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EPAS AND WTO COMPATIBILITY – A DEVELOPMENT PERSPECTIVE

SYNOPSIS

The discussion on WTO compatibility in the Economic Partnership Agreements (EPAs) between the EU and ACP countries has so far been very narrowly defined, and largely from the perspective of the European Union. The EU has asked ACP countries to liberalise at least 80% of their trade.

Rather than simply taking on the EU's interpretation of 'WTO compatibility' and GATT Article XXIV, 'WTO compatibility', from the perspective of developing countries must be seen from the view point of the flexibilities these countries enjoy in the WTO, which should be reinforced in the EPAs.

The following is a matrix providing a comparison of the EPA commitments the EU is asking ACP countries for, and treatment of these issues in the WTO, including where appropriate, the type of flexibilities available for the different developing country groupings at the WTO.

The issues dealt with in this paper include: Market access for agricultural products; Market access for industrial or non-agricultural products; Extent of liberalisation - development benchmarks; Standstill clause; Quantitative Restrictions; Export Taxes; Rules of Origin; MFN Clause; Multilateral Safeguards; Bilateral Safeguards; Infant industry; Domestic Support in Agriculture; Export Subsidies in Agriculture; Intellectual Property; Services; Investment; Competition and Government Procurement.

November 2010
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EXECUTIVE SUMMARY

ISSUE	EU DEMAND IN EPA	WTO/DOHA FLEXIBILITY	COMMENTS/RECOMMENDATIONS
1. Market Access - Agriculture	Elimination of *applied* tariffs (i.e. bring tariffs down to 0%) for 80% of all goods (agriculture and non-agriculture) products	LDCs – no liberalisation needed in Doha Other ACP countries negotiating EPAs – SVE[1] treatment i.e. WTO bound tariffs to be reduced by 24% on average	Need to insert WTO flexibilities into EPA: - no tariff reduction for LDCs - lenient liberalisation for SVEs
2. Market Access – non-agriculture	Elimination of *applied* tariffs (i.e. bring tariffs down to 0%) for 80% of all goods (agriculture and non-agriculture) products	LDCs – no liberalisation needed in Doha Lenient liberalisation treatment for other ACP countries – either because they have 'low tariff binding coverage' or because they are SVEs.	Need to insert WTO flexibilities into EPA: -no tariff reduction for LDCs -lenient treatment for low- binding coverage countries (e.g. Kenya, Nigeria) -lenient treatment for SVEs.
3. Extent of liberalisation (substantially all trade); Development benchmarking	Elimination of tariffs on 80% of tariff lines. LDCs and SVEs have no special treatment.	LDCs and SVEs, as well as other ACP countries have special (SVE) treatment. Inbuilt benchmarking in WTO – liberalise according to level of development.	In EPA, either -match EPA liberalisation with WTO liberalisation flexibilities; or -build in development benchmarking i.e. only when countries arrive at certain development levels do they liberalise.
4. Standstill clause	Freeze all applied tariffs that are to be liberalised	WTO allows for applied tariffs to be raised up to the bound rates	Should be deleted from EPA for WTO compatibility
5. Quantitative Restrictions	No QRs allowed except for limited circumstances	No QRs, but there is a broader list of circumstances QRs can be used (those relating to food security and domestic	Bring QR provision into conformity with WTO QR provisions (e.g. SADC

[1] SVE stands for Small and Vulnerable Economy.

		agricultural production etc are excluded in EPA)	Swakopmund language)
6. Export Taxes	No new taxes introduced, or existing ones raised.	Export taxes are totally legitimate under the WTO and have been widely used (even by the EU eg. for wheat in 1995).	There should be no restrictions on export taxes in EPA – delete existing clause
7. Rules of origin	Largely same as cotonou RoOs except: - textiles (single transformation rather than double transformation) which is useful for some countries - much worse regarding cumulation. Cotonou allowed all-ACP cumulation. Now only possible to cumulate with EPA signatories.	Members largely free to craft their own RoOs. WTO currently provides only broad guiding principles.	Cotonou RoO were restrictive. Many LDCs not able to satisfy 'substantial transformation' criteria. EPA RoOs need to be relaxed to encourage LDC and ACP exports.
8. MFN Clause	MFN clause in goods. MFN clause in Cariforum services chapter also.	WTO's enabling clause allows developing countries to have freedom to craft their own South-South trade agreements.	MFN clause will dampen South-South trade. Should be deleted to be WTO compatible.
9. Multilateral safeguards	EPA parties can use WTO Agreement on Safeguard; Special Safeguard Provision (SSG) of the Agreement on Agriculture. Most do not mention the Special Safeguard Mechanism (SSM) for developing countries (being negotiated in Doha) when it comes into force.	Only 4 African countries have access to the SSG. EU uses the SSG regularly, especially for poultry and sugar. In addition, EU uses domestic subsidies, which has the equivalent effect as permanent safeguards.	Ensure any new WTO multilateral safeguard can also be used in EPA when it is in force. This is currently not possible except for the SADC text.
10. Bilateral safeguard	'Thorough examination' needed, which is more burdensome than	WTO's SSG and the SSM have automatic triggers. No need for thorough	Improve bilateral safeguard by deleting need for 'thorough

	the WTO's SSG.	examination. Value of these automatic triggers depend on trigger levels and remedies – these are still being negotiated in the Doha Round.	examination'. Data provision has always been a problem in the general WTO Safeguard Agreement for developing countries.
11. Infant industry	Remedy is the same as the bilateral safeguard remedy. For most EPAs, the clause expires after 10 – 15 years. Remedy for most EPAs limited to MFN applied tariffs.	GATT Article XVIII provides for a wide range of governmental action to protect infant industries (subject to the need to offer compensation).	Should allow QRs and tariffs going beyond the WTO bound levels if necessary (as is possible in the WTO).
12. Domestic Supports in Agriculture	Fully allowed without limits in EPAs.	Doha mandates 'substantial reductions in trade-distorting domestic support'. Some reductions in supposedly trade distorting supports. But no reductions in Green Box. (EU shifting 70% of supports into Green Box).	Doha negotiations have failed to adequately deal with EU's domestic supports in a fair way. This imbalance is being carried over into EPAs. EPAs should exclude products subsidised by EU. (These should not count towards ACP countries' sensitive list, and ACP countries should be able to raise tariffs on these products).
13. Export subsidies in agriculture	Not mentioned in most EPA texts, i.e. no disciplines. Where mentioned (Central Africa and CARIFORUM), the language is weak and not very useful.	EU agreed to eliminate all export subsidies by 2013 in Doha negotiations.	To be WTO compatible, the commitment to eliminate these should be reinforced in EPA for the EU. Developing countries should be allowed to have export subsidies for a longer period (as in Doha).
14. Intellectual Property	Many TRIPS-plus Provisions in CARIFORUM EPA, including possibly complying with all IPR treaties EC has signed. LDCs to implement all the TRIPS	LDCs do not have to take on substantive commitments of TRIPS still 2013. For medicines, this is till 2016. However, this can be extended for as long as the	WTO does not require countries to negotiate IP in an EPA. IP should be dropped. LDCs should be exempted from any IP commitments, as in WTO, even

	and TRIPS-plus obligations by 2021 unless waiver on IP obligations are extended.	countries remain LDCs.	beyond 2021.
15. Services	EU wants ACP countries to: - liberalise 65 – 76% of sectors/sub-sectors. - standstill clause in services regulation - low or semi-skilled labour excluded from EPA Mode 4 (all of these are in CARIFORUM EPA).	- LDCs do not have to liberalise at all. There is special priority for LDCs – others should open up to LDCs' export interests. - Non-LDCs similarly do not have to liberalise if they choose not to i.e. liberalisation is voluntary in Doha Round. If they liberalise, they are free to choose their pace and depth of liberalisation. - Mode 4 includes low and semi-skilled labour.	WTO does not require countries to negotiate Services in an EPA. Services should be dropped. No obligations to negotiate services in order to meet Art. 24 compatibility requirements. LDCs should not liberalise at all. Non-LDCs should not be required to go beyond commitments in the GATS.
16. Investment	Included in Cariforum EPA under Mode 3 – commercial presence. That EPA also included non-services investment sectors: Agriculture, hunting and forestry; fishing; mining and quarrying; manufacturing; production, transmission and distribution of electricity, gas, steam and hot water.	Included as Services Mode 3 in the GATS. However, in GATS, liberalisation commitments are completely voluntary. Investment as an issue in itself was dropped from Doha agenda in 2004. ACP Ministers were central in pushing for expulsion of this issue.	WTO does not require countries to negotiate investment in an EPA. Investment should be dropped. Inclusion will prohibit better treatment to be provided to local companies.
17. Competition	CARIFORUM EPA includes competition chapter – Parties must have competition authority in 5 years.	Competition as an issue in itself was dropped from Doha agenda in 2004. ACP Ministers were central in pushing for expulsion of this issue.	WTO does not require countries to negotiate competition in an EPA. This should be dropped. Inclusion will make it difficult for countries to provide better treatment to local companies.

