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Which way forward in EPA negotiations?

Seeking political leadership to address bottlenecks

Sanoussi Bilal

Isabelle Ramdoo

with contributions from David Primack

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Abbreviations

ACP	African, Caribbean and Pacific
AGOA	African Growth and Opportunity Act
AU	African Union
ASEAN	Association of South East Asian Nations
CARICOM	Caribbean Community
CARIFORUM	Caribbean Forum
CEMAC	Communauté Economique et Monétaire de l' Afrique Centrale
CET	Common External Tariff
COMESA	Common Market for Eastern and Southern Africa
CSME	CARICOM Single Market and Economy
CSS	Contractual Services Suppliers
DDA	Doha Development Agenda
DFQF	Duty Free Quota Free
EAC	East African Community
EBA	Everything-But-Arms
ENT	Economic Needs Test
EPA	Economic Partnership Agreement
ECDPM	European Centre for Development Policy Management
ECOWAS	Economic Community of West African States
EDF	European Development Fund
EEZ	Exclusive Economic Zone
EFTA	European Free Trade Agreement
EPA	Economic Partnership Agreement
ESA	Eastern and Southern Africa
EU	European Union
FEPA	Framework Economic Partnership Agreement
FTA	Free Trade Agreement
GATT	General Agreement on Tariff and Trade
GATS	General Agreement on Trade in Services
GSP	Generalised System of Preferences
GT	Graduate Trainees
ICT	Intra-Corporate Transferees
ILEAP	International Lawyers and Economist against Poverty
IP	Independent Professionals
LDC	Least Developed Country
MERCOSUR	Mercado Comun del Sur
MFN	Most-Favoured Nation
MT	Metric Tonnes
NAMA	Non-Agricultural Market Access
PACP	Pacific ACP
PAPED	Economic Partnership Agreement Development Programme
QR	Quantitative Restrictions
R&D	Research and Development
SACU	Southern Africa Customs Union
SADC	Southern Africa Development Community
SAT	Substantially all Trade
SPS	Sanitary and Phytosanitary Measures
TDCA	Trade, Development and Cooperation Agreement
TBT	Technical Barriers to Trade
WTO	World Trade Organization

Executive Summary

Fourteen years after the Economic Partnership Agreement (EPA) concept was initially proposed and eight years after the start of the negotiations of EPAs between the Europe Union (EU) and the 77 Africa, Caribbean and Pacific (ACP) countries, only 36 ACP countries have concluded some type of agreement and only 25 have confirmed their commitment by signing an agreement (15 of which are Caribbean). In parallel, negotiations towards final EPAs have been progressing only very slowly, when they have not been stalled.

In a paradoxical way, EPAs, which should have strengthened and anchored the economic relationship of many ACP with the EU, seem to have had an opposite effect with several ACP, which resent the EU insistence to press for domestic reforms and ambitious commitments in the comprehensive economic and trade agreements. In spite of their development objectives, EPAs have often become an issue of continued tension between the EU and Africa, which may have deeper negative repercussions on the EU-Africa relations, including beyond trade and economic considerations.

Despite the numerous challenges, it is high time to find a way forward to the process. The status quo is not sustainable in the long term. Negotiations towards final EPAs have been dragging on for too long and have even lost momentum. A number of unresolved “contentious” issues remain on the table. Negotiations have been difficult and protracted and parties have by now exhausted almost all possible solutions and alternatives at technical levels.

Perhaps the EPAs should sink and be forgotten. That might be the best outcome for some countries and regions. If that is the case, they should stop wasting their energy and end or at least suspend the EPA negotiations. Yet, for those still interested in moving forward along the EPA path, simple solutions are available. But they must demonstrate political leadership and flexibility in order to shape a solid and more constructive relationship, taking a step beyond trade considerations and focus on the broader strategic agenda.

A forward-looking agenda to progress on EPAs should be based on the following parameters.

First, the ambitions of the EPAs must match the degree of commitment and strategic priorities of the countries and regions concerned. For most regions, this means a narrower agenda, focusing first on market access in goods and the development dimension, leaving aside services and a whole set of trade-related issues for future negotiations, and this in spite of the relevance of these issues for economic development. The EU accepted this principle for Economic Community of West African States (ECOWAS) in June 2009, and it should extend the same flexibility to all other interested parties.

Second, parties that are still seriously committed to concluding an EPA must seek politically acceptable solutions to those “contentious issues” that remain major stumbling blocks to the timely conclusion of the negotiations. This will require concessions from all parties. It will also require a differentiated approach, as not all countries or regions share the same concerns. Interestingly, in most regions possible compromise solutions have been identified on many of the issues deemed contentious in 2008. But in a bizarre twist, neither the ACP nor the EU seems too keen to capitalise on those solutions. That such compromises have been identified, however, shows that the negotiations are not as intractable as some have claimed.

Finally, while it is a shared overall objective that EPAs should promote development, it is clear that the parties have different perceptions of the development merits of some of the specific EPA provisions. A positive way forward would be to acknowledge these differences, and ultimately to respect the ACP parties' assessments of their own development strategies.

On **market access**, the EU has interpreted rules of the World Trade Organization (WTO) as requiring the ACP regions to liberalise at least 80 percent of their trade with the EU over a period of 15 years, given that, in return, the EU grants them duty- and quota-free market access. Many ACP countries, and in particular least-developed countries (LDCs), have contested this interpretation and asked for greater flexibility. ACP and EU officials have argued over the last 10 years about the correct interpretation of the Article XXIV of the General Agreement on Tariffs and Trade (GATT) 1994, for which no pertinent jurisprudence exist. The objective is not to arbitrarily interpret the WTO rule, but to consider what level of market opening is both politically acceptable and defensible at the WTO. According to many WTO insiders, in the current context, any free trade agreement that would cover 70 percent or more of trade over a 15-20 years period is most likely to pass this WTO test – even more so if one the parties is an LDC or vulnerable economy, as in many ACP regions.

The inclusion of a **most-favoured nation (MFN)** clause – whereby preferences granted to major third parties would be extended to the other parties of an EPA – has also been passionately debated. While this is not required or proscribed by the WTO, it is one of the most politically sensitive issues at stake. From the ACP side, it is not acceptable as a matter of principle. ACP policy makers consider it an unacceptable constraint on their future trade agreements with third parties. The EU, however, views it as a matter of "fairness" given their generous concessions under the EPA. A technical compromise would consist in explicitly narrowing the scope of application of the clause and relaxing the trigger mechanisms (in terms of joint decision-making process and thresholds) for its application. The MFN clause in the CARIFORUM EPA or the Pacific States interim EPA could be considered: signatories have committed to implement the MFN provision only after consultation, therefore removing any automatic and potentially arbitrary application of the more favourable treatment. The balance of obligations and benefits between a third-country free trade agreement (FTA) and the EPA could also be considered. Another option would be to increase the threshold (in terms of share of world trade) of what constitutes a major trading partner, so as to exclude more countries from the potential application of the MFN clause. However, whether an EPA will include an MFN clause is ultimately a political choice. But even if it does, some options to address concerns over future agreements with major third parties might be politically acceptable.

Another major stumbling block to the negotiations concern the treatment of **export taxes**. The main concern of some ACP is the need to preserve sufficient policy space to industrialise their economies, a position that is challenged by the EU. This is a somewhat grey area at the WTO. However, strictly speaking, WTO rules do not expressly require countries to prohibit the use of export taxes. Therefore, there is no obligation to have a clause on export restrictions in the EPA; if there is one, a simple reference to WTO rules could suffice. Even with a binding provision on export taxes, countries could preserve some flexibility by excluding a list of products from the application of the clause. The introduction of temporary measures under specific circumstances could also be provided for, for instance in case of specific revenue needs, or to protect an infant industry, ensure food security, protect the environment or where a country can justify industrial development needs.

The **treatment of infant industries** has been another major cause of concern. As it currently stands in interim EPAs, it is covered under a general bilateral safeguard and therefore requires lengthy procedures

before any measure could be applied to protect infant industry. However, technical remedies have been found, for instance by having a stand-alone provision with less cumbersome conditions of application.

Many African countries have proposed the inclusion of an **agricultural safeguards and food security** clause in the EPA given the importance of agriculture in many countries. However, the EU has argued that agriculture was sufficiently covered in the general bilateral safeguards. The EU has also forcefully rejected any proposal to address the question of agricultural subsidies through the use of agricultural safeguard measures on the argument that these issues were being discussed at the WTO and therefore should not be part of bilateral negotiations. While the issue of agricultural subsidies is not likely to be resolved in the context of the EPA, technical solutions could be found on treatment of agricultural products, in the light of the FTA between EU and South Korea.

The question of having a **standstill clause** that prevents a country from modifying its tariff schedules is another cause of concern. It is particularly challenging in the context of regional integration, where countries are in the process of adjusting their national tariffs to the regional common external tariffs. Possible technical solutions exist. It could apply only to the products subject to liberalisation and countries would not raise duties above their MFN applied rates. Parties could also jointly agree to allow countries to align their market access offers to their common external tariffs when the region moves toward a customs union. In addition, in exceptional circumstances (to be jointly agreed), such as to meet some special development needs or in case of serious economic difficulties, the country or region could temporarily suspend the application of the schedule.

Interim EPAs have a provision to remove existing **quantitative restrictions** and to prevent the introduction of new such measures. Again, in most cases, technical solutions have been found by making sure that the article is in line with Article XI of GATT 1994, which provides for the possibility to use quantitative restrictions in exceptional circumstances, in particular for the prevention of relief of critical food shortage.

On **services**, many of these fault lines are only just beginning to emerge and the regions – both between and within – will need to determine how best to reflect their own services-related development aspirations in the envisaged texts and commitments.

Last, but not least, the adoption of appropriate **measures to accompany and support the EPA** implementation, by both the ACP concerned and the EU, will be key to unleash the development potential of an EPA.

The way out of the current deadlock is a question of political will. The point here is that technical solutions can be found on many of the remaining issues, if only policy makers on both sides are bold enough to seize them.

The EPAs have been presented as advanced and far-reaching instruments for binding trade and development. A failure to deliver on these development promises would be a serious setback to the EU trade and development agenda, including in the context of the Doha Round.

At the same time, it is important to acknowledge the political repercussions that EPAs have on the relations between the EU and the ACP, notably Africa. The EPA process is too serious of a matter to be left to trade people alone. A more strategic vision towards the ACP/Africa – EU relationship is desperately required.

1. An EPA process in disarray

Despite their development objectives, Economic Partnership Agreements (EPAs) have become a source of continued tension between the European Union (EU) and African, Caribbean and Pacific (ACP) countries. Worryingly, the increasing strains of the EPA process threaten to infect the broader economic and political relationships between the EU and Africa.

The EPA process is in disarray. After eight years of negotiations, which are running three years behind schedule, the EPA agenda remains divisive and inconclusive. Most African and Pacific countries, in particular least-developed countries (LDCs), have not concluded any agreement with the EU, and little progress has been achieved in the negotiations towards final EPAs. Even in the Caribbean, where a comprehensive EPA has been in place since 2008, the implementation process seems to have stalled from the start.

How does an instrument that was conceived to foster economic development and enhance the partnership between the EU and the ACP/Africa risk turning into a liability in their strategic relations? And how can this be avoided? Not only have the EPAs lost momentum; if the existing tensions are not resolved, the process may also have lasting negative consequences on the overall economic and political relationship between the ACP/Africa and the EU.

The EU will have to reassess its position -- so will the ACP. In doing so, policy makers should not get bogged down by technical considerations. Trade negotiators have already done so for too long, with little success. Instead, policy makers on both sides should move a step beyond trade considerations and focus on the broader strategic agenda. To do so, they must demonstrate political leadership and flexibility in order to shape a solid and more constructive relationship. This will not be an easy task.

This paper suggests options to address key bottlenecks on the way forward. Section 2 provides an overview of the EPA process and the current state of play of the negotiations towards final EPAs in the different ACP African and Pacific regional groupings. Following the initialling of the interim EPAs (IEPAs) by many African and a few Pacific countries[1] in 2007, a number of countries, signatories and non-signatories, raised serious concerns regarding some provisions in the IEPAs which, according to them, posed significant threats to their development prospects and weakened their negotiating power with third countries. These concerns, termed “contentious issues[2]”, are an integral part of the negotiations towards the final EPA and are reviewed in Section 3. Focusing on the most prominent ones, the papers identifies for each key contentious issue options to help the negotiations move forward. Similarly, with the likelihood of trade in services also factoring into the route towards final EPAs, Section 4 provides a brief overview of a number of topics that have already shown themselves to be of a contentious nature in some countries. But technical remedies will not suffice to unlock the negotiations. Strong political leadership is required from all parties to instil the necessary momentum to conclude EPAs that match their strategic and development ambitions. Section 5 concludes with a reflection on this process and its broader strategic implications, notably on the Africa-EU relations.

[1] In 2007, 35 out of 77 ACP countries initialled an IEPA with the EU.
[2] See Addis Ababa Declaration on EPA: AU Conference of Ministers of Trade and Finance, 1-3 April 2008, Addis Ababa, Ethiopia.

2. State of Play of the EPA Negotiations

2.1. EPAs: from fatigue to irritation

There is a general EPA fatigue, which is shared by all parties. It is quite apparent that the political attention and economic focus are shifting away from the EPA negotiations. The EU trade attention has turned to Asia and Latin America and to the strengthening of its neighbourhood policy. As for many ACP countries and regions, the EPA process has in many cases tarnished the EU's reputation as a friendly partner. Meanwhile, emerging powers such as China, Brazil and India have become attractive alternative new partners. Such countries are often perceived as offering greater development prospects, with fewer conditions attached.

In a paradoxical way, EPAs, which should have strengthened and anchored the ACP-EU economic relationship, seem to have had the opposite effect. Many African and Pacific countries resent the EU's insistence on domestic reforms and ambitious commitments in comprehensive economic and trade agreements. They want to maintain their policy space to determine for and by themselves the levels of ambition and commitment at which they will pursue their own development objectives. In spite of the EU's rhetoric, they also resent the EU's lack of flexibility in responding to some of their specific concerns on a range of issues, which are deemed contentious. Last but not least, the EU's tendency to lecture the ACP on how to pursue development with an EPA has more often been a source of irritation than inspiration. It is true that the ACP Group and the EU have jointly set out some development objectives in the context of the ACP-EU Cotonou Partnership Agreement, for which the EPA process is a key component. Nevertheless, it is ultimately up to the ACP countries and regions to determine how these objectives can best be achieved, in accordance to their own strategies for development and reform.

