairperson the power to extend the time period for consultations.

Article 8.10 of the DSU provides for SDT at the panel stage by allowing a developing country Member in a dispute with a developed country Member to request the inclusion of at least one panelist from a developing country Member. The article also provides for the panel to accord a developing country Member more time to prepare and present its defence if a

developing country Member is the respondent. However, Article 12.10 of the DSU moderates this provision by stipulating that this must not affect the overall time period for the panel to complete the dispute settlement procedure.

Articles 21.2, 21.3 (c), 21.7 and 21.8 provide for SDT at the implementation phase. Among others, they provide that:

- particular attention be paid to matters affecting the interests of developing country Members in the determination of the reasonable period of time for implementation;
- the Dispute Settlement Body (DSB) must consider, at the request of a developing country Member, what further and appropriate action it might take in addition to surveillance and status reports;
- in such consideration, the DSB must take into account not only the trade coverage of the challenged measures, but also their impact on the economy of developing country Members concerned.

In addition to SDT provisions at these different stages of the WTO DS process, the multilateral GATT/WTO dispute settlement system also provides for SDT through the accelerated procedures of the Decision of 5 April 1966:

This Decision provides, first, that the Director-General may use his good offices, and conduct consultations at the request of the developing country with a view to facilitating a solution to the dispute, where the consultations between the parties have failed. Second, if these consultations conducted by the Director-General do not bring about a mutually satisfactory solution within two months, the Director-General submits, at the request of one of the parties, a report on his action. The DSB then establishes the panel with the approval of the parties. Third, the panel must take due account of all circumstances and considerations relating to the application of the

challenged measures, and their impact on the trade and economic development of the affected Members. Fourth, the Decision provides for only 60 days for the panel to submit its findings from the date the matter was referred to it. Where the Panel considers this time-frame insufficient it may extend it with the agreement of the complaining party. (WTO, 2004b, 112-113.)

Article 27.2 of the DSU provides for the WTO Secretariat to make available to any developing country Member on request, a qualified legal expert from the WTO Technical Cooperation Services. Additionally, private legal counsel may appear before panels and the Appellate Body as part of a party's delegation. An intergovernmental organization known as the Advisory Centre on WTO Law (ACWL) was created in 2001 to provide advice and training on WTO law to developing countries and countries with economies in transition. It is independent of the WTO.

In spite of these provisions, the effectiveness of SDT in the WTO DSU remains questionable (see for example Mitchell, 2006; WTO 2004b). The reasons for this are varied and complex but can be summed up as follows. The constraints facing many developing countries at the WTO DSU cannot be addressed through the granting of procedural privileges. The application of such procedural privileges might detract from the legitimacy of the results of proceedings. Many developing countries have been reluctant to invoke such procedures for this reason. Whilst in the negotiations, developing countries have tended to seek procedural privileges; in dispute settlement practice they have tended to seek formal equality with developed countries.

The EPA DS provisions largely mirror those of the WTO DSU but are relatively more restrictive. By far, the most severe limitation of the EPA DS is its lack of special and differential treatment, given its development orientation and its nature as a North-South FTA. Whilst the WTO DSU provides a modicum of SDT through mostly procedural privileges,

the interim EPAs and the CARIFORUM EPA make no explicit provisions for SDT. Similarly, EPA DS makes no provision for related legal or any form of technical assistance.

More substantively, it can be argued that the EPA DS provisions are more restrictive than the WTO DS system in respect of their lack of flexibility in time limits for dispute resolution - in favour of ACP countries. Whilst the statutory maximum timeframe for a WTO dispute resolution is 20 months (including consultations, panel and Appellate Board rulings), the maximum statutory timeframe for dispute settlement under all the EPAs is just under 12 months (see for example, CARIFORUM 2008; Karli, 2008). The EPA DS reduces the panel stage to six months (instead of seven to eight months under the WTO), which shortens the period for filing legal submissions. This is a crucial stage for developing countries given their limited access to legal resources (Karli, 2008, 29). The restriction of this space in EPA DS makes it more restrictive than WTO DS. The relatively shorter Panel stage in EPA DS would seem to favour the EU, which disposes of sufficient legal capacity. However, the point here is not that this shorter timeframe is problematic per se but rather, considering the human and financial challenges ACP countries face, some flexibility in their favour in respect of this timeframe would be helpful to them without hurting the EU.

Although EPA DS shortens and is very specific about the ruling processes of dispute settlement (e.g. panel decisions), it is curiously silent on the RPT within which arbitral decisions must be implemented (see for example CARIFORUM, 2008; SADC, 2008). The WTO DS is specific on RPT, setting it at 15 months. In contradistinction, EPA DS provides for panels to take into consideration the length of time it would normally take the defending party to adopt the legislative or administrative measures to bring itself into compliance. The panels are also advised to take into consideration demonstrable capacity constraints, which may affect the defending party's adoption of the measures necessary for compliance. Whilst this might be construed

as SDT in favour of ACP countries, there is nothing in EPA DS that prevents the EU from also invoking it (i.e. it is symmetrical).