18. Government procurement (GP)	CARIFORUM EPA: Market access in GP – any EU supplier established in CARIFORUM has access to national GP market. Transparency in GP – extremely detailed provisions which are very burdensome, with necessity tests making it extremely difficult to exclude EU bidder.	There is only a voluntary plurilateral government procurement agreement in WTO. Government procurement as a multilateral issue to be negotiated was dropped from Doha agenda in 2004. ACP Ministers were central in pushing for expulsion of this issue.	WTO does not require countries to negotiate government procurement in an EPA. This should be dropped. Inclusion of even 'transparency in government procurement' will make it very difficult, if not impossible for government contracts to be given to local companies if they are less competitive than an EU provider. Government procurement is a critical industrialisation tool.

I. INTRODUCTION

EU'S INTERPRETS WTO COMPATIBILITY STRINGENTLY FOR ACP COUNTRIES

1. The discussion on WTO compatibility in the Economic Partnership Agreements (EPAs) between the EU and ACP countries has so far been very narrowly defined, and largely from the perspective of the European Union. The EU has asked ACP countries to liberalise at least 80% of their trade (by tariff lines and trade volume) in order to be 'WTO-compatible'. I.e., the EU has given a particular interpretation of Article XXIV, and has told ACP countries to comply with this interpretation.

2. It should be noted that according to its interests, the EU has interpreted Article XXIV differently, for example, in relation to the EU-Syria Cooperation Agreement which has been notified under Article XXIV and which is still in force today, where the EU liberalises in almost all products but Syria does not.[2]

WTO COMPATIBILITY FROM A DEVELOPMENT PERSPECTIVE

3. In the Doha Round, a range of flexibilities has been provided to developing countries. This is because there is explicit acknowledgement that countries can only undertake liberalization that is in accordance with their level of development. As such, there are also different categories of flexibilities developing countries fall into in the Doha negotiations.

These include:

- Least Developed Countries (LDCs) – Not required to take on

[2] In the question and replies concerning the EU-Syria Cooperation Agreement regarding GATT Article XXIV compatibility in 1978, the EU defended this cooperation agreement (where the EU undertook liberalisation commitments but Syria did not) on the following grounds:

'The fact that Syria is initially allowed, in view of its current development needs, not to enter into obligations, as regards the importation of products originating in the Community, corresponding to the undertakings entered into by the Community, is in accordance with the spirit and letter of Part IV of the General Agreement. This fact in no way calls into question the validity or applicability of Article XXIV as regards the Community, for from the moment of the entry into force of the trade provisions of the Agreement, the Community assumes the obligation to eliminate the customs duties and other trade restrictions on the bulk of its trade with Syria.

On the occasion of the examinations provided for under the Agreement, the parties will look for possible ways of making progress towards the elimination of barriers to trade. The Agreement thus reflects a dynamic attitude to economic development in the context of which the basic rule, namely that expressed in Article XXIV, retains its full value as a guiding principle. For these reasons, the parties to the Agreement are not requesting that it be covered by a waiver.' (GATT, L/4641, 14 March 1978).

liberalisation commitments in Agriculture; Non-Agricultural Market Access (NAMA), and Services.

- Small and Vulnerable Economies (SVEs) – Undertake some, but a much lower levels of liberalisation in Agriculture and NAMA, and voluntary services commitments.
- Developing countries (non-LDCs and non-SVEs) – Undertake liberalisation commitments that are less steep than that undertaken by developed countries in Agriculture and NAMA. Services liberalisation is also voluntary.

4. For ACP countries negotiating EPAs with the EU, the majority of whom are LDCs or SVEs (or others which are not SVEs have been provided with SVE treatment), the flexibilities in the WTO and the supposed 'Round for Free' for the LDCs are of little or no value if they are asked to simultaneously open up 80% of their trade to the EU. For a significant number of the ACP countries, the EU is their biggest trade partner. In fact, these vulnerable economies have been asked to liberalise much more in the EPAs than the big emerging developing countries have been asked to do at the WTO (e.g. China and Brazil).

5. This paper contains a matrix providing a comparison of the EPA commitments the EU is asking ACP countries for, and treatment of these issues in the WTO, including where appropriate, the type of flexibilities available for the different developing country groupings at the WTO.

6. The issues dealt with in this paper include:

- Market access for agricultural products
- Market access for industrial or non-agricultural products
- Extent of liberalisation-development benchmarks
- Standstill clause
- Quantitative Restrictions
- Export Taxes
- Rules of Origin
- MFN Clause
- Multilateral Safeguards
- Bilateral Safeguards
- Infant industry
- Domestic Support in Agriculture
- Export Subsidies in Agriculture
- Intellectual Property
- Services
- Investment
- Competition
- Government Procurement.

7. Rather than simply adhering to the EU's interpretation of 'WTO compatibility' and Article XXIV, 'WTO compatibility', from the perspective of developing countries must be seen from the view-point of the flexibilities these countries enjoy in the WTO, which should be reinforced in the EPAs.

8. This approach is also in keeping with the Doha negotiating mandate pertaining to regional trade agreements (paragraph 29 of the Doha Declaration WT/MIN(01)/DEC/1, 20 November 2001), where Ministers agreed that the negotiations on clarifying and improving disciplines and procedures applying to regional trade agreements 'shall take into account the *developmental aspects* of regional trade agreements' (italics added). This set of negotiations has not yet concluded.

9. It should also be highlighted that in the GATT /WTO, there has never been agreement on what GATT Article XXIV's 'substantially all the trade' means. (See box below).

Box: GATT/WTO Practice and Jurisprudence on Article XXIV Provides No Reliable Standard of Interpretation of 'substantially all trade'; Doha Negotiations Still Outstanding on 'Development Aspects' of Article XXIV

As ACP countries consider the level of liberalisation and 'development aspects' that should legitimately be part of the EPAs, four aspects should be taken into account:

1) The fact that GATT/WTO members and GATT/WTO jurisprudence have never been able to define the exact level of liberalisation required under Article XXIV – particularly its 'substantially all trade' criteria for regional trade agreements. In Turkey-Textiles, the Appellate
Body addressed this issue as follows:

'neither the GATT Contracting Parties nor the WTO Members have ever reached an agreement on the interpretation of the term 'substantially' in this provision. It is clear, though, that
'substantially all the trade' is not the same as all the trade, and also that 'substantially all the trade' is something considerably more than merely some of the trade…' (Appellate Body Report, Turkey-Textiles, Paragraph 48).

This is at best a vague and broad definition.

In fact, WTO members have given up on trying to 'examine' RTAs in order to reach a consensus about whether an RTA/ FTA meets the 'substantially all the trade' requirement since no such consensus has ever been possible since the days of the GATT. The Transparency Mechanism of 2006 agreed to by the WTO's Committee on Regional Trade Agreements (CRTA) therefore simply notes that an RTA will be 'considered' by WTO members. Whilst questions may be asked and views may be expressed by other WTO members in the
'consideration' exercise, the WTO body does not even try to take a decision on whether an RTA/FTA is compatible with Article XXIV.

2) The fact that the Doha Ministerial Declaration makes clear 'development aspects' are to be inserted into Article XXIV and this work remains on the negotiating agenda of the Doha Round. Paragraph 29 of the Doha Declaration notes that in clarifying and improving the disciplines and procedures of WTO provisions pertaining to RTAs, 'The negotiations shall take into account the development aspects of regional trade agreements' (WTO Doha Ministerial Declaration, WTO/MIN(0)/DEC/1, 14 November 2001).