Many ACP countries have also implicitly revelled in the delayed EPA negotiations process. Since the end of the Lomé type/Cotonou unilateral preferences as of 2008, many ACP have "settled" into the status quo.

All of the countries that have concluded an interim EPA have benefited from a duty-free quota-free market access to the EU under the EU Market Access Regulation 1528 of 2007 related to EPAs.[3] Though the Regulation 1528 requires the countries not only to conclude, but also to sign, ratify and implement their (interim) EPA "within a reasonable period of time" there seem to have been no negative consequences for any interim EPA country so far. This situation is therefore rather convenient for many ACP countries, which do not feel compelled to speedily adopt or implement the interim EPA. Besides, those ACP countries that have not been in a position so far to conclude an IEPA have not really experienced any significant negative trade or economic effects for falling back on the "Everything-But-Arms" regime for LDCs or the standard EU Generalised System of Preferences (GSP) for the non-LDCs.

These ACP situations may partly explain why EPAs negotiations have lost momentum. Moreover, those African and Pacific countries or regions that would have no serious intention to conclude or implement an EPA may not have an interest in revealing their true positions and further extending the negotiation process, so as to postpone any fallout with the EU.

[3] *Council Regulation (EC) No 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements*. Official Journal of the European Union, L348, 31.12.2007 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:348:0001:0154:EN:PDF

2.2. What is in the Interim Economic Partnership Agreements?

The genesis of the EPAs can be traced back to the historic economic and trade relations between the EU member states and their former colonies in the African, Caribbean and Pacific states. The longstanding relationship has evolved since the signature of the two Yaoundé conventions in 1963 and 1969 respectively, four Lomé conventions and since 2000, the Cotonou Partnership Agreement which will expire in 2020. The Cotonou Agreement[4], which established a comprehensive framework for ACP-EU relations, called for fundamental changes in their longstanding non-reciprocal unilateral trade preferences granted by the EU. In particular, for the first time, ACP countries would have to negotiate trade agreements compatible with rules of the World Trade Organization (WTO), based on reciprocity, in view of the expiry of the WTO waiver in December 2007. EPA negotiations were formally launched on September 27th 2002 and were scheduled to be completed by 31st December 2007.

The main objectives of the EPA are meant to provide a sound basis for trade and development, regional integration and development cooperation. At the same time, they need to secure predictable, WTO compatible market access for ACP countries on the EU market. Initially, the ACP was divided into 6 regions, namely the Caribbean Forum (CARIFORUM), Eastern and Southern African (ESA) region, Central African region, West African region, Southern African Development Community (SADC) region and Pacific ACP (PACP) region. In 2007, the Eastern African Community (EAC) became the 7th ACP region to negotiate an EPA.

Trade liberalisation in ACP is gradual, with varying speed according to the level of development of ACP countries. The EPA contains some flexibility to exclude sensitive products from ACP countries, depending on their development needs.

The EU has initialled an interim or a full EPA with 36 out of the 77 ACP states. Following the expiry on 1 January 2008 of the WTO waiver regarding the non-reciprocal EU trade regime under the Cotonou Agreement, the remaining 41 countries traded either under the Everything-But-Arms (EBA) Initiative or the standard Generalised System of Preferences (GSP) scheme.

Of the 41 ACP countries that have not initialled or signed an EPA, 10 were non- least developed countries (LDCs)[5] and 31 were LDCs. As a result of the perceived stringent commitments that they were asked to make under the IEPAs, these LDCs opted to continue to trade with the EU under the EBA, where they enjoyed duty free quota free (DFQF) market access, despite stricter rules of origin compared to those obtained by IEPA beneficiaries. This was a major cause of concern as it was felt that they were made worse off than under the previous Cotonou Agreement.

The non-LDCs that did not initial an EPA shifted under the GSP scheme, which provides for unilateral preferential market access for all developing countries to the EU in a selected number of products. Although the GSP Plus Scheme, which provides more preferences to support “vulnerable” countries, is in principle open to all the ACP non-LDCs, none of them are currently eligible to it, given its strict conditionalities linked to the signature, ratification and implementation of human rights, core labour law and good governance conventions. Nigeria and Gabon have applied for GSP Plus preferences but their

[4] Article 36 of the 2000 Cotonou Agreement provided for the ACP and the EU “to conclude new WTO compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade”, these new arrangements would be termed economic partnership agreements (EPAs) and would be negotiated between the EU and six regional groupings within the ACP.

[5] The 10 non-LDCs are Congo, Gabon and Nigeria in Africa and Cooks Island, Tonga, Marshall Islands, Niue, Micronesia, Palau and Nauru in the Pacific.

requests were not granted since they have not ratified some of the Conventions under the Scheme[6]. Annex 1 gives a brief overview of the three schemes available to ACP non-EPA signatories, including LDCs.

In all IEPAs, the EU has granted DFQF market access for all ACP products, with a transitional period for rice and sugar as from 1st January 2008.[7]

In addition, improvements were made to the Rules of Origin for a number of products. In particular:

(i) In the case of tuna:

- By far, the most significant improvement was the "global sourcing rule[8]" for the Pacific region for certain processed fish[9], as provided by Article 6(b) of Protocol 1 of the IEPA. This is aimed at supporting firms producing canned tuna and tuna loins, which have historically been constrained in their ability to source sufficient supplies of wholly obtained fish.

- The ESA region has obtained an automatic derogation[10] of 10,000 Metric Tones (MT) annually for tuna (8,000 MT for canned tuna and 2,000 MT for tuna loins).

- The EAC has obtained an automatic derogation of 2,000 MT annually for tuna loins.

- In addition, the crew requirements have been relaxed for vessels to obtain originating fish.

(ii) In the case of Textile and Apparel: The IEPAs simplified the previous two-stage transformation rule for certain textile products to that of a single-stage transformation, implying that producers can now source their fabrics (mainly for cotton products) from any source.

(iii) For a number of agro-industrial products, the rules have been relaxed. Those include, inter alia, the wheat flour requirements for biscuits and pasta; dairy produce; and vegetable oil amongst others.

With regards to development, IEPAs contain provisions, aimed at assisting signatory countries in building capacity and in supporting countries in implementing the agreements. However, the agreements contain no

[6] See *Trade Negotiating Insights* vol 8, Issue 1, February 2009, News and Publications: "EU decisions on GSP+ applications", http://ictsd.org/i/news/tni/39401/

[7] For an analytical overview of the content of African ACP IEPAs, see notably Bilal, S. and C. Stevens eds. 2009. *The Interim Economic Partnership Agreements between the EU and African States: Contents, challenges and prospects*. ECDPM Policy Management Report No. 17. Maastricht, NL: European Centre for Development Policy Management. www.ecdpm.org/pmr17 and World Bank 2009, *Full Report on Implementing Interim EPAs*, http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/EXTAFRREGTOPTRADE/0,,contentMDK:21663686~pagePK:34004173~piPK:34003707~theSitePK:502469,00.html ; for the Caribbean and Pacific regions, see Kennan, J., C. Stevens and M. Meyn. 2009. *The CARIFORUM and Pacific ACP Economic Partnership Agreements: Challenges Ahead*. Economic Paper Series, London: Commonwealth Secretariat. http://publications.thecommonwealth.org/the-cariforum-and-pacific-acp-economic-partnership-agreements-681-p.aspx More relevant reports and studies are available at www.acp-eu-trade.org/library

[8] This is however subject to certain conditions, namely: the provision is available "when circumstances are such that wholly obtained products as defined in Article 5 paragraphs 1(f) and 1(g) cannot be sufficiently utilized to satisfy the on-land demand and following the prior notification to the European Commission"; The notification to the European Commission shall indicate the reasons why the use of the global sourcing will stimulate the development of the fisheries sector in that State, and shall include the necessary information about the species concerned, the products to be manufactured as well as an indication of the respective quantities to be involved.

[9] Article 7(6)b of Protocol 1 of the PACP IEPA states that "processed fishing products of heading 1604 and 1605 manufactured in the State from non-originating materials of Chapter 03 shall be considered as sufficiently worked or processed.

[10] Under the Cotonou Agreement, the only automatic derogation for fish was a total amount of 8,000 MT for canned tuna and 2,000 MT for tuna loins, allocated for the whole ACP region.

binding financial commitments from the EU to provide additional resources that would help signatories meet the transitional costs linked to a fall in fiscal revenue as a result of liberalisation or to address supply side constraints.

2.3. State of Play of EPA Negotiations: A Regional Perspective

2.3.1. CARIFORUM region

The CARIFORUM[11] is the only region to have initialled a full EPA with the EU on the 16th of December 2007, with the aim to build on their long-established economic ties to foster growth, jobs and development in the Caribbean. The EPA was signed in the Caribbean on 15 October 2008 by 14 states. Haiti signed in December 2009.

The CARIFORUM EPA covers inter alia, trade in goods, investment and trade in services, competition policy, transparency in government procurement, intellectual property right, fisheries and development.[12]

In addition to DFQF for goods and improved rules of origin, the CARIFORUM region obtained a range of new market access concessions from the EU on Investment and Services.[13] In terms of sectoral coverage, the EU has taken commitments in services on more than 90% of the sectors[14]. In the field of investment (covering non-services products), the EU has opened almost all sectors for CARIFORUM states, with only targeted exclusions and limitations, often applicable only to its new member states.

Regarding the temporary movement of natural persons, the EU has granted market access for Caribbean firms' contractual services suppliers (CSS) in 29 sectors and has opened 11 sectors for independent professionals (IP; i.e. self-employed), including sectors such as tourist guides, entertainers (of particular importance to the region), artists, chefs de cuisine and fashion models (under CSS) as well as (under CSS & IP) some legal advisory services, computer related services, research and development services and management consulting. Qualification requirements aside, the viability of these commitments are significantly undermined by the EU's generous use of economic needs tests (ENTs), in particular with regards to the above professional and other business services.[15] Access was also granted by the EU in the areas of key personnel and graduate trainees (i.e. persons, including trainees, working for

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[11] Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Surinam, and Trinidad and Tobago.

[12] For an analytical overview of the content of the CARIFORUM EPA, see Kennan, J., C. Stevens and M. Meyn. 2009. *The CARIFORUM and Pacific ACP Economic Partnership Agreements: Challenges Ahead*. Economic Paper Series, London: Commonwealth Secretariat. http://publications.thecommonwealth.org/the-cariforum-and-pacific-acp-economic-partnership-agreements-681-p.aspx

[13] For an analytical overview, see notably Sauvé, P. and N. Ward 2009, The EC-CARIFORUM Economic Partnership Agreement: Assessing The Outcomes on Services and Investment, ECIPE Paper, www.ecipe.org/publications/ecipe-working-papers/the-ec-cariform-economic-partnership-agreement-assessing-the-outcome-on-services-and-investment , Francis, A. and H.Ullrich 2008, *Cariforum EPA and beyond: Analysis of the CARIFORUM-EU EPA*, GTZ Working Paper, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) www.gtz.de/en/dokumente/en-epa-cariforum-and-beyond-cariforum-services-2008.pdf and Schloemann, H. and C. Pitschas 2008, *Cutting the Regulatory Edge? Services Regulation Disciplines in the Cariforum EPA*, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) www.gtz.de/en/dokumente/en-epa-cutting-the-regulatory-edge-2008.pdf

[14] These range from business services (including professional services), communications, construction, distribution, financial, transport, tourism and recreational services.

[15] For a review of the use and impact of ENTs in the CARIFORUM EPA, see Stephenson, S. and M. Robert. 2010. *Economic Needs Tests, CARIFORUM and the EPA.* ILEAP Negotiating Brief (forthcoming). Toronto: International Lawyers and Economists Against Poverty. www.ileap-jeicp.org and Primack, D. and S. Kimani. 2009. *EAC Regional Private Sector Report on Improved Services Exports to Europe.* ILEAP study, Mimeo.

CARIFORUM firms with a commercial presence in Europe), notably with a significant reduction in ENT usage.

The coverage of goods liberalised by CARIFORUM countries amounts to 61.1% of CARIFORUM imports from the EU in value over 10 years, 82.7% over 15 years (84.7% of tariff lines) and 86.9 % over 25 years (90.2 % of tariff lines). Liberalisation will start in 2011, after a 3-years moratorium.

The main exclusions for sensitive products include: agricultural products (poultry and other meat, dairy products, certain fruits and vegetables), fishery products, food preparations (sauces, ice cream, syrup), beverages, ethanol, rum, vegetable oils, chemicals (paints/varnishes, perfumes, make up/cosmetics, soaps, shoe polish, glass/metal polishes, candles, disinfectants), furniture and parts, apparel (cotton pullovers/jerseys/cardigans).

With regards to services and investment, CARIFORUM countries adopted comprehensive rules[16] and made significant offers, in particular in export-oriented and infrastructure sectors key for their development, such as telecommunications, financial services, transport, tourism, manufacturing and environmental services.

In February 2009, an EPA Implementation Unit was set up under the aegis of the CARICOM Secretariat, based in Guyana. However, so far, little has advanced, due largely to the institutional challenges, yet to be resolved, linked to the fact that Dominican Republic is not a member of CARICOM.

The first Joint CARIFORUM-EU EPA Council of Ministers was held at the margin of the EU-LAC (Latin America Caribbean) summit of Madrid in May 2010. This first meeting took important procedural steps to ensure the effective implementation of the EPA, including adopting rules of procedure for establishing the framework of the conduct of mechanisms established under the EPA. They also agreed on rules of procedure for the Joint CARIFORUM-EU Council, the CARIFORUM-EU Trade and Development Committee, special committees set up under the EPA, dispute settlement and code of conduct for arbitrators and mediators under the EPA. A CARIFORUM "High Representative" was designated to the European Commission until December 2011.