Any symmetry in the implementation of arbitral decisions favours the EU, given the economic asymmetries between the EU and ACP countries. Special and differential treatment in respect of the reasonable period of time that the losing party would be allowed to implement the arbitral award is implicit but not precise in the EPA texts. As Karli (2008) has argued, even this minimal and implicit SDT provision is problematic because it only regulates the situation where an ACP country is a defendant, but is silent on circumstances where the EU is the losing party. This is significant for ACP countries because considering the dependence of their economies on trade with the EU, a delay in implementation of arbitral decisions may adversely affect their economies.

The relative restrictiveness of EPA DS timeframes is also partly caused by the lack of provision for Appellate Review in the EPAs, which means the timeframes are shorter than in WTO DS. This in itself is a major weakness of EPA DS. Considering the asymmetrical distribution of power between the EU and the ACP group, an Appellate Review would provide internal checks and balances against judicial excesses, biases or mistakes. The case for that has been amply demonstrated by the sometimes conflicting decisions between WTO Panel and Appellate Rulings.

EPA DS is also more restrictive than the WTO DS in respect of provisions on membership of dispute settlement bodies. Article 8.1 of the WTO DSU explicitly allows government officials to serve on WTO Panels although members of government or citizens of parties to a dispute, including third parties are excluded. In contradistinction, EPA DS prohibits government officials from being nominated as panelists. This is not a problem per se, as the impartiality of government officials is a legitimate concern. The problem arises in the lack of clarification regarding this criterion. For example, it is not clear

whether this applies to anyone who has ever served in government regardless of whether they are members of the government at the time of the dispute settlement. The EPAs provide for a permanent list of arbitrators to be provided at the time of the entry into force of the agreements (EAC, 2008; SADC, 2008; CARIFORUM, 2008). It is not clear when and how the non-governmental-affiliation condition is satisfied.

With the exception of the SADC EPA, all EPA DS provisions provide for the parties to select five individuals each and to agree on five other persons who are not nationals of any of the parties. The SADC EPA provides for eight members each and five non-nationals (EC, 2006; EAC, 2008; CARIFORUM, 2008; SADC, 2008). Any measure that restricts ACP countries' choice of panelists limits the impartiality of the EPA DS. If countries cannot choose the panelists they want, they are unlikely to have confidence in the arbitral decisions. Given the limited technical capacity within ACP countries, the lack of clarity on the governmental membership criterion is likely to limit the technical pool from which ACP countries can nominate panelists.

In a departure from the WTO DS system, all the EPAs provide for compensation as a first-choice retaliatory measure. Whilst this has been lauded in some quarters, such compensation is conditional upon the mutual agreement of the parties. This falls short of the WTO's suspension of concessions, which is not subject to the agreement of the parties. While the WTO DS system does not contain any provision describing the form compensation may take, all the EPAs, except Ghana and Côte d'Ivoire, contain potentially important clauses. For instance, the PACP regions, SADC and Cameroon EPAs explicitly provide that compensation may include or consist of financial compensation although all qualify that this does not oblige the defendant to offer financial compensation. Furthermore, the SADC EPA stipulates that if SADC were the complainant, and asserted that other retaliatory measures would significantly damage its economy, the EU should consider providing financial compensation (SADC, 2008).

This might be read as an assertion of special and differential treatment by SADC.

In a further potentially flexible departure from the WTO DS system, the EPA DS provisions provide for 'appropriate measures' instead of suspension of concessions. Whilst this terminology provides a wider variety of retaliatory measures than those embodied in the WTO's suspension of concessions, it is symmetrical. This means that the EU reserves the right to use it too. This symmetry renders it vulnerable to manipulation and diminishes its economic advantage to ACP countries. For example, some ACP countries are suspicious that the EU might employ this clause in respect of development assistance (aid), which is critical to ACP countries but is not a trade issue (i.e. not a legally binding commitment under EPA). In order to prevent such an opportunistic interpretation, the Ghana EPA explicitly proscribes development assistance from the definition of appropriate measures.

Most EPAs contain further provisions that discipline the use of appropriate measures both for the EU and ACP countries. In that regard, all the EPAs require retaliating parties to consider the economic impact of their actions on the losing party, with the PACP countries' EPA going so far as to stipulate consideration of the impact on development and the economy (PACP, 2008):

Considering how difficult, if not impossible, it is for most ACP countries to suspend any concessions vis-à-vis the EU, let alone harming the EU, the additional flexibility provided by the use of the term 'appropriate measures' may be welcome. This flexibility would give to the ACP countries the chance to enjoy a richer tool box of retaliatory measures. (Karli, 2008, 25.)