Since then, the ACP has reiterated that 'S&D treatment for developing countries be formally and explicitly made available to developing countries in meeting criteria set out in paragraphs 5 to 8 of GATT Article XXIV…' (TN/RL/W/155, 28 April 2004). They have noted that

'With regard to duties, appropriate flexibility shall be provided for developing countries in meeting the 'substantially all the trade' requirement in respect of trade and product coverage…'.

3) The practice by various members in past and current RTAs. For instance, the EU-Syria Cooperation Agreement mentioned in footnote 1, notified under Article XXIV whereby Syria does not liberalise, but the EU liberalises most products. There are many other examples of protectionism in various RTAs (see South Centre's paper on Article XXIV SC/AN/TDP/RTA, Dec 2008).

4) WTO flexibilities enjoyed by developing countries in the Doha Round. These flexibilities would be eroded if they are not reinforced by the EPAs. The rest of this paper provides in detail, the flexibilities available in the WTO for a range of issues.

Topic/ Issue	EU Request/ Ambition in the EPA	WTO Treatment for LDCs, SVEs and other Developing Countries	Comments/ Recommendations
1. Market Access for agricultural products	100% reduction (i.e. elimination) of applied tariff rates for 80% of all tariff lines / trade. It is up to sub-regions to decide how to divide the protected sensitive list of 20% between agriculture and industrial products. Most EPA sub-regions have tended to use their sensitive list to protect more of their agricultural tariff lines and liberalise most of their industrial product tariff lines.	In WTO, tariffs are • Reduced from the WTO bound rates, not the applied tariff rates (for most developing countries, bound tariff rates are significantly higher than applied tariff rates) • Based on non-reciprocity for LDCs and less than full reciprocity for other developing countries. LDCs are not required to undertake any tariff reductions in bound (or applied) duties in the Doha Round[3]. On average, Small and Vulnerable Economies (SVEs)[4] have to cut their bound tariffs by 24% and developing countries by 36% in the Doha Round. (para 64 and 130, TN/AG/W/4/Rev.4). Some additional flexibilities for Special Products are available to developing countries (lower or no tariff cuts).	For EPA compatibility with WTO, 1) LDCs should not have to reduce their tariffs in the EPAs 2) Non-LDCs should reduce tariffs from their bound levels 3) The flexibilities enjoyed by SVEs and developing countries should be maintained. Most ACP sub-regions are a mix of LDCs and non-LDCs. Sub-regions with such a mix should ensure that their collective offer in the EPA does not undermine LDCs' flexibilities at the WTO i.e. a sub-region with LDCs should be given LDC flexibilities in the EPAs to safeguard regional integration. Currently, LDCs are being made to 'sacrifice' their WTO flexibilities and their already free access to the EU market under the Everything But Arms (EBA) scheme for LDCs in order to meet the needs of

[3] 33 of the 48 African countries negotiating EPAs are LDCs and do not undertake liberalisation commitments in the Doha negotiations. These LDCs include: Central Africa - Central African Republic; Democratic Republic of Congo; Chad; Equatorial Guinea; Sao Tome
East African Community – Burundi; Rwanda; Tanzania; Uganda
Eastern and Southern Africa (ESA) – Djibouti; Eritrea; Ethiopia; Malawi; Somalia; Sudan; Zambia; Comoros; Madagascar
West Africa – Benin; Burkina Faso; Gambia; Guinea; Guinea Bissau; Liberia; Mali; Mauritania; Niger; Senegal; Sierra Leone; Togo
Southern African Development Community (SADC) – Lesotho; Mozambique; Angola

[4] A Small, Vulnerable Economy (SVE) in the WTO is defined as one whose average share in 1999 – 2004 of a) world merchandise trade does not exceed 0.16 per cent b) world non-Agriculture trade does not exceed 0.10 per cent and c) world agricultural trade does not exceed 0.4 per cent. African countries negotiating EPAs that have SVE treatment in the Doha Agriculture negotiations include Botswana, Cameroon, Gabon, Ghana, Kenya, Mauritius, Namibia, Swaziland, Zimbabwe, Republic of Congo, Cote d'Ivoire and Nigeria. That is, all African countries negotiating EPAs which are not LDCs have SVE treatment in the Doha agriculture negotiations, with the exception of Seychelles which is not a WTO member, and South Africa, which is a 'developing country' in the WTO.

Topic/ Issue	EU Request/ Ambition in the EPA	WTO Treatment for LDCs, SVEs and other Developing Countries	Comments/ Recommendations
			non-LDCs in their sub- region. This is an inversion of the logic in the multilateral system where LDCs' needs are to be accommodated. Hence, in the context of the Doha Round mandate (para 29 of the Doha Declaration) that the 'development aspects of regional trade agreements' should be inserted into Article XXIV, the EC should liberalise fully, but sub-regions with LDCs should collectively take on no or minimal liberalisation, until they attain a higher level of development. The EU-Syria Cooperation Agreement was notified under Article XXIV in 1977 and remains in force today. In this agreement, the EU provides nearly full market access (except on some agricultural products), and Syria does not liberalise at all. This should be the treatment provided to sub-regions with LDCs.

Topic/ Issue	EU Request/ Ambition in the EPA	WTO Treatment for LDCs, SVEs and other Developing Countries	Comments/ Recommendations
2. Market Access for industrial/ non-agricultural products	100% reduction (i.e. elimination) of applied tariffs for 80% of all tariff lines / trade. It is up to the sub-regions to decide how to divide the protected sensitive list of 20% between agriculture and industrial products Most EPA sub-regions have tended to use their sensitive list to protect more of their agricultural tariff lines than their industrial product tariff lines.	In the non-agricultural market access (NAMA) negotiations of the WTO: LDCs are exempt from tariff reductions, but they are 'expected to' though not bound to increase the level of tariff binding commitments (para 14, TN/MA/W/103/Rev.3).[5] Developing countries with low binding coverage[6], i.e. they have bound less than 35% of their total tariff lines will bind 75 to 80% of non- agricultural tariff lines at a maximum overall tariff level of 30% in the Doha Round. They do not undertake liberalisation according to the Swiss formula (as must the other developed and developing countries apart from LDCs and SVEs). (Par 8(a)), TN/MA/W/103/Rev.3) SVEs reduce, depending on their average bound tariff level, between 18% and 30% of their WTO bound tariff levels. The effect is that the bulk of SVEs do not reduce applied tariff levels in the Doha Round.[7]	

[5] LDCs negotiating EPAs availing of this treatment in the Doha NAMA negotiations are those in Footnote 1 above.
[6] African countries negotiating EPAs and availing of the flexibilities provided to low-binding coverage countries in the Doha's NAMA negotiations include: Cameroon; Congo; Cote d'Ivoire; Ghana; Kenya; Mauritius; Nigeria; Zimbabwe.
[7] African countries negotiating EPAs that have SVE treatment in the NAMA negotiations include Botswana, Swaziland and Gabon. However, all of them have been promised even more flexible treatment in the draft Doha NAMA text (TN/MA/W/103/Rev.3).

Topic/ Issue	EU Request/ Ambition in the EPA	WTO Treatment for LDCs, SVEs and other Developing Countries	Comments/ Recommendations
		Developing countries[8] cut up to 54% of their bound tariffs through the Swiss formula (SC/AN/TDP/MA/10).	
3. Extent of EPA liberalisation : **Compatibility with WTO Doha Round Liberalisation;** **Concept of Development Benchmarking**	The EC has asked for special preferential treatment for certain countries/ regions on the basis of their level of development e.g. Moldova, Western Balkans, and in the past for the Mediterranean countries (Syria, Algeria, among others). However, EC has tried to undermine any attempts to introduce development benchmarking in the EPAs for ACP countries. Nevertheless, the benchmarking idea has been surfacing repeatedly, introduced by several different EPA negotiating countries/ sub- groups eg. Ethiopia, ESA group, Angola etc.	There is de facto benchmarking in the WTO. Developing countries have been classified according to development levels–LDCs, SVEs, other developing countries–and their liberalisation commitments in the Doha Round are defined according to these categories. Also, the Enabling Clause allows differentiated treatment of developing countries by developed countries on the basis of objective criteria corresponding to "development, financial and trade needs" of developing countries (Article 3c, Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979, L/4903).	There are two main methods of injecting WTO flexibilities into the EPA: 1) Certain development benchmarks can be used – and liberalisation can be pegged to these benchmarks (See SC/AN/TDP/EPA/20). I.e. only when countries have attained a certain level of development do they take on further liberalisation commitments. 2) Matching EPA liberalisation commitments to countries' WTO liberalisation commitments and flexibility. Whichever method is used, effectively, the same flexibilities for the different developing country groupings as provided for in the WTO should be reinforced in the EPAs. Otherwise, the EPAs would undermine the WTO flexibilities which developing countries have worked hard to attain.