2.3.2. Eastern and Southern African (ESA) Region

ESA is a diverse and heterogeneous group including Indian Ocean islands (Comoros, Madagascar, Mauritius and Seychelles), countries from the Horn of Africa (Djibouti, Ethiopia, Eritrea and Sudan) and some countries of Southern Africa (Malawi, Zambia and Zimbabwe).

At the end of 2007, the 6 ESA states[17] initialled an IEPA with the EU. In August 2009, only four countries (Madagascar, Mauritius, Seychelles and Zimbabwe) signed the IEPA. To date, only the Seychelles has ratified the Agreement.

Those that have initialled the IEPA have all submitted individual market access offers, with different liberalisation schedules and exclusion lists, although all offers were based on the Common External Tariff of the Common Market for Eastern and Southern Africa (COMESA), which had yet to be finalised. After a 5-year preparatory period, tariffs will be dismantled over a period of 10 years.

[16] For further analysis on services rules in the CARIFORUM EPA see Noonan, C. 2008. *Some Options for ACP Regions Contemplating the Negotiation of an EPA Containing Chapters on Trade in Services and Investment.* ILEAP Background Brief No. 15. Toronto: International Lawyers and Economists Against Poverty. http://www.ileap-jeicp.org/publications/background_briefs/bb15.html

[17] Namely Comoros, Madagascar, Mauritius, Seychelles, Zambia and Zimbabwe.

1. Comoros has agreed to liberalise 81% of its imports although it has not yet signed the IEPA. Its main exclusions include meat, milk, vegetables, flour, tobacco and motor vehicles.

2. Madagascar has also agreed to liberalise 81%, excluding mainly meat, milk and cheese, fisheries, vegetables, cereals, oils and fats, edible preparations, sugar, cocoa, beverages, tobacco, chemicals, plastic and paper, textiles, metal articles and furniture.

3. Zambia, which has not yet signed the IEPA, is expected to liberalise 80% of its imports, with the exception of meat, milk and cheese, vegetables, cereals, oils and fats, edible preparations, sugar, chemicals, plastics and rubber articles, scratch cards, textiles, ceramic products, articles of base metal, machinery, vehicles and furniture.

4. Seychelles, for its part, agreed to liberalise 98% of its imports, excluding meat, fisheries, beverages, tobacco, leather articles, glass and ceramics products and vehicles.

5. Mauritius will liberalise 96% of its imports from the EU, and has excluded live animals and meat, edible products of animal origin, fats, edible preparations and beverages, chemicals, plastics and rubber articles of leather and fur skins, iron & steel and consumer electronic goods.

6. Finally, Zimbabwe, which will open 80% of its market for the EU, has excluded products of animal origin, cereals, beverages paper, plastics and rubber, textiles and clothing, footwear, glass and ceramics, consumer electronic and vehicles.

Since the initialling of the IEPA in 2007, negotiations have continued in the region, in particular to take into account the concerns of those that were not in a position to negotiate the IEPA. Negotiations have focused on:

1. Addressing the contentious issues (see Section 3 for details of their negotiations); and

2. Negotiations on outstanding issues contained in the Rendez-Vous clause (Article 57 of the IEPA), in particular on trade in services; investment and private sector development; trade facilitation; sanitary and phytosanitary (SPS) measures, technical barriers to trade (TBTs); competition policy; intellectual property rights and government procurement amongst others.

3. The need to have a comprehensive and costed development chapter with the aim at securing additional resources to finance supply side constraints and the related costs associated with EPA implementation.

While all countries are fully committed to conclude the final EPA, the region emphasised the need for appropriate sequencing between strengthening regional integration and completing negotiations among the countries of the region on key issues such as services and investment, before engaging on binding commitments with the EU. Although much progress has been achieved so far on the framework for an agreement on services (namely vis-à-vis a legal text), progress has been relatively slow regarding the market access component.

On the proposal of the EU to have ambitious commitments on trade related issues, such investment and Government Procurement, the region has so far argued that it was ready to have an agreement covering

cooperation and strengthening capacity but was not ready to negotiate market access in these areas at this stage.

On the issue of development, ESA has proposed a Development Matrix to the EU. Negotiations are ongoing on the need to prioritise the various projects included in the matrix.

No specific deadlines have however been agreed to finalise the final EPA.

2.3.3. Eastern African Community (EAC)

On the 27th of November 2007 the EAC (Burundi, Kenya, Rwanda, Tanzania, and Uganda) agreed to an interim EPA with the EU. Over the next 25 years, EAC will liberalise 82.6% of imports from the EU by value (including 80% over the first 15 years). EAC decided to exclude products such as agricultural products, wines and spirits, chemicals, plastics, wood based paper, textiles and clothing, footwear, ceramic products, glassware, articles of base metal and vehicles.

While the IEPA was initialled in November 2007, none of the EAC Partner States have signed the agreement, despite dates for the signing ceremony having been set on a couple of occasions. Responding to renewed pressure to sign the agreement since the beginning of 2010, the EAC and EU agreed in a June 2010 meeting of Ministers to accelerate the negotiations towards a final EPA by the end of November 2010. Only a single EAC EPA experts meeting has been convened since the June agreement by Ministers, hindered in large part due to resource constraints to fund further EAC preparatory efforts.

Part of the challenge in concluding these negotiations, as they related to the interim EPA, is that no consensus has been reached so far on the contentious issues (see Section 3), in particular on important issues of export taxes, the much debated MFN clause, the flexibility for future tariff modifications that could arise as a result of the implementation of regional integration programmes and the development matrix. Some progress has however been achieved on the article relating to dispute settlement and the standstill clause.

On other outstanding issues towards the final EPA, such as trade in services, investment, SPS measures, TBT, Customs and trade facilitation, there have been varying degrees of progress.

On services in particular, the countries in the region have focused on expediting regional integration in the context of the EAC Common Market. As such, EPA services discussions have not taken prominence, with significant work outstanding on advancing a joint legal text, as well as the preparation of possible requests and offers.

2.3.4. Central African region

Central African countries include Cameroon, Central African Republic, Chad, Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, and São tome é Principe.

Only Cameroon agreed an IEPA in December 2007, to prevent trade disruption for its main exports, namely aluminium, cocoa, bananas and other agricultural products, after the expiry of the WTO waiver. Over the next 15 years, Cameroon is expected to liberalise 80% of its imports from the EU but excluded a number of agricultural and non-agricultural processed goods, mainly to ensure the protection of certain sensitive agricultural markets and industries but also to maintain fiscal revenues. These include most types of meat, wines and spirits, malt, milk products, flour, certain vegetables, wood and wood products, used clothes and textiles, paints, and used tyres.

Cameroon signed the IEPA on the 15th of January 2009. However, Cameroon has made a request to the EU to delay its tariff dismantlement as set out in its IEPA until conclusion of a regional EPA agreement in order to not disrupt the customs union of the Communauté Économique et Monétaire de l'Afrique Centrale (CEMAC). The EU has yet to formally respond to this request.

Although Equatorial Guinea has signified its intention not to join the EPA before 2020, the Central Africa region remains committed to the final EPA. However, not much progress has been made so far towards the completion of the final EPA.

With regards to trade in goods, the region was mandated by the Council of Ministers in February 2010 to negotiate 60% tariff liberalisation within a transition period of 20 years (including a five-year preparatory period before liberalisation begins) and to exclude all EU subsidised products from trade liberalisation and to strengthen safeguard measures and the use of export taxes on certain products to counter the negative effects of tariff dismantlement. Furthermore, they have proposed common ACP rules of origin and the possibility of cumulation with ACP and neighbouring countries.

Main difficulties remain on the contentious issues (see Section 3) and on financing of accompanying measures. Central Africa has rejected the EU proposal to include Most Favoured Nation (MFN) and non-execution clauses in the EPA.

In parallel, at the regional level, they are currently working to accelerate negotiations to harmonise tariffs in view of the implementation of the common external tariff (CET), which is expected to serve as the basis for their market access offers. Work is also ongoing on fiscal reforms that need to be put in place in different countries to address the revenue losses resulting from tariff cuts.

The region has also recognised the importance of trade in services in the EPA. They have submitted both an initial offer and request to the EU, though the feedback to-date has pointed to over-ambition on the request and under-ambition on the offer. In particular, the latter was cited as being inadequate for WTO (GATS Article V) compatibility. The region renewed their preparatory efforts with a revised internal roadmap in March 2010, however movement has been slow to advance with implementation.

Regarding the critical issue of community levy, the region intends to work together with the West Africa region, which has similar concerns, with a view to finding a common position to engage with the EU.

2.3.5. West African Region

West African region include Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea, Guinea Bissau, Cote d'Ivoire, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo

Cote d'Ivoire and Ghana both agreed IEPAs with the EU in December 2007 to prevent disruption to their exports to the EU, in particular on cocoa, bananas and other agricultural products, after expiry of the WTO waiver in 2007. Cote d'Ivoire signed the interim EPA on the 26th of November 2008. Ghana has yet to sign its IEPA.

Over the next 15 years, Cote d'Ivoire will liberalise 81% of imports, while Ghana will liberalise 80% of imports from the EU. Côte d'Ivoire and Ghana excluded a number of agricultural goods and non-agricultural processed goods from liberalisation, mainly to ensure the protection of certain sensitive agricultural markets and industries but also to maintain fiscal revenues. The exclusion lists of Côte d'Ivoire and Ghana

are not identical as they reflect the respective situation in each country, although both Ghana and Côte d'Ivoire have excluded chicken and other meats, tomatoes, onions, sugar, tobacco, beer, worn clothes. Côte d'Ivoire has also excluded cement, malt, gasoline and cars while Ghana has excluded wheat, frozen fish and industrial plastics. In the context of the final EPA, both countries are working with the West African region to produce a common market access offer.

Some progress has been made in the negotiations towards the final EPA, on the basis of the directive received by the region's Heads of States in June 2009 to negotiate in two phases - the first including an EPA comprised of trade in goods only and development, with a second phase aimed at expanding to 'remaining topics'.

Challenges for the first phase remain on the elaboration of a regional list of sensitive products and the adoption of a Common External Tariff by the Economic Community Of West African States (ECOWAS). The region tabled a regional market access offer in March 2010, suggesting the possibility of opening up to a maximum of 70% of their market (in terms of tariff lines and value of trade) over a period of 25 years after a 5-year preparatory period. This proposal has, however, been judged insufficient by the EU, which would like to see West Africa liberalise "essentially" all its offer within 15 years, so far set by the EU at 80% of value of trade for ACP countries. Little progress has been made so far regarding the inclusion of the MFN clause, rules of origin and the question of the Community levy, as well as the inclusion of a non-execution clause. The bulk of these outstanding issues were remanded to the political level, after technical and senior officials were unable to resolve them at recent (mid-September) meetings.

Regarding development, the West Africa region has prepared an EPA development programme (EPADP/PAPED) to address development needs arising from an EPA, which would be included in the final EPA as an annex. The PAPED was initially estimated by West Africa at €9.5 billion over the next five years.[18] On the 10th of May 2010, in the form of a Council Conclusion, the EU Ministers of development outlined their expected support to the EPADP/PAPED. Besides reiterating commitments on aid for trade and aid effectiveness, the EU estimated that "funds available for PAPED-related activities from all of its financing instruments over the next five years amount to at least 6.5 billion Euros", while "total aid for trade to West Africa from all donors can be projected to exceed 12bn US dollars in the same period". While the region welcomed EU's response, they however felt that the financial commitments would be insufficient to meet the needs of the PAPED.

On services, as noted above, this area could be included in a second phase of negotiations towards a final regional EPA. In the interim, the region has remained steadfast that no negotiations will proceed until the contentious issues on trade in goods and development are resolved. Preparations in this area however are advancing in some member countries.

2.3.6. Southern African Development Community (SADC) Region

The SADC consists of 15 members. Seven of them (Angola, Botswana, Lesotho, Mozambique, Namibia, Swaziland and South Africa[19]) are negotiating an EPA with the EU as the SADC EPA group.

[18] See ECDPM. 2010. *The EU Commitment to Deliver Aid for Trade in West Africa and Support the EPA Development Programme (PAPED).* ECDPM Discussion Paper 96. Maastricht: European Centre for Development Policy Management. www.ecdpm.org/dp96

[19] South Africa is currently trading with EU under the Trade, Development and Cooperation Agreement (TDCA) negotiated bilaterally between the parties in 1999.

At the end of 2007 Botswana, Lesotho, Swaziland, Mozambique (23rd November) and Namibia (3rd December) agreed an IEPA with the EU. South Africa did not join the agreement because of a series of disagreements on some of the key provisions of the text. Angola did not join the agreement either.

The IEPA was signed by Botswana, Lesotho and Swaziland on the 4th of June 2009 and by Mozambique on the 15th of June 2009. Namibia did not sign the IEPA. Botswana, Lesotho, Namibia and Swaziland will liberalise 86 % of EU imports over the next 10 years. Mozambique will liberalise 81% of imports excluding mainly goods in the agricultural, textile and processed agricultural sectors.

Although trade between South Africa and the EU does not fall under the trade provisions of the CPA, a decision of the ACP-EU Council of Ministers allowed South Africa into the SADC EPA negotiating group, in order notably to preserve the integrity of the Southern Africa Customs Union (SACU)[20].

As a result from this very specific current state of affairs, and in order to safeguard regional integration processes, implementation of the IEPA has not started in the region.

A key issue in the region is the coherence of tariffs towards the EU among SACU members. Much progress has been made in the region to align Annex III of the SADC IEPA with the market offer of the South Africa under the Trade, Development and Cooperation Agreement (TDCA) with the EU.

Regarding negotiations on Trade in Services, SADC proposed to agree on the framework for the liberalisation of trade in services within the context of the final EPA, with specific content to be concluded definitively by 2014. The EU, however, would like faster implementation of those measures. Regarding investment provisions, disagreement is persisting on the degree of commitments the EPA should encompass: while the SADC EPA Group calls for cooperation, the EU hopes for a concrete liberalisation schedule in access to investment.