Finally, the SADC, PACP regions and Cameroon EPAs provide for appropriate measures to

be proportional to the violation. However, proportionality is not defined which limits its legal utility or functionality.

The EPA DS has also been faulted for provisions allowing only the winning party to retaliate. This goes against the ACP countries' demand for the right to retaliate collectively and the experience of developing country coalition building in WTO DS. The presence of a coalition on the side of a developing country enhances a country's chances of undermining the power of a dominant developed country, accessing legal resources and expertise, and discouraging developed countries from threatening economic coercion. Economic Partnership Agreements are the direct result of such coalition building. A handful of Latin American Member countries (led by Ecuador) joined by the USA were able to force the end of the Lomé preferences (Abass, 2004; Bown, 2005).

Overall, EPA DS does little if anything to address the problem of effective remedies in dispute settlement between developed and developing countries. As demonstrated by the gambling case between Antigua and Barbuda and the US, retaliatory trade measures are hardly viable options for developing countries wronged by large industrial countries. For example, if Mauritius were to suspend concessions and obligations to the EU as a result of the EU's breach of some trade obligation, it is Mauritius that would suffer greater economic damage from such suspension. This renders suspension of concessions an ineffective remedy for many developing countries. This is the context within which developing countries have been calling for alternative measures to suspension of concessions (e.g. financial compensation). Whilst EPA DS introduces potentially useful remedies, the symmetrical nature of such remedies renders them effectively similar to the prevailing WTO DS.

6. THE NON-EXECUTION CLAUSE

The Cotonou Partnership Agreement contains non-execution clauses, which allow the EU to unilaterally suspend any concessions under the agreement, including trade concessions (Articles 96 and 97). Article 96 allows for the imposition of sanctions in the case of failure, “to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law,” while Article 97 allows for sanctions in serious cases of corruption. The EU has transferred the substance of these articles into interim EPAs and the CARIFORUM EPA despite strong objections from the ACP group (African Union, 2008). Even before the EPAs were concluded or initialled, the EU had invoked Articles 96 and 97 of the CPA twice: in 2001 against Zimbabwe in response to alleged electoral fraud, and in 2007 against Fiji following a military coup, suspending development aid (Bilal and Lui, 2009).

The ‘general exception’ clauses in virtually all the EPAs reserves the rights of the parties to suspend preferences under a wide a range of circumstances going beyond those permissible under the WTO (e.g. protection of human, animal and plant life). It extends to purely political or non-trade related cases that would be difficult to defend at the WTO.

The non-execution clause in the EPAs is at least partly legally and developmentally problematic. Firstly, the ACP group maintains that political cooperation with the EU is distinct and separate from trade relations and the two should be kept apart and were legally kept apart under the CPA. Economic Partnership Agreements are provided for under Article 37 of the CPA and not Articles 96 or 97. Accordingly, Articles 96 and 97 of the CPA do not apply to EPAs (ACP, 2007).

Secondly, it is not clear that a WTO Panel would uphold a suspension of concessions over non-

trade related issues, such as obtained in Fiji or Zimbabwe. Were such suspensions to occur in the transition period, the validity of such an EPA, if it were a bilateral one, would be uncertain. As Bilal and Lui (2009, 32) argue, “the ability to suspend trade liberalisation would not satisfy the requirements to eliminate tariffs on substantially all trade in Article XXIV”, considering the symmetrical nature of the tariff liberalization commitments between the EU and ACP countries. Given the asymmetrical nature of trade liberalization between the EU and ACP countries, if the EU were to suspend a significant value or volume of its preferences either to an ACP country in a bilateral or regional EPA within the next 15 years, it is not at all clear that the FTA would meet the terms of GATT Article XXIV on substantially all trade. It is equally unclear what the impact of such suspension would be on regional FTAs.

In spite of the legal and development challenges posed by the non-execution clause, the inclusion of such a clause is not uncommon although it is generally governed by public international law, especially the Vienna Convention on the Law of Treaties. This is the context in which the CPA provided for such a clause in respect of human rights and democracy. Dispute Settlement Understanding jurisprudence has shown that panels and Appellate Boards have explicitly and implicitly considered this Convention in the past. In spite of the ACP countries’ contestation of the inclusion of such a clause in EPAs, it might be permissible under WTO law. Notably, this is not the first time that the EU is employing a similar clause in its trade relations with developing countries. For instance, the EU-Mexico FTA contains a similar clause. Although Mexico has challenged the inclusion of the non-execution clause politically, it has so far not been legally challenged.