[8] African countries negotiating EPAs that fall under the 'developing country' category in the NAMA negotiations include Namibia and South Africa

Topic/ Issue	EU Request/ Ambition in the EPA	WTO Treatment for LDCs, SVEs and other Developing Countries	Comments/ Recommendations
			Regional groupings with LDCs should enjoy LDC flexibilities, with a view to taking on more stringent liberalisation commitments as the LDCs in the group graduate from LDC status. The same reasoning the EU had used in the EU-Syria Agreement in 1978 can be utilized. The developing countries do little or no immediate liberalisation, whilst the EU liberalises the bulk of its customs duties and other restrictions of trade. The EPA would therefore reflect 'a dynamic attitude to economic development in the context of which the basic rule, namely that expressed in Article XXIV, retains its full value as a guiding principle' (EC's response in 'Agreement Between the European Community and Syria: Questions and Replies' GATT, 14 March 1978, L/4641).
4. Standstill clause	All the EPAs freeze tariffs at their current applied rates. Most allow duty increases for products that are in the sensitive list.	No such standstill clause on applied tariffs exists in the WTO. Countries can always increase their applied tariffs to their higher WTO bound levels. Countries are free to raise applied tariffs to any level for unbound tariff lines. (Most African countries bound their agricultural tariff lines in the Uruguay Round, but left their industrial tariff lines unbound.)	To be compatible with the WTO, the standstill clause in the EPA, which does not exist in the WTO should be eliminated.

Topic/ Issue	EU Request/ Ambition in the EPA	WTO Treatment for LDCs, SVEs and other Developing Countries	Comments/ Recommendations
5. Quantitative Restrictions (QRs)	All EPAs incorporate the essence of the first paragraph of GATT Article XI (general elimination of quantitative restrictions). Some EPAs partially cover the exceptions listed in the second paragraph of GATT article XI.	There are a host of WTO provisions allowing QRs in certain situations. Examples include: • The exceptions mentioned in the second paragraph of Article XI, relating to food security and domestic agriculture production • Balance of Payments difficulties (Article XII or XVIII:B) • Infant industry protection for developing countries (XVIII:A and C) • Article XIX and the Safeguard Agreement • General Exceptions (Article XX) • Agreement on Import Licensing (defining when an import license is not trade restrictive).	It is a major loss of policy space for ACP countries to have a more restrictive QR clause, as is the case with the EPAs today. The best option is for African and Pacific countries to ask for quantitative restriction rules that are in conformity with the WTO Agreement (as was agreed between SADC and EU in Swakopmund, March 2009 'The Parties to this Agreement may apply quantitative restrictions provided such restrictions are applied in conformity with the WTO Agreement').
6. Export Taxes	Elimination of all export taxes with some limited scheduled exceptions (e.g. Ghana, ESA, EAC). Most do not allow for new taxes to be introduced in any circumstance (EAC, ESA and CARIFORUM). However some EPAs do allow for temporary export taxes after consultation with the EC (SADC, Central Africa).	Export taxes are not prohibited by the WTO. In fact, they are extensively used by the WTO Membership, including the EU (e.g. wheat in 1995).[9] The EU attempted to introduce the elimination of export taxes in the WTO as a non-tariff barrier (NTB) issue (TN/MA/W/101). However, this has been shot down by other WTO members including Argentina, Brazil, Indonesia, Venezuela etc. [10]	Remove this provision to bring it in line with WTO rules where export taxes are allowed. Export taxes can generate an increase in domestic processing and value addition and can be an important source for public finances. Low-income countries use export taxes on agricultural products such as sugar, coffee and cocoa, forestry products, fish products, mineral and metal products, leather, hides and skin products.

[9] The Role of Export Taxes in the Field of Primary Commodities, Roberta Piermartini, WTO staff working paper
[10] http://www.dti.gov.za/parlimentary/EPAoutcomes.pdf

Topic/ Issue	EU Request/ Ambition in the EPA	WTO Treatment for LDCs, SVEs and other Developing Countries	Comments/ Recommendations
7. Rules of Origin (RoO)	The current temporary rules of origin agreed to by ACP sub-regions in the interim EPAs included Rules of Origin that are largely based on the Cotonou Agreement Rules of Origin. The only really significant change related to textiles and clothing (conferring origin when there is single transformation rather than 2- stage transformation). This is the only industrial sector where RoOs were changed from the Cotonou RoOs. Other than that, there are some minor changes for certain agricultural products and also for fish (for the latter, only the crew requirement has changed. The Pacific region has received further flexibilities although this has not been extended to other ACP sub-regions). All the EPAs note that there will be a review of the RoOs within 3 or 5 years of entry into force of the EPA. A significant deterioration in the EPA, compared to Cotonou RoOs was that under Cotonou, cumulation between ACP was allowed. EPA RoOs only allow for cumulation between countries that have initialed or signed an EPA. The EC has been in a process of re-assessing its preferential RoOs and possibly using only	The WTO's Agreement on Rules of Origin (ARO) addresses non-preferential RoOs. The ARO basically provides a work programme towards the harmonization of these rules within the WTO. Deadlines for this harmonization have come and gone and this work remains underway. To date, about 55% of the work is supposedly completed.[11] In the transition, the ARO provides for only some principles that apply to countries' RoO. The WTO addresses preferential rules of origin in Annex II of the ARO. Here again, only some general principles are required to be observed e.g. various transparency provisions; broad criteria for establishing origin; that RoOs are based on a positive standard (defined in terms of what confers origin rather than what does not); are subject to judicial review etc. These are very broad principles, leaving Members essentially free to craft their own criteria for preferential RoOs.	One of the key problems with the Cotonou Agreement for ACP countries was restrictive rules of origin. ACP countries without intermediate industries found it difficult to attain what is defined in Cotonou as satisfying substantial transformation. Unless the EPA improves significantly on this issue, the same problems in accessing the EU market will emerge. A key principle the ACP countries should push for in these negotiations is non-reciprocity in RoOs, i.e. more relaxed RoOs for the ACP countries, but tougher RoOs for the EU. For ACP countries, there should be a lower threshold in the calculation of the value content of domestic value-added required. Even though high-value added content should in theory ignite more domestic processing, in practice (under Cotonou), the result instead has been the prohibition of access to the EU market. There should be all ACP cumulation allowing for regional/ ACP-wide sourcing of inputs.

[11] The Chair of the Committee on Rules of Origin on 25 March 2010 noted that WTO members have to date reached consensus on country-of-origin rules for 1,528 products. She said this meant 55 per cent of the work of the Committee had been completed. http://www.wto.org/english/news_e/news10_e/roi_25mar10_e.htm

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	the value addition methodology to confer origin status. This could potentially be very problematic for many ACP countries if the RoOs are based on overly high value addition figures.		Without this, the EPA will disrupt rather than foster regional integration and South-South trade particularly as some countries in sub-regions are signing EPAs and others are not. Provide support to ACP countries' institutions that are issuing preferential certificates of origin, as well as ACP customs authorities.
8. MFN Clause	All the EPAs have an MFN treatment clause. Whatever better treatment is provided to a major economy by either the EU or the ACP group after the signing of the EPA will have to be offered also to the EPA partner. The rationale for the MFN clause is that the EU aims to preserve preferential access to the African continent for its resources (e.g. raw materials) for as long as possible, and it wants to ensure that the emerging developing countries (Brazil, India, China) will not be given better access to ACP resources and eventually outcompete the EU.	GATT Article XXIV does not require an FTA to have an MFN clause. An MFN clause requires developing countries to extend preferences from future South-South agreements falling under the Enabling Clause (2c) to a developed country (e.g. EU). Brazil and others have suggested that such an MFN clause violates the 1979 Enabling Clause which attempts to encourage South-South trade. In the Doha Round, the ACP proposed that Members reaffirm the legal validity of the Enabling Clause to cover regional trade arrangements entered into among developing countries (i.e. South-South agreements) to the effect that developing countries' right to form such arrangements under the Enabling Clause are not undermined by paragraphs 5 to 9 of GATT Article XXIV (WTO document TN/RL/W/155).	The MFN clause in the EPA should be dropped: It would erode the incentive for developing countries to provide preferences to each other (e.g. Brazil may not be interested in an FTA that has deep liberalisation commitments with South Africa after the EPA since South Africa would have to offer any better terms it provides Brazil also to the EU. There would therefore not be preferential treatment for Brazil in the South African market). If the EU continues to insist on an MFN clause in the EPA, the MFN Clause in the Cooperation Agreement between Syria and the European Union (Art. 22) can be used. It offers MFN on paper, but it does not seem to that the MFN clause can be operationalised:

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			'1. Subject to the special provisions relating to frontier zone trade, Syria shall grant the Community treatment in the field of trade no less favourable than most favoured-nation treatment. 2. Paragraph 1 shall not apply in the case of the maintenance or establishment of customs unions or free-trade areas. 3. Furthermore, Syria may derogate from the provisions of paragraph 1 in the case of measures adopted with a view to regional economic integration or measures benefiting the developing countries. The Community shall be notified of such measures.'
9. Multilateral Safeguards	Apart from the interim SADC text, the EPAs do not provide for countries to be able to use the Special Safeguard Mechanism (SSM) for developing countries, when it comes into force (at the conclusion of the WTO's Doha Round). However, the EPAs mandate the use of the Special Safeguard Provision (SSG – Article 5 of the Agreement on Agriculture) for the EU. This is an example of reversed Special and only Botswana, Namibia, South Africa and Swaziland have recourse to the SSG.	The general WTO Safeguard Agreement has been difficult to use, especially by developing countries due to data availability and timeliness. This Agreement demands that countries provide evidence of a causal link between the import surge and the injury. This is even an inconvenience for developed countries. For this reason, the Special Safeguard Provision (SSG or Article 5 of the Agreement of Agriculture) was created in the Uruguay Round so that an automatic and quick safeguard can be used. However, since only a few developing countries can use the SSG, developing countries in the WTO are negotiating the Special Safeguard mechanism (SSM) that will be available to all	Any multilateral safeguard that is negotiated at the WTO e.g. SSM (including interpretative notes, decisions etc), should be available for use by developing countries in the EPA. This should be specifically mentioned in the EPA texts.

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		developing countries. EU uses the SSG regularly, especially for poultry and sugar. In addition, EU uses domestic subsidies, which has the equivalent effect as permanent safeguards.	
10. Bilateral Safeguards	The bilateral safeguard is nearly identical in at the EPAs. It can be used when conditions cause or threaten to cause a) serious injury to the domestic sector b) disturbances to the sector causing social and economic difficulties c) disturbances to the markets of the product or like product or mechanisms regulating those markets. The remedy countries can use include: a) suspension of further import duties under b) increase duties to the MFN applied level (SADC text is the only one that is different, allow duties to be raised to bound MFN levels) c) introduction of tariff quotas. The major problem with the bilateral safeguard is that it requires 'thorough examination' (e.g. Article 34.8c of SADC text, similar in other EPAs). Many developing countries have difficulties producing accurate and timely data, and this could likely make the bilateral safeguard difficult to use.	The present negotiations on the SSM in the WTO may not be the best example of a 'good' safeguard. Countries opposed Countries opposed to the SSM have loaded it up with triggers that are very high and remedies that may not be so effective. SSM proponents (represented by the G33) have very different positions on the SSM. This is one of the issues which remains unresolved in the Doha Round.[12]	The bilateral safeguard can be improved upon by eliminating the clause requiring 'thorough examination' as this clause would defeat the objective of a quick and easy-to-use safeguard. The EU-South Africa's Trade Development Cooperation Agreement (TDCA)'s agricultural safeguard can be improved upon but even that text is already better than the EPA's bilateral safeguard: When there is disturbance caused by imports, 'the Cooperation Council shall immediately consider the matter to find an appropriate solution. Pending a decision by the Cooperation Council, and where exceptional circumstances require immediate action, the affected Party may take provisional measures necessary to limit or redress the disturbance…' (TDCA, Article 16).

[12] South Centre's analysis of the SSM negotiations in the Doha Round is available at http://www.southcentre.org/index.php?option=com_content&task=category&sectionid=12&id=51&Itemid=211&lang=en

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11. Infant industry	All EPAs have an infant industry clause that has the same remedies as the EPA bilateral safeguard, and the same procedural requirements. In most EPAs, the infant industry clause expires after 10 to 15 years (15 for Cameroon). Two regions (SADC, ESA) have renegotiated the infant industry clause, which have not yet been incorporated into the interim EPA texts, but is to be incorporated into their final EPA text. They managed to make the clause permanent. However, the remedy available for SADC is worse in the new renegotiated infant industry clause - tariffs can only be raised to the MFN applied rather than bound rates.	GATT Article XVIII provides for the possibility of a wide range of government actions to help protect and encourage infant industries, subject to reasonable requirements to consult and notify WTO members and offer them compensatory adjustments where necessary. The definition of 'infant industry' is quite broad: it includes establishment of particular industries, the development of new or the modification or extension of existing production structures. (GATT document L/4897, Safeguard Action for Development Purposes, 28 November 1979).	An infant industry clause should be permanent and allow for remedies that are sufficient to bring about the desired objective – to protect the infant industry. Quantitative restrictions and high enough tariffs going beyond the WTO bound levels should be allowed if necessary. Countries should be free to introduce infant industry protection without having to go through burdensome procedures. The definition of infant industry in the 1979 GATT Decision can be a useful guide.
12. Domestic Support in Agriculture	All the EPAs allow for the payment of subsidies to national producers in goods (agriculture and non-agriculture) without limits (e.g. SADC text Article 36.4). This is a problem for ACP countries since most developing countries do not have the financial resources that EU has to support European farmers, creating an imbalanced playing field.	The mandate for the Doha Round negotiations on agricultural subsidies is that there should be 'substantial reductions in trade-distorting domestic support' (para 13 of Doha Declaration). However, the negotiations so far have not successfully addressed this issue, due to intransigence by developed countries. EU and US bound their 'trade distorting' domestic supports at very high levels in the Uruguay Round, much higher than their applied levels. In the Doha Round, they have agreed to cut their bound trade	EU provides about 50-60 billion Euros in subsidies per year to EU farmers. This does not even include the national subsidies that are also provided. With the bulk now shifted to the Green Box, which is left undisciplined in the Doha negotiations, the multilateral trade rules have essentially not dealt with the issue of subsidies to any level of satisfaction. EU subsidies are even more problematic in the context of the EPAs than the WTO

		distorting subsidy levels, but these cuts will not affect their actual applied subsidy levels.[13] In addition to the 'paper cuts' in 'trade-distorting' supports, the EU and US are both shifting the bulk of their domestic supports to the Green Box.[14] Farmers are provided with direct payments based on their historical, not current production levels. Green box subsidies have trade distorting effects since they keep farmers on the land, when without these supports, many would have to exit the industry. However, EU and US have refused to limit Green Box subsidies in the Doha Round. The Green Box is therefore one of the biggest loopholes in the agriculture negotiations in Doha. Developing countries have noted many times that developed countries are simply 'box- shifting' – shifting subsidies from one box to another. Since most ACP countries do not provide significant levels of subsidies, the playing field is tilted against them both in their own domestic markets (as they suffer from cheap imports from EU) and export markets (because the EU market	because tariffs and subsidies are intrinsically linked. In as far as tariffs are eliminated in the EPAs (going much further than the WTO), ACP domestic producers are even more directly affected by EU's unfairly subsidized agricultural products. EU subsidies (cereals, dairy, sugar, poultry, fruits and vegetables etc) are therefore a major EPA issue. It should also be noted that there is a direct parallel between subsidies and safeguards. EU's subsidies are in effect a form of permanent safeguards. The subsidies (e.g. direct payments to producers) allow prices in EU domestic markets to be much lower than what they should be. ACP farmers will therefore find it difficult if not impossible to access EU markets. This must be addressed when ACP countries negotiate safeguards with the EU. Suggestions in the negotiations: EU should eliminate all domestic supports if it truly believes in free trade and its positive

[13] Independent from the issue of export subsidies, the WTO categorizes domestic supports in agriculture into:

- Red /amber box subsidies, also known as Aggregate Measure of Support (AMS). These subsidies are usually tied to price (higher supports when price decreases) and are seen as 'trade-distorting'. In the Doha Round, those with higher bound levels of AMS have to reduce them by a larger percentage.
- Blue box subsidies are supports provided largely by developed countries for programmes that limit production compared to historical levels. This has traditionally been used by the EU.
- Green box subsidies which are seen as non-trade distorting. They include environmental supports and other direct payments to producers independent of production and price. As they are seen to be non-trade distorting, even though this is not the case in reality, the WTO allows them to be provided without limits.