Significant progress has been achieved on contentious issues (see Section 3), with agreements reached in March 2009[21] on a number of key technical issues, including food security, free circulation of goods, prohibition of quantitative restrictions, declaration on Article 97, stand-alone infant industry clause and export duties. Main areas of disagreement remain on the more political issues of MFN, agricultural safeguards and definition of parties.

Furthermore, the EU has recently made new requests to negotiate ambitious commitments regarding intellectual property rights, including geographical indications, sustainable development, government procurement, competition policy, as well as tax matters, within the scope of the agreement. Negotiations are yet to begin on these issues. There are however concerns that these new requests might hamper the pace of negotiations, that were set to be concluded before the end of 2010.

2.3.7. Pacific ACP Region

The Pacific ACP (PACP) group is made up of mainly of small island economies (with the exception of PNG), representing only 0.06% of trade with the EU, but vast exclusive economic zones (EEZ) in the surrounding ocean. The region includes Fiji, Papua New Guinea, Cook Islands, Tonga, Marshall Islands, Micronesia, Niue, Palau, Nauru, Kiribati, Samoa, Solomon Islands, Tuvalu and Vanuatu.

[20] According to Art. 31 of SACU Agreement, all SACU members have to negotiate and conclude trade agreements as a group.
[21] See texts agreed at Swakopmund, 9-12 March 2009.

The two major Pacific countries that agreed an IEPA with the EU in November 2007 are Papua New Guinea (PNG) and Fiji, therefore becoming the first two Pacific countries to benefit from a landmark, new preferential rule of origin for the export of processed fish and marine products to the European market. In effect, fish, regardless of their origin, are deemed to originate from these Pacific ACP countries as long as they are transformed from being fresh or frozen into a pre-cooked, packaged and canned product in Fiji or Papua New Guinea, which can then be exported to the EU free of duties and quotas. Fiji and PNG signed the IEPA on the 30th of July 2009.

Trade between the Pacific and the EU is very limited and erratic and therefore none of the PACP except Fiji and PNG decided to conclude an IEPA. The least developed countries (LDC), i.e. Kiribati, Samoa, Solomon Islands, Tuvalu and Vanuatu all benefit from the EBA initiative, which offers duty free quota free access to the EU. The non-LDCs that did not join the IEPA (Cook islands, Tonga, Marshall islands, Micronesia, Niue, Palau and Nauru) trade under the GSP scheme since 1 January 2008.

PNG will liberalise 88% of EU imports from the date of application of the agreement and excluded products from the most sensitive economic sectors (e.g. meat, fish, vegetables, furniture) and luxury products (jewellery).

Fiji will liberalise 87% of EU imports over 15 years and excluded products from the most sensitive economic sectors and those important for revenue purposes such as meat, fish, fruits and vegetables, alcohol, tubes and iron.[22]

In 2009, Niue, Samoa, Cook Islands and Micronesia presented market access offers to the EU for trade in goods based on liberalising between 70-75% of their trade and with transition periods up to 25 years. The EU claimed that this was not yet acceptable and requested for further work on the offers. Such work has been on-going, with revised offers from these countries, alongside Tonga and possibly others, expected to be submitted to the EU before the end of 2010.

Some progress has been made on a number of issues including food security, cooperation in agriculture, infant industry protection, export taxes, sanitary and phytosanitary provisions and technical barriers to trade.

On trade in services, the region maintained their refusal to negotiate liberalisation commitments before completing negotiations on services liberalisation at a regional level (i.e. within PICTA) and to prevent any negative precedents in relation to ongoing trade negotiations with their main trading partners, Australia and New Zealand. Services would thus remain covered by a rendez-vous clause.

With regard to fisheries, there are serious concerns in the region regarding EU's apparent position reversal on its earlier commitment to include improved market access for fresh, chilled and frozen fish in the EPA as well as on the proposed new fisheries access provisions.

[22] For an analytical overview of the content of the Pacific ACP IEPA, see Kennan, J., C. Stevens and M. Meyn. 2009. *The CARIFORUM and Pacific ACP Economic Partnership Agreements: Challenges Ahead*. Economic Paper Series, London: Commonwealth Secretariat. http://publications.thecommonwealth.org/the-cariforum-and-pacific-acp-economic-partnership-agreements-681-p.aspx

Due to the slow progress, a comprehensive regional EPA is unlikely anytime soon. The region is therefore considering an alternative "à la carte" solution, to have more countries sign the existing IEPA and gradually expand its scope.

3. Key bottlenecks and options to move forward

As has been mentioned above, a number of "contentious" issues were identified in the IEPAs concluded by many African states. In 2008, the AU Ministers of Trade and Finance identified a non-exhaustive list of those issues deemed "contentious"[23] that caused serious concerns in most African regions. The same concerns were later shared by most Pacific states.

While the degree of "contentiousness" varies across the different regions and among the different countries within the same region, all the regions have unanimously expressed the need to review those clauses to provide more flexibility in the context of the final EPAs[24]. Those contentious issues that have attracted the most attention during the negotiations are:

1. The definition of "substantially all trade" and transitional periods for tariff liberalisation; [25]
2. Export taxes;
3. Bilateral safeguards and the treatment of Infant Industry;
4. The Most Favoured Nation (MFN) clause; and
5. The non-execution clause.

Besides those issues identified at the 2008 AU Meeting, other issues of critical importance for many countries have since been highlighted, with countries calling for the need to negotiate more flexible provisions in order to take into account their special development needs. These critical issues include, amongst others, quantitative restrictions, the standstill clause, agricultural safeguards and food security, the definition of parties; and rules of origin.

Initially, most of the contentious and critical issues were considered to be questions that could be resolved at the technical level. Indeed, most countries and regions requested additional flexibility from the EU to take into account their special and differential needs, and in particular those of LDCs. In some cases (for instance in the case of the infant industry clause, standstill clause or the treatment of quantitative restrictions), technical solutions were found and agreed in some regions. In other cases however, although technical solutions could also be feasible, negotiations have been much more complex and intensive due to the fact that those issues were politically sensitive and therefore resulted in little advancement.

[23] The AU list comprises of the following contentious issues: (i) the definition of substantially all trade; (ii) transitional periods for tariff liberalization; (iii) export taxes; (iv) national treatment; (v) free circulation of goods within ACP; (vi) bilateral safeguards; (vii) infant industry; (viii) the MFN clause; and (ix) the non-execution clause.
[24] See Bilal S. and Lui D. (2009): Contentious Issues in the EPAs: Potential Flexibility in the negotiations – ECDPM Discussion Paper 89, Maastricht, The Netherlands: European Centre for Development Policy Management. www.ecdpm.org/dp89
[25] The definition of substantially all trade is found in Article XXIV (8.a) of the General Agreement on Tariff and Trade (GATT). This article stipulates that countries have the right to negotiate free trade agreements that would allow them to extend more favourable treatment to each other, without extending the same to other WTO members, provided that "…duties are eliminated with respect to substantially all the trade between the constituencies", and that this occurs "within a reasonable length of time" (GATT Article XXIV (5.c)), which, according to the formal understanding adopted by WTO members "should exceed 10 years only in exceptional cases".

Resolving these more complex issues require more "political" solutions, given their likely negative implications on the broader economic and political relationships between the EU and Africa. For some regions, some of these issues include the treatment of export taxes, the inclusion of a MFN clause and the interpretation of substantially all trade, including timeframes for liberalisation. The non-execution clause has yet another political dimension since it might allow the EU to adopt unilateral trade sanctions on those countries that do not comply with democratic or human right principles. Ultimately, however, whether an issue is considered technical or political depends on the parties concerned and the dynamics of the negotiations, which may vary from region to region, or even country to country.

3.1. Substantially all trade and time frame for liberalisation

Since the beginning of the EPA negotiations, the EU has set a benchmark of a minimum of 80% liberalisation over a period of generally 15 years, for tariff liberalisation in all EPAs. This benchmark is based on EU's own interpretation of the "substantially all trade" (SAT) requirement contained in Article XXIV of the GATT 1994 at the WTO. In practice, however, there is no clear and agreed definition of what "substantially all trade" should be in terms of coverage[26] and time frame for liberalisation.

While some EPA signatories did not have a major problem with the 80% threshold[27], most African and Pacific non-signatories were of the view that the level of liberalisation set by the EU did not provide them with sufficient flexibility both in terms of product coverage and timeframe. This was a particular cause of concern for many LDCs. The high degree of liberalisation that they were asked to undertake did not take into account their low levels of development, their needs for industrialisation as well as their national sensitivities. Moreover, it was further felt that drastic cuts in customs duties would cause important losses in customs revenue, a major source of government revenue, therefore adding more fiscal pressures to existing weak economic situations.

This has perhaps been the main cause of tensions and the major stumbling block between the EU and several EPA regions. For those that did not initial or sign an IEPA, almost no progress has been made in the negotiations towards a final EPA. Most LDCs in particular indicated that they were not in a position to meet the EU's requirements.

Despite various arguments put forward by EPA regions, in particular by LDCs, regarding their low levels of development and hence the difficulty to meet such requirements, the EU has shown little flexibility to accept market access offers that did not meet the 80% threshold. Although the EU continues to use the argument of WTO compatibility, in part, this showed the EU's reluctance to "set a precedent" that could limit their own ambitions in future agreements with other countries. The EU has indicated that it could consider countries' proposals on a case-by-case basis; but so far, not much has happened.

Options

While all African and Pacific countries fully concur with the need to be compatible with the WTO rules, at the same time, there is a strong call to remain coherent with WTO provisions available to developing countries, and in particular for LDCs, which benefit from additional flexibilities and longer time period to

[26] This means whether it should be calculated in the basis of the tariff lines liberalised, or in terms of the value of trade or whether some sectors could be excluded from the scope of an FTA.
[27] This was the case for instance, in the ESA for Mauritius, which had already undergone substantial autonomous liberalisation prior to the EPA and for Seychelles, which could afford to liberalise 98% of its trade with the EU.

implement their commitments. To this end, the (implicit) flexibility provided by the WTO rules, including in terms of possible asymmetry, could be pursued beyond the current EU arbitrary interpretation.

Furthermore, there may be a need to give due consideration to LDCs requests in the light of those preferential market access that have been notified at the WTO but where liberalisation is lower than 80% and over a longer time period.

There is no clear legal interpretation of flexibilities available under Article XXIV of GATT 1994. As shown in Table 1, countries have interpreted the SAT requirements to fit their own needs and concerns.

Table 1: Summary of regional positions on SAT and Time Frame

Region	Regional proposals	State of Play
Contentious issue: EU Minimum threshold: 80% over 15 years		
SADC BLNS: 86% Mozambique: 81% Time frame: 10 years, starting 2010	Main issue is aligning market access offers of BLNS and TDCA to avoid undermining SACU	Under negotiations
ESA Seychelles: 98%; Mauritius: 96%; Comoros/Madagascar: 81%; Zambia/Zimbabwe: 80% Time frame: 10 years starting 2013	Request for special and differential treatment for LDCs: 70% over 25 years for LDCs	The EU insists on the 80% over 15 years. However, possible exceptions on case by case basis
EAC 82% (80% over the next 15 years) Time frame: 25 years starting 2010	No new requirements	
West Africa Ghana: 81% Cote d'Ivoire: 80% Time frame: 15 years, starting 2009 Community levy to be eliminated	Request: 70% coverage Timeframe: 25 years after 5 years moratorium Not acceptable, given importance for regional integration	No Agreement
Central Africa Cameroon: 80% Time frame: 15 years, starting 2010	Request: 60% over 20 years after preparatory period of 5 years	No Agreement

Possible criteria to be used could be based on the acceptability (or rather, lack of opposition) of the measure. Past experience may be useful indicator there.

With regards to time frame for liberalisation for instance, even developed countries have not religiously applied a 15-years time frame, as shown in the following five examples:

1. US – Morocco: 24 years for Morocco and 18 years for US[28]
2. Thailand – Australia[29]: 20 years for Thailand

[28] Upon entry into force of the Agreement (2006), US liberalised 82.8% of tariff lines i.e. 80.3% of imports from Morocco; by 2011, US will liberalise 93.2% of its tariff lines i.e. 95.5% of its imports and by 2023, its market will be fully opened. Morocco opened 29.2% of its tariff lines, i.e. 67.4% of its imports from US upon entry into force. By 2010 it will liberalise 93.3% of its tariff lines i.e. 90.6 of its imports. In 2030, it will liberalise 99.4% of its tariff lines i.e. 94.2% of its imports from the US.

3. Thailand – New Zealand[30]: 20 years for Thailand
4. US – Australia" 18 years for US[31]
5. Canada – Chile: 18 years for Chile.

With regards to the degree of liberalisation, Box 1 shows that in many cases of regional trade agreements notified at the WTO, at least on party has liberalised less than 80% of the value of trade.

In the absence of explicit jurisprudence at the WTO, debates regarding "thresholds" for the interpretation of GATT 1994 Article XXIV can go on forever and lead to no concrete solutions in practice. To unlock the current status quo, it is clear that the current situation requires a political answer, since all technical arguments have by now already been put forward. However, while none of these agreements has so far been challenged by any WTO member, including by the EU itself, there may be need to assess how likely an EPA liberalisation schedule between the EU and the ACP parties (many of which are LDCs) would be challenged by another WTO member.

As a way forward, the focus of the political discussion between the parties would have to remain on the degree of required flexibility for LDCs and vulnerable countries that would ***be jointly politically acceptable and defensible at the WTO***. According to many WTO insiders, in the current context, **any FTA that would cover 70-plus percent of trade over a 15-20 years period** is most likely to pass this WTO test. Even more so if one the parties is an LDC or vulnerable economy, as in many ACP regions.

Of course, as an alternative to an EPA, the EU could also provide unilateral preferences to those countries that would not find sufficient flexibility in the free trade agreement framework. This could be done either through the EU GSP system of preferences (standard GSP, GSP Plus and EBA), or through new preferences that would require a waiver. Though the EU has been opposed to the idea of a waiver, there have been recent precedents, as illustrated in Box 2.