7. CONCLUSION

The study examined the legal and developmental implications of five fundamental provisions of the EPAs with a view to assessing whether or not they were relatively more restrictive than those provided for under WTO or necessary for development, financial and trade interests of ACP countries. It found that all the EPAs contain more restrictive legal provisions than necessary for WTO compatibility or developmentally desirable for ACP countries.

Specifically, the EPAs have been shown as relatively more restrictive than legally necessary or compared to like FTAs in respect of interpretation of GATT Article XXIV on substantially all trade. They have also been shown to contain WTO-plus obligations, such as MFN and standstill clauses, that are potentially detrimental to the development, financial and trade interests of some ACP countries. Finally, the EPA dispute settlement system has been shown to be relatively lacking in special and

differential treatment provisions compared to the WTO dispute settlement system.

In summary, it has been argued that the WTO-plus provisions of EPAs and their restrictive interpretations of WTO rules pose serious systemic challenges to the multilateral trading system, particularly the purposes and functions of the Enabling Clause and the underlying principle of special and differential treatment. The legal design of the EPAs undermines this principle and diminishes the policy space or flexibility available to ACP EPAs in dealing with challenges inherent in their levels of economic development such as the need for infant industry protection, revenues from trade taxes, etc. Specifically, the EPA MFN clause threatens to undermine the role of the Enabling Clause in governing South-South trade. It also imposes unnecessary constraints on trade relations between the ACP countries and other industrialised countries.

8. RECOMMENDATIONS

In light of the foregoing discussion, this article makes the following recommendations regarding pending issues or continued negotiations of EPAs.

1. African, Caribbean and Pacific countries should seek the elimination of the MFN clause in the final negotiations on full EPAs. Failing that, major trading economies in the MFN provisions in EPAs should be redefined to exclude developing countries. Any definition of major trading economies that includes developing countries potentially conflicts with the purposes and functions of the Enabling Clause in governing South-South trade.
2. The Economic Partnership Agreement standstill clause is a WTO-plus provision. It would be in the development, financial and trade interests of ACP countries to seek its elimination in the final negotiations on full EPAs. A second best alternative in this respect would be for the ACP countries to freeze their tariffs at bound rather than applied levels and freeze tariffs relating only to products committed for liberalization as opposed to all products as provided for in some interim EPAs.
3. Consistent with many other FTAs (e.g. EU-Chile, EU-Czech, EU-Morocco, EU-South Africa, US-Australia, US-Morocco) and in the interests of their development, trade and financial needs, ACP countries should consider excluding any sensitive sectors or products from liberalization commitments. These should be defined in both 'static' (short term, e.g. food security, infant industry protection) and 'dynamic' (long term - e.g. industrial or national development) terms. This could be considerably more than their present exclusions in interim EPAs.
4. For purposes of compliance with GATT Article XXIV, 80 percent liberalization by ACP countries (either in regional groupings or as individual countries in bilateral EPAs) within 15 years would appear to suffice for compatibility with GATT Article XXIV, if the EU liberalizes 100 percent of its trade with any given ACP country configuration at the outset. This would amount to 90 percent coverage of the trade between the parties in 15 years. All the interim EPAs and the CARIFORUM EPA provide for at least 80 percent liberalization within 15 years by the ACP bloc and 100 percent immediate liberalization by the EU barring transitory periods for rice and sugar. Any liberalization commitment by the ACP group beyond the 80 percent 15-year mark would appear deeper than legally necessary compared to many prevailing FTAs. In the interests of their development, trade and financial needs, these countries could seek indefinite phase-out periods for liberalization commitments beyond the 80 percent 15-year watershed or subject such commitments to tariff reduction rather than elimination. This would be consistent with other North-South FTAs, particularly those involving the US.
5. The Economic Partnership Agreement dispute settlement should be no stricter than the WTO dispute settlement. Developing countries face considerable challenges utilizing the WTO DS system. A more stringent system than the WTO's would only make things worse for the ACP countries. They could consider choice of forum provisions in the EPA dispute settlement systems with the WTO system as a potential alternative option. This could enhance the symmetry of the EPA DS mechanism given the economic disparities between the EU and the ACP regions.
6. If ACP countries choose to conclude agreements on services and investments, it would be in their development, trade and financial interests to demand special and differential treatment as provided by GATS Article V in respect of services. As GATS provides for MFN treatment in RTAs, it would also be in their interests to consider the items they might exempt from MFN provisions of the GATS. The ACP countries would also benefit from an MFN clause with both pre- and post-establishment provisions as inspired by GATS Article II.

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Founded in 1996, the International Centre for Trade and Sustainable Development (ICTSD) is an independent non-profit and non-governmental organization based in Geneva. By empowering stakeholders in trade policy through information, networking, dialogues well-targeted research and capacity building, the centre aims to influence the international trade system such that it advances the goal of sustainable development.