[14] The EC is shifting at least 70% of its CAP payments into the Green Box – direct aid payments.

		remains inaccessible as subsidized EU producers are artificially more competitive).	effects. If it does not want to do this, it should at the least be transparent and notify to the EPA committee all the agricultural products for which domestic supports are provided. For these products, the ACP countries should put them on a separate list for which liberalisation in not required. This list should also be distinct from their sensitive list. I.e. they should not be part of ACP countries' sensitive list as the ACP countries are not the ones responsible for EU subsidies. If the sensitive list is to be very limited as the EU is arguing, it should be reserved for other products. ACP countries should be allowed to raise tariffs on these products to counteract the subsidies provided.
13. Export Subsidies in Agriculture	Apart from the Central African, CARIFORUM EPA and Pacific EPAs, the other EPA texts do not mention export subsidies. The Central African EPA text signed by Cameroon notes: 1. No Party or signatory Central African State may introduce new export subsidies or increase any existing subsidy of this nature on agricultural products destined for the territory of the other Party. With regard to existing subsidies, this paragraph shall not prohibit increases due to variations in the world prices of the products in question. 2. For any group of products, as defined in paragraph 3, which receive an export refund under EC legislation for the same basic	The Uruguay Round in fact allowed the continuation of existing export subsidies in agriculture, even though these were banned for industrial goods. In fact, it took long negotiations before the EU even accepted the inclusion of any export subsidy disciplines in the Uruguay Round agriculture negotiations. In the Uruguay Round, export subsidies were only subject to reductions (not elimination) for both developed and developing countries. Developing countries could maintain and even increase certain categories of export subsidies (Article 9. 4 of the Agreement on Agriculture – marketing and internal transport /freight charges).	Export subsidies for the EU should be eliminated in the EPA, in keeping with the promise of the EU made at the WTO Hong Kong Ministerial in 2005. The Central African text is very weak because it allows for export subsidies to be provided in keeping with variations in world prices. This caveat will allow EU to bring back export subsidies whenever the situation arises that world prices go down and EU produce becomes too expensive to be competitive on the world market. This caveat should not be there for the EU since it makes the clause prohibiting export subsidies effectively useless.

	product for which the Central Africa Party has undertaken to eliminate its tariffs, the EC Party undertakes to dismantle all existing subsidies for exports of this group of products — corresponding to the same basic product — to the territory of the Central Africa Party. In the context of this paragraph, the Parties shall hold consultations by 31 December 2008 in order to establish the details of this dismantling process.	In the Doha Round, export subsidies are to be abolished by the end of 2013 for developed countries and 2016 for developing countries (TN/AG/W/4/Rev.4). "We agree to ensure the parallel elimination of all forms of export subsidies and to be completed by the end of 2013" (Par.6 of Hong Kong Ministerial 2005) Certain categories of export subsidies for developing countries (marketing, internal transport and freight charges) can be maintained till 2021 (TN/AG/W/4/Rev.4).	The Special and Differential Treatment that is a basis of the WTO (allowing developing countries use of export subsidies for a longer period) is not captured in the EPA. Since the EU has for decades developed its agricultural industry, but ACP countries have not, producers in ACP countries should be allowed flexibility including in the use of export subsidies, in order to gain strength and competitiveness.
14. Intellectual Property	This analysis takes the CARIFORUM text as the EU template (since other regions are still deciding whether or not to include IP in the full EPA, and if so to what degree). There are many TRIPS-plus obligations, including: 1) LDCs will have to implement TRIPS and all the TRIPS-plus obligations by 2021, unless the EPA joint committee decides to extend the waiver for LDCs. 2) ACP countries may have to comply with all the IPR treaties which the EC is part of, but which ACP individual countries are not part of (Article 139 of CARIFORUM text – 'The EC Party and the Signatory CARIFORUM States shall ensure an adequate and effective implementation of the international treaties dealing with intellectual property to which they are parties ', italics added).	LDCs are not required to take on the substantive obligations of the TRIPS Agreement until 2013. For medicines, there is a TRIPS wavier for them till 2016. This exemption can then be extended as long as countries are still LDCs. The TRIPS Agreement does not oblige countries to accede to EPA mentioned IP treaties (point 3 on left column) or to apply their provisions. In the TRIPS Agreement, it is recognized that LDCs should enjoy Special and Differential Treatment (S&D). There is no requirement for regional harmonization, which can potentially put an additional burden on LDCs. There are flexibilities in the TRIPS that are important for developing countries that have not been fully captured in the EPA e.g. TRIPS Articles 30 and 31 on exceptions to rights conferred to	Countries' level of intellectual property rights protection increases as a country becomes more developed. Taking on a high level of IP protection prematurely will impact on countries' development since it inhibits technology diffusion'. Late industrialisers such as US, Germany, Japan and South Korea succeeded because they easily copied the latest technologies. The EU's agenda in the EPA is for ACP countries to adopt the same level of IP protection as that in the EU (hence Article 139 of the CARIFORUM EPA). This is inappropriate for the needs of ACP countries – particularly in terms of technology diffusion. There is no requirement in Article XXIV to include intellectual property issues in

	This would include treaties that are not even mentioned in the EPA text e.g. The Anti-Counterfeiting Trade Agreement (ACTA) which EC is negotiating currently with a few countries. 3) ACP countries are obliged to take on stricter IPR rules in addition to the TRIPS, which would erode many of their TRIPS flexibilities. The specific treaties CARIFORUM states have to accede to include: i) the Patent Cooperation Treaty (1984); ii) the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure (1980) (Art 147.2); and iii) they shall 'endeavour' to accede to the Patent Law Treaty (2000) (Art 147.2) and iv) countries are asked to 'consider acceding' to the International Convention for the Protection of New Varieties of Plants – UPOV (1991) (Art 149) v) as well as 'endeavour' to apply a series of WIPO recommendations and other treaties on Trade mark protection (Art 144). 4) The TRIPS agreement leaves countries free to decide if they want to sign on to UPOV or adopt another system of protecting breeders and farmers' rights. UPOV 1991 gives exclusive rights of sale and reproduction of seeds to IP holders, denying local farmers the right to replant and exchange seeds. This has	patent holders and use of the subject that is patented without authorization from the right holder under certain circumstances.	an RTA in order to be WTO compatible. . Given that most ACP sub-regions have LDCs and LDCs are exempted from substantive TRIPS obligations in the WTO, IP issues should not be included in EPAs. Their inclusion would make development more challenging for these economies.