Box 1: Overview of some FTAs notified at the WTO[32]

Agreement between Chile and European Free Trade Agreement (EFTA)[33]
For EFTA countries, products has been liberalised on the entry into force of the Agreement. While Iceland opened up 94.1% of its tariff lines, i.e. 99.9% of its imports from Chile and Norway liberalised 89.9% of its tariff lines and 96.7% of its imports from Chile, **Switzerland/Lichtenstein liberalised only 79.8% of its tariff lines representing 56.8% of its imports from Chile**.

Agreement between India and Singapore
The Agreement entered into force in 2005: In 2006, Singapore liberalised all its tariff lines. India has a 4-year transition period. At the end of that period (2009), **India liberalised 23.6% of its tariff lines representing 75.1% of its imports** from Singapore.

Agreement between Papua New Guinea and Australia
This Agreement entered into force in 1977 but is still valid. At the time of the entry into force of the Agreement in 1977, PNG made no commitment to liberalise its trade with Australia, given the asymmetric level of development between the two countries. On its side, Australia liberalised 99% of its trade with PNG.

[29] However, note that Australia will liberalise 100% of its tariff lines by 2010 and Thailand 100% of its tariff lines by 2025. The Agreement entered into force in 2005.
[30] New Zealand will liberalise 100% of its trade with Thailand in 2015 and Thailand will completely open its market by 2025.
[31] Note: an agreement between 2 developed countries.
[32] With the exception of the Sri Lanka – Pakistan agreement, notified under the Enabling Clause, all the other agreements have been notified under GATT Article XXIV.
[33] Iceland, Norway, Switzerland and Lichtenstein

Agreement between the EU and Mexico
This agreement entered into force in 2000. It has a different transitional period for agricultural and for industrial products: For industrial product, the EU has a 3-year transitional period, while Mexico has 7 years. For agricultural product, both have a 10-year transitional period.
At the end of the transitional period, EU has liberalised 90.3% of its tariff lines (i.e 98.1% of its trade with Mexico. On its part**, Mexico has liberalised only 55.7% of its tariff lines (i.e. 54.1% of its trade) with the EU**. A large part of agricultural products is excluded from liberalisation: **the EU would have liberalised only 45% of its tariff lines in agriculture while Mexico would have liberalised only 29% of its tariff lines**.

Agreement between Faroe Islands[34] and Norway
The agreement **covers only industrial goods and fisheries**. **Agriculture is excluded** from this Agreement (covered by a specific agreement not notified at the WTO).

Agreement between Pakistan and Sri Lanka
This Agreement entered into force in 2002, with a transition period of 4 years for Pakistan and 5 years for Sri Lanka. At the end of the transitional period, Pakistan has liberalised 88.6% of its tariff lines (i.e. **74.5% of the value of its imports** from Sri Lanka) while Sri Lanka has liberalised 82.2% of tariff lines (i.e. **71.6% of value of imports**) from Pakistan.

Source: Lagande D, Rolland J P and Alpha A (2009): "Etude comparative des accords de libre échange impliquant des PED ou des PMA": GRET et AFD. www.gret.org/ressource/pdf/09100.pdf

Box 2: WTO waiver for discriminatory unilateral trade preferences

Seeking a waiver at the WTO is a common practice for developed countries that want to provide discriminatory unilateral preferences to a country or group of countries.

For instance, the **EU** itself has accorded an autonomous preferential market access to **Moldova**[35], given the latter's particular economic situation and in preparation of a FTA in the future. This has so far not been contested at the WTO.

Even more recently, the EU has announced that it would suspend tariffs on 75 tariff lines from **Pakistan** (accounting for 27% of the latter's current imports from the EU) for a period of three years as a result of the devastating floods that affected the country[36].

The **US** has obtained a waiver at the WTO for its African Growth Opportunity Act (**AGOA**) on 24 March 2009, as well as for its Caribbean Basin Economic Recovery Act (**CBERA**) and its Andean Trade Preference Act (**APTA**).

Similar options could be considered for the most vulnerable African or Pacific countries. Clearly the EU has refused to seek a general waiver for the whole ACP group given the cost of preference erosion that it may have but could nevertheless consider this option for special country cases or regions, based on their particular situations. Some observers have also suggested that the EU could elaborate an AGOA-type of unilateral preferences for African countries, for which a waiver should be sought[37].

[34] Faroe Islands are an autonomous province of Denmark and are not WTO members.
[35] The EU requested a waiver at the WTO in 2008 to apply autonomous preferences to Moldova. See http://trade.ec.europa.eu/doclib/html/140567.htm
[36] http://trade.ec.europa.eu/doclib/press/index.cfm?id=627
[37] See www.wto.org/english/news_e/news09_e/good_24mar09_e.htm

3.1.1. Phasing out of the Community Levy

The request from the EU to some African regions (namely ECOWAS and CEMAC) to eliminate the community levy as part of the substantially all trade requirement has been another major cause of concern, given the fact that the levy is currently the only financial instrument available to these regions to finance the their own regional integration programmes. The EU argued that these levies are applied on imports and therefore represent customs duties and should, in principle, be dismantled within the framework of the EPA to comply with Article XXIV of the GATT 1994.

However, this issue is considered as a red line and non-negotiable by these regions. The community levy is a key financial instrument for regional integration and in the absence of other instruments, its dismantling, at least in the short term, is likely to have significant revenue implications for the regional organisations and hence for the implementation of regional programmes.

Options

One possible option, which is a longer-term one, would be to undertake reforms at national and regional level to find alternative ways to mobilise resources. This would necessitate accompanying measures to ensure effective implementation of the reforms, as well as possible (net) compensation of customs revenue losses in the short term. An alternative tax could be considered.

3.2. MFN Treatment resulting from future FTAs

Another widely debated contentious issue in the IEPA is the requirement for signatories to extend to the EU any more favourable treatment that it might give in the future to a "major trading economy". This principle applies both to the EU and to the ACP signatories and does not cover only tariffs but also rules of origin.

The EU's argument is based on a question of fairness and non-discrimination: it has provided DFQF market access to all products originating in ACP countries while in return, countries/regions have exempted a fair share of their trade (up to 20%) from liberalisation. It therefore expects that if an EPA signatory region/country would be in a position to extend a more favourable treatment to any other major third party, then it would be fair for the EU to benefit from the same treatment in return, given its degree of openness towards ACP countries.

On its side, African and Pacific regions have a different perception of the likely implications of such a clause in the EPA, in particular on their scope for future trade negotiations. In effect, the inclusion of the MFN provision leaves very little policy space for countries to negotiate ambitious trade agreements, in particular with other developed countries (e.g. US, Australia) and major trading economies[38] (e.g. China, India, Brazil) or with other major regional groupings (e.g. MECOSUR, ASEAN). They feel that by committing to extend to the EU preferences it might give in the future, will weaken their negotiating power vis-à-vis any important trading partner, in particular, given the increasing importance of new trading partners from the south. This has triggered a big political debate in most of the regions about the willingness of countries and regions to bind themselves to the EU on future trade agreements, whose terms are not yet known.

[38] "Major trading economies" relate to any developed country, or any country accounting for a share of world merchandise exports above 1%, or any group of countries accounting collectively for a share of world merchandise exports above 1.5% in the year before the entry into force of the preferential trade agreement in question.

It is further argued that the MFN clause is contradictory to the "development spirit" of the EPA, where it poses serious threats to any potential developmental benefits that ACP could derive from free trade agreements with other important trading partners.

Although the EU has provided DFQF under the IEPAs, in practice however, the preference margin obtained under the EPA has been relatively low. In effect, under the Cotonou Agreement, 97% of ACP products were already duty free so that the real value added of the EPAs in terms of margin of preference was only 3%. Those LDCs that have not yet agreed to an EPA are already benefiting from DFQF under the EBA, and hence would benefit from no additional preference margins under an EPA. Therefore, any future trade agreement with any major trading economy is likely, in practice, be more attractive should they provide higher margin of preferences for African countries, including on rules of origin.

Both the EU and the African and Pacific countries have expressed strong positions on this issue, often on the ground of principle; and there seems to have been no satisfactory advancement on the negotiations so far. Though options to accommodate the concerns of both parties are available at the technical level, it seems that a common political decision might be required.

While generally most regions want the MFN clause to be deleted from the final EPA, some regions have made proposals to keep the MFN clause, while excluding its application for all developing countries or if applicable certain developing countries, not to extend the preference automatically to the EU without prior consultations (see Table 2). On its side, the EU is open to discuss such flexibilities with each region, as appropriate.

Table 2: Summary of regional proposals on the MFN treatment

Region	Regional proposals	State of Play
Contentious issue: EU Minimum threshold: Extend any more preferential treatment that could be given in future negotiations to any large trading partner (developed or large developing country or group of countries) to the EU		
SADC	Proposal to have a consultation process prior to the extension of the treatment to the EU	No agreement so far
ESA	Proposal to exclude the application of the MFN to all developing countries	No agreement so far
EAC	MFN to be deleted	No agreement so far
West Africa	MFN to be deleted	No agreement so far
Central Africa	Proposal to exclude the application of the MFN to all developing countries	No agreement so far

Options

The MFN clause is first and foremost a political issue. A technical compromise would consist in explicitly narrowing the scope of application of the clause and relaxing the trigger mechanisms (in terms of joint decision-making process and thresholds) for its application. The MFN clause in the CARIFORUM EPA or the Pacific States IEPA could be one that could be considered: signatories have committed to implement the MFN provision only after consultation, therefore removing any automatic and potentially arbitrary application of the more favourable treatment (see Box 3). Furthermore, countries and regions could also consider:

1. Raising the threshold to such a level (for instance at 2.5%), so that it excludes most developing countries;

2. Including a "grand-fathering provision" that would also extend any more favourable treatment given by the EU to agreements it has concluded before the EPA to all EPA signatories. Knowing that the EU is currently engaged in a number of FTAs with many large developing countries, some of which are likely to be concluded before EPAs, this could be a "win-win" proposal that could be politically acceptable.

3. Agreeing to a non-automatic clause, where before deciding to extend the treatment to the EU, parties would jointly examine the balance of benefits obtained under the agreement with the third parties, compared to the EPA, considering issues such as the margin of preferences, rules of origins and accompanying measures.

Box 3: MFN provisions in the CARIFORUM EPA and Pacific States IEPA

Article 19 (5) of the CARIFORUM-EU EPA on more favourable treatment resulting from free trade Agreements states that:
Where any Signatory CARIFORUM State becomes party to a free trade agreement with a third party referred to in paragraph 2 and such a free trade agreement provides for more favourable treatment to such third party than that granted by the Signatory CARIFORUM State to the EC Party pursuant to this Agreement, the Parties shall enter into consultations. The Parties may decide whether the concerned Signatory CARIFORUM State may deny the more favourable treatment contained in the free trade agreement to the EC Party. The Joint CARIFORUM-EC Council may adopt any necessary measures to adjust the provisions of this Agreement.

Article 16 (3&4) of the Pacific States-EU IEPA states that:
3. Where a Pacific State or the Pacific States can demonstrate that they have been offered by a third Party a substantially more favourable treatment in goods, including rules of origin, than that offered by the EC Party, the Parties will consult and may jointly decide how best to implement the provisions of paragraph 2.

4. The provisions of this Chapter shall not be so construed as to oblige the EC Party or any Pacific State to extend reciprocally any preferential treatment applicable as a result of the EC Party or any Pacific State being party to a free trade agreement with third parties on the date of signature of this Agreement.

Despite possible technical solution, the main problem of the MFN clause, however, relates more to a question of principle, including on the negative precedent it would set. Although the probability of using such a clause is relatively slim, it appears to lower the negotiating capacity of developing countries and LDCs with other trading partners, since negotiations would start on the basis that the partner would receive no more favourable treatment that the EU.

A political solution thus needs to be found at the highest level, in view of the fact that non-flexibility on this issue may have serious negative (and undesirable) consequences on the broader economic and political relationship between the ACP and EU in general. There is also a need to measure how likely it is, in reality, many African countries would be willing to treat more favourably than the EU a large (and highly competitive) country. If the MFN clause will sour relationships and if the likeliness of ever using the clause is rather thin, then the EU may reconsider the need to have the clause in the agreement.

3.3. Export Taxes

There have been growing concerns among African and Pacific policy makers regarding the treatment of export taxes in the IEPA. Most countries, in particular the producers and exporters of primary products[39] have argued for the need to maintain their policy space. It is felt that the current provision in the IEPA would constrain an important industrial policy instrument for many developing countries that may want to use a trade measure to respond to particular economic development challenges, such as value addition, infant industry development or promotion of industrialisation in general.

The specific request from the EU in bilateral negotiations for the elimination of export taxes and the prohibition of their use in the future as well as the removal of non-tariff barriers to EU's exports and investment is part of the latter's broader external policy as defined in 2006 in its policy document "*Global Europe: Competing in the world: A Contribution to EU's growth and job strategy*." It has, since then, been an important policy actively pursued by the EU in all its FTAs, in particular with a view to securing access to resources such as energy, hides and skins, primary metal raw materials and certain agricultural raw materials[40].

In the context of EPA negotiations, the EU has further called for the elimination of export taxes, on the ground that, so far export taxes have not been very conclusive from a development point of view but instead have discouraged exports and have contributed to bring down the price of agricultural commodities. The pros and cons of the use of export taxes can be widely debated and while no African or Pacific countries have argued against possible negative effects that export restrictions could potentially have on their development, it is felt that the policy choice of taking such measures, deemed appropriate for their future development, ultimately remains theirs. Measures, while remaining compatible with the requirements of Article XXIV of the GATT 1994, need to be temporary as in the long run they may have the reverse effect of breeding industrial inefficiency and lack of competitiveness.

Although compatibility with the rules of WTO remains the key issue, the GATT 1994 itself does not explicitly prevent countries from applying export taxes although implicitly, export taxes is also part of the family of "customs duties". So far at the WTO, most countries have taken commitments to reduce duties only on imports. But some recently acceding members (such as China, Vietnam, Saudi Arabia and Ukraine) were asked to take commitments to progressively eliminate restrictions on exports.