	major consequences on the traditional practices of farmers to save, exchange and improve seeds, putting sustainable food production systems at risk. It also has cost implications for subsistence farmers and could impact on their long-term viability. 5) The PCT which the CARIFORUM will have to accede to (Art 147.1.2a) provide a single window for the filing of patent applications i.e. an application submitted to the US will also be simultaneously forwarded to all PCT member patent offices for application. Countries have the right to carry out their own national examination before deciding whether to approve the application or not. However, the result of the PCT so far is an overload of patent applications in patent offices, resulting in less than rigorous examinations and an exponential increase in patent rights granted by developing countries that are PCT members, with ramifications on their development prospects. 6) The Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure (1980) (Art 147.1.2) will mean that applicants for patents on micro-organisms will be allowed to deposit a sample of the micro-organism to one international depository authority recognized under the Budapest Treaty, instead of having to deposit		

	such samples to designated authorities in each country where the patent application is filed. Most of these recognized depositories under the Budapest Treaty are in developed countries and these laboratories hold the bulk of the deposited samples. Thus, joining the Budapest treaty will facilitate more granting of patents on micro-organisms as it makes it easier to file such applications. It will also mean that developing countries will not have easy access to the deposited samples. As most biotechnology patent applicants are from developed countries, this can increase the outflow of royalties. There is also a risk of the samples deposited with the recognized laboratories under the Budapest Treaty being passed on to companies and patented without prior informed consent or benefit sharing with the countries where the micro-organism originated. Moreover, if a country joins the Budapest Treaty, it cannot opt out for at least seven years. 7) There are TRIPS-plus provisions relating to IP enforcement and border measures i.e. the suspension or retention of counterfeit goods at the border. The definition of counterfeit goods has been broadened (CARIFORUM EPA Article 163 as compared with TRIPS Article 51), and Footnote 2(b(ii)) states that the Parties will further collaborate to expand the scope of this definition. The EC will use this as the opportunity to bring this EPA		

	provision closer to the very broad definitions of counterfeit goods proposed in ACTA, and also contained in the EU Enforcement Directive 2004/48/EC and the EU Customs Regulation 1383/2003. Indications are clearly TRIPS-plus. Countries have to establish a system of GI protection by 2014. GI protection covers all classes of products unlike in TRIPS where it is mostly limited only to wines and spirits. Governments have to pursue abuses of GIs ex officio i.e. on their own initiative. 8) Regional harmonization of domestic IP laws (CARIFORUM EPA Art 133) which does not exist in TRIPS. This can be interpreted as either leading to higher standards of IPRs for LDCs. 9) Significant additional protection for industrial designs, with implications on developing countries' development.		
15. Services **Mode 1 –** cross border supply of services (e.g. call centers) **Mode 2 –** consumption abroad (travelling abroad to enroll in an education	Taking the CARIFORUM EPA as the EU's template, the EU is asking ACP countries to liberalise up to 65- 75% of all services sectors and subsectors whilst it liberalises 90%. The EU is also asking ACP countries to agree to a standstill in services liberalisation (i.e. the current level of applied liberalisation must be frozen). This has deep ramifications since in services/ investment, a country's level of liberalisation depends on the coverage of	'*Appropriate flexibility for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access inline with their development situation*' is central in the GATS. In the Doha Round, further GATS commitments by WTO members (including developed countries) are voluntary and based on a request-offer approach. Developing countries in the Doha Round therefore need not offer new liberalisation commitments if they choose not to.	African states have no obligations to negotiate services in order to meet GATT Art. 24 compatibility requirements. The best option is for countries to assert their right not to negotiate an agreement with the EU on services and investment. A second best option is a cooperation agreement with the EU. Cooperation arrangements can include language most

program) **Mode 3** - commercial presence(the establishment of a branch of a foreign bank) **Mode 4** – movement of natural persons. (nurses going abroad to provide services)	its services/investment domestic regulation (e.g. in the retail sector, many developed countries have zoning policies limiting the number of supermarkets that can be set up within a zone. Many developing countries do not). Since most ACP countries' level of regulation of services is not very detailed, enforcing a standstill will inhibit the further development of their regulation and it means locking ACP countries into liberalisation that is deeper than what the EU has liberalised (since the EU has very developed and detailed regulations). The EPA commitments apply to all measures taken by all levels of government decision-making – central, regional and local (Article 61.5b). This is GATS-plus. Whilst this article mirrors GATS Article I.3, the non-binding and weak language in that GATS Article has been omitted in the EPA. This can mean onerous obligations on government agencies, local bodies and village councils which have not been consulted during the negotiations, and which may face conflicting priorities and obligations. An MFN Clause is also included in the services chapter of the CARIFORUM EPA. If this is replicated in other EPAs, ACP countries offering better treatment to a major economy e.g. China, will have to also offer this to the EC in services and investment.	Article IV:1 provides for increasing the participation of developing countries through the negotiation of specific commitments by other members in order to (i) strengthen their domestic capacity, efficiency and competitiveness; (ii) improve their access to distribution channels, information networks and technology; (iii) liberalise sectors and modes of supply of interest to developing countries. Article IV:3 provides that in implementing the aforementioned provisions, 'special priority shall be given to the LDCs. In particular, non-LDC members should take into account the serious difficulties LDCs face in accepting negotiated specific commitments due to their special economic situation and their development, trade and financial needs.' Article XIX calls for special treatment for LDCs. In the Doha Round, it is explicitly recognized that LDCs need not take on further liberalisation commitments (Paragraph 26 of the Hong Kong Ministerial Declaration, WT/MIN(05)/DEC 22 December 2005). Annex C of the Hong Kong Declaration on Mode 4 calls for new or improved commitments on the categories of Contractual Services Suppliers, Independent Professionals and Others, de-linked from commercial presence, to reflect inter alia removal or substantial reduction of economic needs tests.	appropriate to meet countries' development objectives; the provision of financial assistance; support schemes to widen universal access and develop infrastructure, and supplement investment in these areas by the governments. However, countries must be careful to shape the cooperation programmes to meet their needs, not the EU's agenda. If negotiations are pursued, GATS flexibilities for LDCs and developing countries must be maintained. LDCs should be exempted from commitments. Other developing countries cannot be expected to lock in deep liberalisation commitments because of the situation of weak regulatory capacity and due to the huge capacity gap between developing country services providers and the giant EU corporations. If they do, local services providers will be squeezed out of the domestic markets. Prior to any decision to embark on services and investment negotiations, governments should conduct a comprehensive analysis of their domestic needs and capacity, identify both their non-trade objectives for policy and regulation and their existing legal obligations, and assess the implications of the EPA. This is important because of the human rights and universal access issues connected to many services sectors, as well as the economic and employment

	Mode 4 (movement of natural persons) is a step backwards in the EPA as compared to the GATS for developing countries since the EU has specifically included only professionals. Low or unskilled workers are not included in the EPA Mode 4, unlike in the GATS. The other key GATS-plus feature in the EPA is the inclusion of sector-specific regulation chapters into the EPA text itself. Some of these originate from the GATS (specifically telecommunications and financial services) but they are voluntary/ optional under GATS. The EPA goes beyond the GATS by including regulatory chapters not available in GATS - computer, courier (which is in essence about postal services), maritime transport, and tourism services. Some of these regulatory chapters: • have strict competition clauses (foreign providers must be given equal treatment as nationals) making it unclear how local providers are to compete with big EU companies; • prohibit 'anti-competitive cross subsidisation' (e.g. telecoms chapter); • allow for universal service provision but includes necessity tests i.e. the way universal services are provided must be 'not more burdensome than	Annex C of the Hong Kong Ministerial Declaration WT/MIN(05)/DEC 22 December 2005 ((Para 9) asks WTO members to develop methods for the full and effective implementation of the LDC Modalities, including (a) expeditiously developing appropriate mechanisms for according special priority including to sectors and modes of supply of interest to LDCs (b) undertake commitments, to the extent possible, in such sectors and modes of supply identified, or to be identified, by LDCs that are a priority in their development policies (c) assist LDCs to enable them to identify sectors and modes of supply that represent development priorities. (d) Provide targeted and effective technical assistance and capacity building for LDCs in accordance with the LDC Modalities. The draft proposal on a services waiver for LDCs transforms the above-mentioned principles and modalities into concrete measures (JOB/SERV/18). This decision is essentially a waiver from the MFN clause (Article II. 1) allowing Members to provide preferential and more favourable treatment to services and services suppliers of LDCs without according the same treatment to like services and services suppliers of all other members. This treatment shall be granted immediately and unconditionally	implications of injury to local services providers. Given the unique and systemic risks attached to the liberalization and deregulation of financial services and investments, the financial sector should be excluded from these agreements. Governments should insist on retaining full authority over capital movements. Mode 4 should include unskilled and non-professionals, not only the skilled professionals, otherwise this reduces most of the value of Mode 4 market access for African/Pacific countries. The 'right to regulate' should be framed in ways that guarantee governments the flexibility to respond to policy and market failure, social needs, climate change and other ecological catastrophes, and democratic and accountable decision-making by all levels of government. This is not the case in the GATS or worse still, the EPAs where the right to regulate is conditioned by the necessity for regulation instruments to be least trade restrictive, competitively neutral etc.