In the context of a FTA notified under Article XXIV of the GATT 1994, countries are required to "eliminate **duties and other restrictions of commerce** on substantially all **trade**". By definition, "**duties**" implies charges and levies applied both to imports and exports and "trade" covers both imports and exports. This ultimately implies that any agreement that would be notified under Article XXIV should, in principle, also cover exports. However, the article requires restrictions to be eliminated on "***substantially*** all trade", and not on "***all*** trade", implying that some restrictions, including some export taxes, can still be maintained.

Until now, export taxes have remained a fairly "under-regulated" area of WTO laws. Yet, in the recent years, it has become increasingly important: for instance, during the 2007-2008 food crisis, many countries have imposed various forms of export restrictions on staple food in order to maintain domestic food security and contain rising food prices. The rise of new emerging powers since the past two decades has also led to an increasing quest for raw materials, in particular those that are of strategic importance for high-tech and

[39] This includes in particular the producers and exporters of agricultural products, raw materials and other natural resources.
[40] See EC SEC(1230)2006: Secretariat Staff Working Paper: Annex to the Communication: "Global Europe: Competing in the world: A Contribution to EU's growth and job strategy".

sophisticated industries. As a result, some of those emerging powers, which also happen to host a high concentration of the production of these strategic raw materials, have increased the use of export restrictions to maintain the domestic availability of supplies.

To limit the use of trade distorting measures, countries have started to initiate dispute cases at the WTO against those countries that use export restrictions to distort world market. A Panel was established in 2009 at the WTO to examine complaints brought by the United States, the European Union and Mexico concerning China's export restrictions on selected raw materials.

In addition, to further strengthen the disciplines regarding export taxes and restrictions, some countries, including the EU, have made concrete proposals in the context of the Doha Development Agenda negotiations since it is felt that WTO legal texts are relatively limited in scope and lack clarity. In 2007, The EU proposed a Draft WTO Agreement on Export Taxes in the Negotiating Group on Market Access[41]. The proposal was not accepted and was widely criticised by many members. It was however revised in the context of the 4th Revision of the Non-Agricultural Market Access (NAMA) Modalities, where the EU proposed a new submission on Export Taxes in 2008. The elements of the EU proposal on export taxes are threefold:

1. The need to operationalise the basic GATT principles relating to export duties and charges, in particular GATT Articles I, VII, VIII and XVII, to apply to situations where WTO members use export taxes for industrial or trade policy purposes with negative effects on other WTO members. The proposal however includes exceptional circumstances where export taxes could be maintained or introduced, such as financial crises, infant industry, environment (preservation of natural resources) and local short supply;

2. Incorporation of additional flexibility for small developing countries and LDCs to maintain or introduce export taxes in other situations; and

3. Limitations of GATT disciplines for export taxes to non-agricultural products (hence excluding agricultural products).

This new proposal forms part of the NAMA Modalities and is currently being discussed. While most African countries are also members of the WTO and participate in the on-going Doha Round negotiations, it is important to ensure the coherence of their positions in the EPA and their position at the WTO.

The main bottlenecks refraining a technical resolution to this issue in the EPA negotiations is therefore one of strategic economic and political interests linked to access to resources, in particular given the surge in demand coming large emerging economies over the past few years. While the EU's main purpose is to maintain undistorted access to primary products to safeguard the interests of its own industries, most African countries claim that they have the same legitimate right to maintain policy space for their future industrial development and introduce measures they deem fit on their own resources.

Both the EU and Africa have strong stakes regarding the use of export restrictions and none of them is likely to easily concede on their positions: it is increasingly becoming clear that what was initially regarded as an issue requiring a technical solution has now become one having broader strategic and political implications.

[41] See Job(07)/43: Communication from the European Communities in the negotiating group on market access relating to a Proposal on NTBs entitled "WTO Agreement on Export Taxes", 2 April 2007.

Options

One option that could help unlock the current stalemate in the EPA negotiations could be to leave disciplines on export taxes/restrictions to be resolved at the WTO (as is the case for agricultural subsidies). With the current dispute regarding China's restrictions and the proposal in NAMA modalities, there are likely to have clearer rules at the WTO sooner than later. This option is also likely to provide greater flexibilities to African countries as it currently proposes to "*limit GATT disciplines for export taxes on non-agricultural products*" (hence excluding agriculture) and to give "*additional flexibility for small developing economies and LDCs to maintain or introduce export taxes in other situations*[42]". African countries would need to be fully involved in the debates and remain vigilant about their likely implications on their own policies.

Alternatively, technical solutions could also be found to improve the current provisions of the IEPA, with necessary flexibilities to address the concerns of certain countries and regions.

Table 3 summarises the current (re)negotiations and proposals made by different EPA regions on the provision relating to Export Taxes.

A brief look at the different proposals shows that the current provision, as it stands in the IEPAs (i.e calling for the elimination and prohibitions of all export taxes) could be made more flexible to accommodate the major concerns of most African countries/ regions if a two-pronged approach was adopted:

To address the concern relating to **existing** export taxes, countries/ regions could negotiate the right to exclude those from the scope of the Agreement so long as the products concerned does not constitute a significant part of the country's exports to the EU. The ESA IEPA has an exclusion list for some products subject to export taxes;

In addition, to take into account the concern relating to the use of export taxes **in the future**, countries can negotiate the right to introduce temporary measures under specific circumstances, in particular in case of specific revenue needs, the protection of infant industry, in the case of critical food shortage or to ensure food security, to protect the environment or where a country can justify industrial development needs. Such flexibility has been agreed between the EU and the SADC region.

Table 3: Summary of regional proposals on Export Taxes

Region	Regional Positions	State of Play
Contentious issue: Restrictions and elimination of export taxes		
SADC	Temporary export duties can be introduced in case of: - specific revenue needs - protection of infant industry - protection of environment - In case of critical food shortage or to ensure food security; - Where country can justify industrial development needs	Agreed at Swakopmund

[42] See Job(07)/43: Communication from the European Communities in the negotiating group on market access relating to a Proposal on NTBs entitled "WTO Agreement on Export Taxes", 2 April 2007.

ESA	(i) Maintain existing export taxes (as contained in Annex III) (ii) For future Export taxes, Temporary export duties can be introduced: - to pursue development objectives such as infant industry, value addition - diversification and food securit - Revenue and environmental considerations	Already in the IEPA Draft sent to the EU; Still under negotiations
Central Africa/ West Africa and EAC	Maintains the need to flexibility to impose export taxes in certain circumstances	Negotiations on going with the EU

3.4. Bilateral safeguards

(a) Treatment of infant industry:

Another key contentious issue under the IEPA is the insufficient flexibility accorded to developing countries for the treatment of infant industries. Currently, under IEPA, the provisions for the temporary protection of an infant industry are provided under the general bilateral safeguard clause, and therefore subject to the same conditions as any other product that would face a surge in imports that may cause or threaten to cause serious injury to any industry. The provision is also temporary and is subject to a sunset clause, whereby the provision can be invoked up to 20 years from the entry into force of the agreements.

African and Pacific regions have expressed the need to have a stand-alone provision for the treatment of infant industries, which would allow them the flexibility to take domestic policy measures to provide temporary support to their nascent industries. As it currently stands in IEPAs, the provision only enables them to take trade defence measures for infant industries in the case of surges in imports that would threaten the industry.

On its side, the EU argues that the case of the infant industry is well reflected in the existing bilateral safeguard clause and that a stand-alone clause is therefore not necessary.

However, the main bottleneck lies in understanding when and why countries want to protect their infant industries. While most developing countries and in particular LDCs, would like to be able to protect infant industries independently of imports, in particular to provide them with some time to become competitive, the EU argues that the several provisions in the IEPA, such as list of sensitive products or modification of tariff schedules in case of fiscal difficulties already make provisions for infant industries. Moreover, they argue that too much flexibility might render the Agreement incompatible with the “substantially all trade” requirement of the WTO, which is a more sensitive issue.

Options

As summarised in Table 4, some regions have proposed a stand-alone provision for the treatment of infant industries, which would have no sunset clause and which would be easier to apply than the wider bilateral safeguard measures.

The issue of protecting infant industries, in particular in countries that are currently developing their industrial base, is of key importance. The EU has agreed to the proposals regarding the stand-alone infant industry clause in addition to the safeguard clause.

It is however important to ensure that the clause is user-friendly, and not necessarily linked imports but are rather pre-emptive enough to prevent imports from affecting the infant industry. However, these measures need to be of temporary nature as their use in the long-run might not help the industry to take off and be competitive.

Table 4: Summary of regional proposals on the treatment of infant industries

Region	Regional positions	State of Play
Contentious issue: Treatment of Infant Industry		
SADC: Maximum length of protection: 8 years. Sunset clause: Provision available within the first 12 years (15 years for LDCs) of entry into force of IEPA with possibility of extension	Stand alone infant industry: Measures can be taken to a period of 8 years and may be extended (no sunset clause)	Agreed at Swakopmund
ESA: In IEPA: Maximum length of protection: 8 years. Sunset clause: Provision available within the first 10 years (15 years for LDCs) of entry into force of IEPA	Stand alone infant industry clause: Measures can be taken to a period of 8 years and may be extended (no sunset clause) Provisional application of measures without complying with requirements of article possible in critical circumstances	Agreed in Mauritius at signing ceremony
Central Africa: Cameroon In IEPA: Maximum length of protection: 8 years. Sunset clause: Provision available within the first 15 years of entry into force of IEPA	Proposal for flexibility to extend the 15 years subject to the decision of the EPA committee (note: no stand-alone proposal)	Still being negotiated
EAC In IEPA: Maximum length of protection: 8 years. Sunset clause: Provision available within the first 10 years of entry into force of IEPA	Proposal not available	
West Africa: Cote d'Ivoire and Ghana: In IEPA: Maximum length of protection: 8 years. Sunset clause: Provision available within the first 10 years (with possibility of extension) of entry into force of IEPA	Proposal not available	

(b) Treatment of Agricultural safeguards and food security

Trade measures related to agriculture have always been a tough and sensitive issue for the EU. Issues such as export subsidies in agriculture or agricultural safeguards have so far been dealt at the multilateral level in the context of the WTO Doha Development Agenda (DDA) and remained outside the realm of EPAs, where the EU refused to include any rules in the IEPAs.

At the same time, agriculture is the mainstay of many African countries/ regions. In the context of the final EPA negotiations however, a number of African countries, in particular in the Eastern and Southern African region, have increasingly made the case that questions relating to agriculture should be adequately covered, in particular as it is felt that on their side, they were making significant tariff concessions, including in agricultural products. As a result, there is a shared concern, mostly among African agricultural producers

that domestic support given to EU farmers would negatively affect their domestic market share as a result of the latter's duty free export.

It is therefore forcefully argued that while the IEPAs contain some provisions on the promotion of the agricultural sector, such efforts could be undermined, in particular due the continuous domestic support that the EU provides to its own agricultural sector. Hence, to correct for such imbalances in the current rules, African countries have proposed that there should be a mechanism under the final EPAs that allow them to take corrective measures in the case of serious injury (or the threat thereof) to their local industries.

On its side, the EU has consistently rejected any proposals made by the regions, maintaining the need to keep discussions at the multilateral level and that in its current form, IEPAs allowed for countries to use bilateral safeguard measures to address the effect of subsidies. It is however very unlikely that this issue would be resolved in the final EPA.

Options

It is against this background that proposals have been made to address food security concerns and to mitigate the impacts of trade-distorting subsidies in the final EPA negotiations. Table 5 summarises the proposals of the different regions regarding Agricultural safeguards.

Table 5: Summary of regional proposals on the treatment of agricultural safeguards

Region	Regional Proposal	State of Play
Contentious issue: Treatment of Agricultural Safeguards		
SADC: No specific treatment	Stand alone Agricultural Safeguard clause: Measures can be taken to temporarily restrict importation or exportation of goods for purposes of rural development, food security and poverty alleviation	Still subject to negotiations
ESA: No specific treatment	Stand alone Special Agricultural Safeguard Clause: (i) ESA shall take measures if imports of agricultural products from the EU cause or threaten to cause serious injury to ESA markets (ii) In the event of subsidies provided by EU that cause or threaten to cause serious injury to ESA industries, the latter may take countervailing duties equivalent to the margin of subsidy; (iii) In the event of decrease in price by (x%) of a product or increase in volume of trade in a product (by x%) as result of tariff concessions by ESA, special safeguard mechanism shall apply.	The EU is not agreeable to the provision
Central Africa: Cameroon/ **EAC/West Africa**: Cote d'Ivoire and Ghana	Proposals not available	

While so far the EU has remained quite inflexible to accept a new clause in the EPA on agricultural safeguards, some regions have made concrete proposals for a stand-alone clause on agricultural safeguards. No agreement has been made yet.

It is however worth noting that the recent agreement concluded with South Korea includes a stand-alone article on agricultural safeguard, which is a temporary measure applicable to a limited number of agricultural products, for a limited period of time and based on a system of trigger (see Box 4).

African countries/regions could consider whether such is clause would be relevant to the current EPA negotiations, bearing in mind that many countries have excluded many agricultural products from the scope of the Agreement.

Box 4: Summary of Agricultural Safeguard Measure of the EU-South Korea FTA

The EU-South Korea FTA signed in October 2010 includes an Agricultural Safeguard clause applicable to specific agricultural products for Korean products, which are listed in Annex 3 of the Agreement. Products included are beef, pork, apple, malt and malting barley, potato starch, ginseng, sugar, alcohol and dextrin.

The purpose of the measure is to allow Korea to raise import duty (a maximum safeguard duty is defined for each product in Annex 3) on the agricultural products mentioned above, if the aggregate volume imports of that product in any year exceeds a trigger level as set out in the Annex. The duty level should not exceed MFN rate or the maximum safeguard duty defined in the Annex. The measure has a sunset provision and can be invoked during a certain number of years only.

The measure cannot be applied in case the product is already subject to a bilateral safeguard measure (Art 3.1 of the Agreement), under Art XIX of GATT 1994 Agreement on Safeguards or under Article 5 of the Agreement on Agriculture.

While there is no lengthy process regarding the application of the measure (such as investigation), the measure needs to be transparent, notified to the other party and the implementation and operation to be discussed in the Committee on Trade in Goods.

3.5. The Standstill clause/ Modification of Tariff Schedules

The standstill clause in the IEPAs is meant to ensure that after the entry into force of the EPAs, the parties (i) will introduce no new tariffs; (ii) will not raise existing tariffs; and (iii) once eliminated, will not be re-introduced.

The EU initially showed reluctance to allow for future tariff modifications, for predictability purposes, to prevent countries to increase tariffs unnecessarily. In exceptional circumstances where it could agree to such a position, this should remain WTO compatible.

There were two main concerns regarding the clause as it currently stands in the IEPA:

1. The provision should only apply to those products that are subject to the liberalisation schedule and not to the exclusion list.

2. It does not provide the necessary flexibility to modify tariff schedules in the future as countries and regions deepen their regional economic integration agenda. In effect, many African countries have submitted individual market access offers to the EU, which did not necessarily take into account the evolution of regional integration agenda. Some regions are expected to become customs unions and therefore are expected to have a common external tariff. Also, as was the case in the ESA region, market access offers were based on CETs that were not yet finalised in 2007. There might therefore be a need to harmonise the market access offers with the CET when the latter will be implemented.

Options

Table 6 summarises the proposals made by the regions regarding the standstill clause.

Table 6: Summary of regional proposals regarding the standstill clause

Region	Regional positions	State of Play
Contentious issue: No new duties to be imposed; no tariff re-imposition; no tariff increase		
SADC Applied only to products subject to liberalisation	No proposal available	
ESA	Provision shall not apply to list of exclusion; Also a new article proposed: Modification of tariff schedules: - in the case of special development needs or to prevent serious difficulties	Agreed in Mauritius at signing ceremony
EAC Applied only to products subject to liberalisation	No proposal available	
West Africa: Cote d'Ivoire/ Ghana As part of the finalisation of the ECOWAS CET, Cote d'Ivoire may until 2011 revise its basic customs duties, in so far as the impact is not higher than resulting duties in Annex 2	No proposal available	
Central Africa: Cameroon	Proposal to have a carve out for products in Annex III which could be reviewed in the context of the CET in 2013	Currently being negotiated

To address the concerns of the countries, the clause could consider three criteria:

1. it would apply only to the products subject to liberalisation and countries could agree not to raise duties above their MFN applied rates;
2. it could allow countries to align their market access offers to their common external tariffs when the regions move to the customs union; the new schedule would then be jointly considered by the EU and the country/region;
3. in exceptional circumstances (to be jointly agreed), such as to meet some special development needs or in case of serious economic difficulties, the country or region could temporarily suspend the application of the schedule.

Proposals so far to reflect the countries' concerns have been agreed by the EU, which has proposal would have to remain in line Articles XXIV and XXVIII of the GATT 1994.

3.6. Quantitative restrictions

All IEPAs have a provision to remove existing quantitative restrictions (QRs) and to prevent the introduction of new such measures. The rationale behind is to eliminate non-tariff barriers to trade. Many countries have however argued that this should be in line with Article XI of GATT 1994 which provides for the possibility to use QRs as a temporary tool in exceptional circumstances, in particular for the prevention or relief of critical food shortage.

Options

Table 7 highlights the proposals made so far in the regions.

Table 7: Summary of regional positions on quantitative restrictions

Region	Regional proposals	State of Play
Contentious issue: Quantitative restrictions to be eliminated; no new measures to be introduced		
SADC	Should be based on WTO principles	Agreed at Swakopmund
ESA	Carve out for products at Annex II; Temporary measures may be applied to prevent relief of critical food shortage and other products essential to the exporting country Necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade	Agreed in Mauritius at the signing ceremony
EAC/ West Africa/ Central Africa	No proposal available	

There seems to be no disagreement with the EU to adapt the clause to that of Article XI of the GATT 1994, which provides the necessary flexibility to address the concerns raised so far.

Whiles some regions do not have clear proposals so far, the ESA region has agreed to a clause that is based on Article XI of GATT 1994 but does not provide for all the flexibilities of the GATT. It would be appropriate to make reference to the GATT or to bring in the entire clause into the EPA to ensure policy space, as appropriate.

3.7. Non execution clause

Articles relating to the "non execution clause" are found in Cotonou Agreement (Articles 11b, 96 and 96 respectively). They provide for the possibility for parties to take sanctions and hence suspend commitments, in the case of violations of democratic or human rights principles or rules of law.

While this clause has been invoked twice[43] under the Cotonou Agreement, it is however important to note that sanctions by the EU related to the suspension of aid, but not trade preferences.

The IEPAs all have included a non-execution clause, with the express mention that countries may be subject to trade sanctions. The ACP therefore argues that such a clause should be delinked from the trade agreement and should remain within the realm of political cooperation to avoid unilateral trade sanctions for political violations. All regions have expressly rejected the inclusion of the non-execution clause in the IEPA.

[43] Zimbabwe in 2001 and Fiji in 2007.

4. Trade in services – where do we stand?

As noted in the introduction, outside of trade in goods and development-related issues, another key area which is likely to factor into the road towards final EPAs is trade in services. Negotiations in this area – which in some instances have not even been formally launched (e.g. ECOWAS) – are far less advanced than trade in goods, however there are already a host of issues that have proven themselves to be of a contentious nature. Although these discussions are generally not at an advanced stage, this section will seek to review a selection of key emerging contentious issues on trade in services.[44]

With the shared competency between the EC and EU member states on services (and investment), the EC has effectively been promoting a template text based on the provisions agreed internally. This text forms the basis of the CARIFORUM EPA Title II, *Investment, Trade in Services and E-commerce*, as well as the draft texts proposed by the EU to the African and Pacific regions. In assuming the agreed CARIFORUM text now serves as the EU's preferred template for future EPA services negotiations, it is used as the main reference point below, with contentious issues identified on the basis of discussions with relevant African regions.

4.1. Scope and coverage – Services, Investment and WTO compatibility

At the outset, it is essential to clarify that unlike trade in goods, the Cotonou Agreement places no obligation on the ACP to negotiate trade in services (or investment). There is no existing regime to replace, no potential threat of multilateral litigation should these negotiations never come to fruition and consequently no firm deadline to meet. These points steer clear of the reasons why a country or region may *want* to negotiate services (and investment) commitments under the EPA – for which there are many – but merely states a fact regarding their required inclusion and associated timeline.

Similarly, while trade in services by definition ('mode 3') covers investment (or 'commercial presence') in the services sector, there is no requirement that investment in non-services sectors be included.[45] The latter is subject to the interests of the negotiating parties. That being said, the inclusion of investment has been a contentious issue, with the EU promoting it and most African regions rejecting it.

Should, however, services commitments be sought under the EPA, they would be required to comply with GATS Article V (on Economic Integration Agreements).[46] Though to a lesser extent than its GATT counterpart (Article XXIV), GATS Article V also contains significant ambiguity on exactly what constitutes 'substantial sectoral coverage'. Notably however, the provision does not dictate that all sectors must be included, but rather that all modes of supply must be covered.

Indeed when debating just how much coverage is substantial, unlike in goods, GATS provides for explicit flexibility when interpreting this for developing countries, such that developing country Members 'shall' be provided flexibility to open fewer sectors and type of transactions (Article XIX (2)).

[44] For more detailed analysis, from which this section draws, see Noonan, C. 2008. *Some Options for ACP Regions Contemplating the Negotiation of an EPA Containing Chapters on Trade in Services and Investment.* ILEAP Background Brief No. 15. Toronto: ILEAP. http://www.ileap-jeicp.org/publications/background_briefs/bb15.html.
[45] The CARIFORUM EPA does include such commitments in manufacturing, mining, agriculture and forestry.
[46] GATS Article V indicates that an agreement on services involving WTO Members must i) 'have substantial sectoral coverage' (in terms of the number of sectors, volume of trade affected and modes of supply, with no a priori exclusion of any mode of supply); and ii) provide for eliminating 'substantially all discrimination' between domestic and foreign firms in existing measures and/or the prohibition of further measures.

In this respect, it remains to be seen to how narrow or broad an interpretation of GATS Article V the EU will pursue in Africa.[47] As noted above, we do know the EU rejected Central Africa's initial offer as being unacceptable for WTO compatibility. We also know that in CARIFORUM, the (relatively) 'more developed' countries provided sectoral coverage averaging approximately 75% of all services sectors, while the less-developed countries made commitments in 65% of services sectors.

It is worth mentioning of course that the mere number of commitments says nothing regarding the precise extent to which liberalisation will occur. In this regard, one is challenged to determine how 'asymmetry' in commitments can be operationalised.

4.2. Most Favoured Nation Treatment

As in goods, a contentious issue already rearing itself in the services discussions relates to the EU's pursuit of an MFN provision that would seek to ensure it receives as good access to African markets than any other significant country might get without needing to make reciprocal (additional) concessions. While this could in theory also play to Africa's benefit, the proposed MFN (as included in the CARIFORUM EPA) is only binding for commercial presence and cross-border supply (i.e. modes 1, 2, & 3), but not for the movement of natural persons (mode 4). This would clearly undermine such potential benefits on the African side.

In the CARIFORUM construct, the parties agree to accord to the services, services suppliers, commercial presences and investors treatment no less favourable than the most favourable treatment applicable to like services, services suppliers, commercial presences and investors of any major trading economy with whom they conclude an economic integration agreement. Such a "major trading economy" is defined as any developed country, or any country accounting for a share of world merchandise exports above one percent in the year before the entry into force of the economic integration or any group of countries acting individually, collectively or through an economic integration agreement accounting collectively for a share of world merchandise exports above 1.5 percent in the year before the entry into force of the economic integration agreement.

Exceptions to this MFN rule would cover internal market agreements or where parties significantly approximate legislation so as to remove services or investment discrimination s (e.g. EU or CARICOM Single Market and Economy, CSME), as well as measures providing for recognition of qualifications, licenses or prudential measures in accordance with Article VII of the GATS or its Annex on Financial Services.

While the EU's claim for such treatment in goods is predicated on their offering DFQF market access for goods (though as noted in 3.2.2 the actual preference margin emanating from the EPA is very low), this is not the case in services. Here the EU is offering only marginally greater access than set out in their revised Doha services offer.[48] As such, the contention has been raised as to why such an MFN provision should be included in services as it would pose a significant detriment to the ability of African countries to benefit from services negotiations with third parties – notably vis-à-vis south-south trade with emerging

[47] For example, will they seek 'accession-like' commitments, where recent WTO developing country members have had to accept extremely wide-ranging commitments (i.e. in over 90 out of 166 sub-sectors), far beyond those required of many original WTO members.
[48] See TN/S/O/EEC/Rev.1

economies. The general position in Africa (and the Pacific) has thus been to delete the provision (or at least modify it such that it only provided for consultations/negotiations with no pre-determined outcome).[49]

4.3. Regional preference

While couched in the context of promoting regional integration, and not substituting for it, the EU's proposed provisions on regional preference have raised some concerns within the ACP. Notably, the proposed provision would see any more favourable treatment and advantage that may be granted by one member of a negotiating party to the other negotiating party must also be granted to all other members of the first negotiating party. In other words, any more favourable treatment provided by one CARIFORUM State to the EC would also have to be granted to all other CARIFORUM signatory States.

The above would quite clearly create a regional services arrangement that would not have existed prior. In other words, it would substitute a regional services agreement with (at least) those commitments provided to the EU. Indeed, the CARIFORUM regional preference clause extends beyond specific commitments on goods and services to include regulatory principles and as a consequence, the timing and scope of CARIFORUM regional integration would no longer be determined exclusively by CARIFORUM States.

4.4. Temporary movement of natural persons

The temporary movement of natural persons (Mode 4) is perhaps the most contentious subject in the services negotiating arena. Whereas importing countries are often concerned that mode 4 could enable a circumvention of immigration rules (and the political sensitivities associated with migration issues more generally), exporting countries (particularly in Africa) view mode 4 into developed countries as one of the primary areas where services liberalisation may deliver concrete development benefits.

As such, expectations at the outset of the EPA negotiations were that the EU understood the importance of mode 4 for EPAs to deliver on their development promise and would consequently pursue a relatively high level of ambition. The absence however of this ambition has been clear, with implications across the services negotiating theatre.

For example, the CARIFORUM EPA restricts movement to "key personnel" that are employed by a "commercial presence"; "business service sellers"; "contractual service suppliers"; and "independent professionals". Where the market access offered has been greatest relates largely to Intra-Corporate Transferees (ICT; e.g. managers and specialists) and Graduate Trainees (GT) that are tied to a Caribbean firm having a commercial presence in Europe (i.e. tied to mode 3). Conversely, those mode 4 categories not tied to investment (and thus deemed of greater potential development value), i.e. "contractual service suppliers"; and "independent professionals", benefit from far lesser market opening in Europe.

Furthermore, low skilled or semi-skilled people fall outside of the chapter on the movement of natural persons. The services of many of the occupational groups that African countries might be interested in exporting to the EU also fall outside of the scope of the text. There are also no provisions for the recognition of skills of non-university trained people, nor has the EU shown any willingness to consider agreeing to a minimum numbers of people allowed to enter the EU market (which is not without precedent in a services agreement).

[49] A further suggestion has been that more favourable treatment only needs to be provided to the other party to the EPA if the third party in question has not overall provided greater market access than the EPA party seeking MFN treatment.

As touched on earlier, the pervasive use of economic needs tests (ENTs) is another highly contentious aspect surrounding the expected EU mode 4 commitments. The is due to the fact that the EU's use of ENTs effectively provides member states a potentially discriminatory window in which they can refuse market access on the basis of some undefined 'market situation', which may (or may not) include 'the number of, and impact on, existing suppliers'. Offering only a generic criteria in the CARIFORUM EPA, and that most ENTs listed in the schedule offer only 'Economic needs tests', it provide no specificity that can be assessed ex-ante for the relevant sub-sector and hence no means for verifying compliance with the commitment. In addition, aside from the reference to the number of service suppliers, it again provides no specificity to the precise quantitative number and/or type of measure which is contingent on the ENT. This lack of transparency, alongside any mechanism in the EPA on which to challenge an ENT-based decision, further enhances the potential for discriminatory application.

5. How to move forward? A question of political will

Despite the numerous challenges, it is high time to find a way forward in the EPA process. The status quo is simply not sustainable in the long term. The EU is currently reassessing its options, but it has yet to outline its approach on the way forward, based on concrete new proposals. In the meantime, ACP countries and regions have to individually reassess their ambition and degree of commitment to the EPA process. The ACP and the AU fora, among others, offer them an opportunity to consider a common platform on the way forward on EPAs.

5.1. Focus on WTO-compatible options reflecting the ACP diversity and regional integration dynamics

To progress in the EPA negotiations, notably on the contentious issues, it is crucial for the parties concerned to reach an agreement that both reflects the development ambitions of the ACP and that can be jointly defended at the WTO. This will require a careful assessment and strong political guidance.

Recognising the possible difference of opinions on the development merits of some of the contentious provisions in an EPA, the parties' primary focus should be on ensuring that the potential agreement is compatible with WTO rules and principles. At the same time, policy makers should also aim to maintain the overarching objective of longer-term sustainable development.

While a coherent approach on EPAs must be preserved across ACP/African countries and regions, it is important to recognise the diversity of situations and interests across the ACP. Various options can be followed in different regions or countries, based on the driving strategic objectives and specific development needs of each region or country.

That said, one of the overarching objectives of the EPA process is the strengthening of regional integration in the ACP. While the EPA process cannot be a substitute for an endogenous regional agenda by ACP groupings, the conclusion of EPAs should not undermine the regional integration process. A key concern should thus be to construct an EPA that will strengthen regional integration. It is thus important to conduct a reality check, and assess which type of agreement is most likely to effectively support the regional integration objective, where possible.

The EU has the means to flex its muscles to speed up the conclusion of final EPAs. Setting firm deadlines for the removal of EPA preferences to those countries or regions that do not comply with their commitment to sign, ratify and implement EPAs that have been concluded could be a decisive move. However, the imposition of too-tight deadlines with little flexibility from the EU could seriously disrupt regional integration processes if a particular region is split on how to move forward. It could also have detrimental effects on development if a deadline forces some countries or regions to endorse an EPA agenda that does not match their domestic development strategies. Effective implementation might also become illusionary. It may also sour relations with the EU, with long lasting negative consequences.

A more flexible approach – one that acknowledges concerns expressed during the negotiations, even at the price of reduced ambitions – may prove a more effective way forward.[50] Recognising that some ACP countries may not yet be ready or willing to conclude an EPA would also be crucial.

Indeed, contentious issues in the EPA will remain at the core of the negotiations for the final EPA. While many non-IEPA signatories have expressed the wish to be part of the final EPA, one of their conditions, however, related to the need to resolve the contentious issues, while at the same time addressing outstanding technical issues.

The state of advancement of the negotiations on the contentious issues is varied. Some issues have been resolved relatively easily at technical level, others are more sensitive and require clear political guidance. These include fundamental issues of the degree of market access liberalisation expected from negotiating countries (such as SAT, transition period, community levies, export taxes, safeguards, standstill and non-execution clause), in particular LDCs, which is the main determinant of the deal, and the inclusion of an MFN clause, which may influence the negotiating power of African and Pacific countries in future trade agreements. As discussed in this paper, several options can be identified to address some of these key contentious issues.

On *market access*, the EU has interpreted WTO rules as requiring the ACP regions to liberalise at least 80 percent of their trade with the EU over a period of 15 years, given that, in return, the EU grants them duty- and quota-free market access. Many ACP countries, and in particular LDCs, have contested this interpretation and asked for greater flexibility. ACP and EU officials have argued over the last 10 years about the correct interpretation of the Article XXIV of the GATT 1994, for which no pertinent jurisprudence exist. The objective is not to arbitrarily interpret the WTO rule, but to consider what level of market opening is both politically acceptable and defensible at the WTO. According to many WTO insiders, in the current context, any free trade agreement that would cover 70 percent or more of trade over a 15-20 years period is most likely to pass this WTO test – even more so if one the parties is an LDC or vulnerable economy, as in many ACP regions.[51]

The inclusion of an *MFN* clause – whereby preferences granted to major third parties would be extended to the other parties of an EPA – has also been passionately debated.[52] While this is not required or proscribed by the WTO, it is one of the most politically sensitive issues at stake. From the ACP side, it is not acceptable as a matter of principle. ACP policy makers consider it an unacceptable constraint on their

[50] See Bilal S. and Lui D. 2009. "Contentious Issues in the EPAs: Potential Flexibility in the negotiations", ECDPM Discussion Paper 89, Maastricht, The Netherlands: European Centre for Development Policy Management. www.ecdpm.org/dp89

[51] Many FTAs notified at the WTO, including by the EU, have lower thresholds that those currently advocated by the EU for EPAs.

[52] See for instance Diouf, E.H., "Why the MFN clause should not be included in EPAs", *Trade Negotiations Insights*, Vol.9, No.8, October 2010.

future trade agreements with third parties. The EU, however, views it as a matter of "fairness" given their generous concessions under the EPA. A technical compromise would consist in explicitly narrowing the scope of application of the clause and relaxing the trigger mechanisms (in terms of joint decision-making process and thresholds) for its application. The MFN clause in the CARIFORUM EPA or the Pacific States IEPA could be considered: signatories have committed to implement the MFN provision only after consultation, therefore removing any automatic and potentially arbitrary application of the more favourable treatment. The balance of obligations and benefits between a third-country FTA and the EPA could also be considered. Another option would be to increase the threshold (in terms of share of world trade) of what constitutes a major trading partner, so as to exclude more countries from the potential application of the MFN clause. However, whether an EPA will include an MFN clause is ultimately a political choice. But even if it does, some options to address concerns over future agreements with major third parties might be politically acceptable.

Another major stumbling block to the negotiations concern the treatment of *export taxes*. The main concern of some ACP is the need to preserve sufficient policy space to industrialise their economies, a position that is challenged by the EU. This is a somewhat grey area at the WTO. However, strictly speaking, WTO rules do not expressly require countries to prohibit the use of export taxes. Therefore, there is no obligation to have a clause on export restrictions in the EPA; if there is one, a simple reference to WTO rules could suffice. Even with a binding provision on export taxes, countries could preserve some flexibility by excluding a list of products from the application of the clause. The introduction of temporary measures under specific circumstances could also be provided for, for instance in case of specific revenue needs, or to protect an infant industry, ensure food security, protect the environment or where a country can justify industrial development needs.

The *treatment of infant industries* has been another major cause of concern. As it currently stands in IEPAs, it is covered under a general bilateral safeguard and therefore requires lengthy procedures before any measure could be applied to protect infant industry. However, technical remedies have been found, for instance by having a stand-alone provision with less cumbersome conditions of application.

Many African countries have proposed the inclusion of an *agricultural safeguards and food security* clause in the EPA given the importance of agriculture in many countries. However, the EU has argued that agriculture was sufficiently covered in the general bilateral safeguards. The EU has also forcefully rejected any proposal to address the question of agricultural subsidies through the use of agricultural safeguard measures on the argument that these issues were being discussed at the WTO and therefore should not be part of bilateral negotiations. While the issue of agricultural subsidies is not likely to be resolved in the context of the EPA, technical solutions could be found on treatment of agricultural products, in the light of the FTA between EU and South Korea.

The question of having a *standstill clause* that prevents a country from modifying its tariff schedules is another cause of concern. It is particularly challenging in the context of regional integration, where countries are in the process of adjusting their national tariffs to the regional common external tariffs. Possible technical solutions exist. It could apply only to the products subject to liberalisation and countries would not raise duties above their MFN applied rates. Parties could also jointly agree to allow countries to align their market access offers to their common external tariffs when the region moves toward a customs union. In addition, in exceptional circumstances (to be jointly agreed), such as to meet some special development needs or in case of serious economic difficulties, the country or region could temporarily suspend the application of the schedule.

Interim EPAs have a provision to remove existing *quantitative restrictions* and to prevent the introduction of new such measures. Again, in most cases, technical solutions have been found by making sure that the article is in line with Article XI of GATT 1994, which provides for the possibility to use quantitative restrictions in exceptional circumstances, in particular for the prevention of relief of critical food shortage.

On *services*, many of these fault lines are only just beginning to emerge and the regions – both between and within – will need to determine how best to reflect their own services-related development aspirations in the envisaged texts and commitments.

Last, but not least, the adoption of appropriate *measures to accompany and support the EPA implementation*, by both the ACP concerned and the EU, will be key to unleash the development potential of an EPA.[53]

5.2. Politics and broad strategic ambitions should drive the way forward

To find a way out of this impasse, the EU must propose concrete options to African and Pacific countries. Similarly, it is high time for the ACP countries and regions to assess whether they want to conclude a final EPA – if so, then they must decide by when and under what conditions. Reaching an agreement will require concessions from both sides.

To start, all parties must recognise that the EPA process is first and foremost a political issue, not a technical one that should be left to trade negotiators. Political leaders should thus guide possible technical remedies by negotiators, notably on contentious issues.

The EPAs have been presented as advanced and far-reaching instruments for binding trade and development. A failure to deliver on these development promises would be a serious setback to the EU trade and development agenda, including in the context of the Doha Round.

At the same time, it is important to acknowledge the political repercussions that EPAs have on the relations between the EU and the ACP, notably Africa. The EPA process is too serious of a matter to be left to trade people alone. A more strategic vision towards the ACP/Africa – EU relationship is desperately required.

[53] See for instance ECDPM. 2010. *The EU Commitment to Deliver Aid for Trade in West Africa and Support the EPA Development Programme (PAPED).* ECDPM Discussion Paper 96. Maastricht: European Centre for Development Policy Management. www.ecdpm.org/dp96

Annex 1 Overview of EU GSP Schemes

The scheme of generalised tariff preferences offers unilateral trade preferences to 176 developing countries to the EU. The current scheme applies from 1st January 2009 to 31 December 2011. It contains one standard scheme for all beneficiaries (Standard GSP) and two special arrangements taking into account the various development needs of countries (GSP+ and EBA respectively).

	Standard GSP	GSP +	EBA
Specificity of Regime	Unilateral trade preferences granted to 176 developing countries	Special scheme for "vulnerable countries" based on sustainable development and good governance	Special arrangement for LDCs: covers 49 countries
Rules of Origin	As per EC Regulation 314/2007. Same rules apply for all three schemes		
Criteria of eligibility	Not classified by World Bank as high-income countries for 3 consecutive years; When value of imports for 5 largest sections of its imports covered by GSP into EU < 75% of total GSP-covered imports of the country into EU When beneficiary country benefits from preferential trade agreement with the EU	"vulnerable": (i) not classified by World Bank as high-income countries and where 5 largest sectors of their GSP covered imports > 75% of their total GSP covered imports; (ii) Where their GSP covered imports < 1% of total GSP covered Sign, ratify and implement 26 Conventions on core labour standards, human rights, sustainable development and good governance	Countries must be identified by UN as LDCs
Application	Automatic	Countries need to apply (for current scheme, deadline was 31 Oct 2008 and 30 April 2010) + beneficiaries need to re-apply when there is a new scheme	Automatic
Product coverage	6244 products, split in "sensitive" and "non-sensitive" Non-sensitive (except for agricultural products) =duty free (about 3200 products) Sensitive = tariff reductions by specific amounts below MFN: - for ad-valorem duties: 3.5% or 20% for Section XI (mainly textile and Clothing); - for specific duties: 30%	6336 products: Ad valorem tariffs: duty free Specific duties: duty free, unless combined with an ad valorem tariff	7140 products: all duty free quota free (exception: arms and ammunition) Transition period for sugar: bet 1 Oct 2009- 30 Sep 2012, importer under heading 1701 should undertake t purchase such products at a price not lower than the minimum price.

Beneficiary countries	176 developing countries	Currently 17 countries (no ACPs) – Armenia, Azerbaijan, Bolivia, Costa Rica, Ecuador, El Salvador, Georgia, Guatemala, Honduras, Mongolia, Nicaragua, Paraguay, Peru, Panama, Sri Lanka[54], Venezuela	49 LDCs
Top 5 beneficiaries		Sri Lanka*, Ecuador, Peru, Columbia, Costa Rica	Bangladesh, Cambodia, Laos, Nepal, Maldives
Utilisation Rate	45%	78%	47%
Removal of preferences	Under GSP and GSP Plus : When average value of EU's imports from a country > 15% of the value of EU's imports from all beneficiaries over 3 consecutive years. For sections XI (a) and (b), threshold is 12.5%. For GSP+: Violation of conventions For all schemes: - export of goods by prison labour - serious shortcomings in customs control on exports; transit drugs; non-compliance with money laundering conventions; - serious and systematic unfair trade practices that may affect EU industries; - serious and systematic infringement of objectives of regional fisheries organisations concerning management and conservation of fishery resources - non compliance with rules of origin		

Source: Council Regulation (EC) 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period 1 January 2009 to 31 December 2011

[54] Sri Lanka has been temporarily suspended from the GSP + Scheme in February 2010 following an investigation which identified shortcomings in Sri Lanka's implementation of three UN Human rights conventions. However, the measure was set to take effect after six months, to give Sri Lanka the possibility to address the problems identified. It came into effect on 15 August 2010.

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ECDPM Discussion Papers present initial findings of work-in-progress at the Centre to facilitate meaningful and substantive exchange on key policy questions. The aim is to stimulate broader reflection and informed debate on EU external action, with a focus on relations with countries in the South.

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European Centre for Development Policy Management

ecdpm

HEAD OFFICE
SIÈGE
Onze Lieve Vrouweplein 21
6211 HE Maastricht
The Netherlands *Pays Bas*
Tel +31 (0)43 350 29 00
Fax +31 (0)43 350 29 02

BRUSSELS OFFICE
BUREAU DE BRUXELLES
Rue Archimède 5
1000 Brussels *Bruxelles*
Belgium *Belgique*
Tel +32 (0)2 237 43 10
Fax +32 (0)2 237 43 19

info@ecdpm.org
www.ecdpm.org
KvK 41077447