	necessary' (telecoms); • require services to be provided within a structure. E.g. Article 91 - courier services, notes that the service must be 'administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary'. This has ramifications on how services sectors are organized and administered and also has implications on effective universal access and affordability. • Includes a GATS-plus clause regarding new financial services. In the GATS Understanding on Commitments in Financial Services (which WTO members can sign on to if they want), the foreign supplier must be established in the host country before it can supply new financial services. Commercial presence is not required in the CARIFORUM EPA. This is a dangerous clause given how such new instruments can easily lead to financial crises.	to services and services suppliers of LDCs. The termination date of this waiver shall be fifteen years from the date it is granted. <u>On RTAs</u> GATS Article V.1 states that an RTA liberalizing services should have 'substantial sectoral coverage'. However, Art V.3 notes that for developing countries, flexibility shall be provided for in relation to national treatment and the time frame for implementation. Flexibility also applies to the requirement for 'substantial sectoral coverage'. This calls into question the EC's interpretation in the EPAs that i) developing countries need to liberalise 65 – 75% of sectors ii) there should be a standstill clause freezing services domestic regulation.	
16. Investment - **Mode 3–** Commercial presence.	The liberalisation of investment in a sector, when no restrictions have been put in place by the host country means providing EU investors the same rights as local investors. When liberalizing services in an EPA, commercial presence (Mode 3) is actually the	The EU has wanted to bring investment liberalisation (beyond GATS Mode 3) more directly into the WTO as part of the Doha Round. However, the investment issue, together with the rest of the Singapore issues were rejected by ACP countries at the 2003 WTO Ministerial Conference,	For EPAs to be WTO compatible (Article XXIV), there is no need to include investment or services issues. ACP countries in fact need to give preferential treatment to their local investors, if they are to be supported to be competitive

[15] 'Comparison Of The Legal Text On Investment And Services In CARIFORUM-EC/Pacific-EC EPAs'. http://web.me.com/jane_kelsey/Jane/Pacific_Trade_EPA_files/RP31%20Jane%20Kelsey%2019%20July%202010.pdf

	equivalent of the liberalisation of investment because it involves allowing European companies to set up subsidiaries or branches in the partner country to provide services. If we take the CARIFORUM EPA as the EU template, EU has gone beyond the GATS by asking for the liberalisation of not only the services sectors, but also non-services sectors including • agriculture, hunting and forestry • fishing • mining and quarrying • Manufacturing • Production, transmission and distribution on own account of electricity, gas, steam and hot water. This move is aimed at securing a deeper level of access to ACP countries' natural resources and markets, and ensuring that the EU has access that is better or equivalent (through the MFN clause) as that accorded to other emerging economies e.g. China. The goal of the EU to include the liberalisation of investment in the EPAs is: • to secure market access for its services firms in the host country (e.g. retail, telecoms, financial, courier etc companies) • to secure access to ACP countries' natural resources (e.g. concessions for its energy or mining companies) and raw materials that are critical to its high	and officially expunged from the Doha negotiating agenda in 2004. The African Union Conference of Ministers of Trade clearly stated: "On the issues of investment policy, [...]. We reaffirm that these issues be kept outside the ambit of Economic Partnership Agreements." (Nairobi Declaration on EPAs, April 2006)	– by giving them priority access to local natural resources, and local markets. Liberalisation of investment EU-style could permanently stymie any potential of local investors to increase their production capacities. At the heart of this issue is the EU 'treatifying' and hence making permanent their access to ACP countries' natural resources and markets and ensuring that this access is not given away to China and others. This is about locking ACP countries into what is essentially a continued colonial relationship.

	technology firms (e.g. coltan and other minerals used in cell phones, DVD players and other high tech products) • land rights and access to water so that these companies can operate where the resources and/or markets are • be able to buy the services these companies require from whomever it wants inside or outside the country • unfettered movement of capital, including profits and proceeds of sale.[15]		
17. Competition	Based on CARIFORUM EPA, enact competition legislation. These competition policies must address restrictions to competition, and establishment of competition authority within five years (Art. 127.1). What is anti-competitive is defined from the EU's perspective as: i)'agreements and concerted practice which have the object or effect of preventing or substantially lessening competition in the territory of the EC Party or of the CARIFORUM States' (Article 126(a)). ii) abuse of market power (Article 126(b)). Public enterprises and monopolies must be subject to competition rules (unless there are specific sectoral rules) (Art.129.2, 3). Adjust public enterprises of a commercial nature so that in five years 'no discrimination	On 1 August 2004, WTO member states agreed to exclude competition policy from the Doha Work Programme amongst other Singapore issues (investment and government procurement). This is because the majority of developing countries felt that providing equal treatment to foreign goods, services and investors (as would have been required if competition were incorporated) would disadvantage and even destroy their national producers.	The clauses the EU wants will have an impact on ACP countries' national investment policies, taxation, regulation of domestic services sectors (e.g. banking, distribution, mining etc), the operation of public enterprises, government procurement, state aid etc. Historically, countries have tended to take on more stringent free market competition rules only after they have become more competitive (e.g. Japan's competition law allowed for big Japanese companies to engage in 'anti-competitive practices' in order to gain strength on the international market). The EU's definition of competition (CARIFORUM EPA Art. 126), which ACP countries' competition authorities would have to comply with is therefore not suitable for ACP countries. Individual countries/ sub-regions need instead to define their own

	regarding the conditions under which goods and services are sold or purchased exists between goods and services originating in the EC Party and those originating in the CARIFORUM States or between nationals of the Member States of the European Union and those of the CARIFORUM States, unless such discrimination is inherent in the existence of the monopoly in question' (Article 129.4). This clause has far reaching implications, including possibly the introduction of government procurement liberalization throughthe backdoor. Key competition provisions are also littered through the services sectoral chapters e.g. Prevention of anti-competitive practices through "appropriate measures" in courier services (Art. 90) and tourism (Art. 111). Best endeavour cooperation between EU and CARIFORUM competition authorities – for exchange of information and enforcement cooperation. The clause on exchange of information and cooperation between the EPA partners is weak and falls short of what the EU itself was willing to do at the WTO (see its WTO proposal WT/WGTCP/W/152 of 25 September 2000).		optimal level of competition. Inclusion of competition is not required for Article XXIV compatibility. In fact, since competition has been rejected for inclusion in the Doha Round/WTO, ACP countries should not accept it in the EPA. This exclusion will make the EPAs compatible with the WTO. As a second best option, countries can negotiate a framework for cooperation with the EU, which may include technical and financial assistance to develop national or regional instruments and institutions. However, in the course of this assistance, ACP countries, not the EC, should dictate the content of their competition norms.

18. Government Procurement	Using the CARIFORUM EPA as the EU template, the public procurement chapter covers CARIFORUM Procurement of supplies - over SDR 155,000 Procurement of services – over SDR 155,000 Procurement of works –over SDR 6,500,000. For the EC, the agreement covers Procurement of suppliers – over SDR 130,000 Procurement of services – over SDR 130,000 Procurement of works – over SDR 5,000,000. Not all government offices are covered. The list for CARIFORUM and EC of the government offices covered are in Annex VI of that EPA. There are also sectors that have been exempted from the EPA procurement chapter. The EU excludes from the scope of this chapter drinking water, energy, transport and the postal sector (Annex VI, Appendix IV, Pt 1). The CARIFORUM countries only excluded energy and the postal sector (Annex VI, Appendix IV, Pt 2). The Dominican Republic added further exceptions (Annex VI, Appendix VI, Pt 7). The CARIFORUM EPA procurement chapter covers 2 main issues: 1) As long as an EU supplier is established in	This issue has been incorporated in the WTO as a plurilateral Agreement. To date, there are only 14 WTO members that are party to this Agreement, including 27 EU countries counting as 1. Most Members are developed countries and no ACP country is a member. There are 23 observers, of which 9 are negotiating accession. Of the ACP countries, only 1 country (Cameroon) is an observer to this agreement. Like the other Singapore issues, attempts to bring this issue into the Doha Round were officially rejected in 2004.	Government procurement is widely acknowledged to be a critical development and industrialisation instrument. In the financial crisis, this instrument has been used by developed countries to support their domestic companies through the crisis. There is no need to include this issue in the EPA for compatibility (Article XXIV of GATT) purposes. In fact, to bring it in line with the WTO, this should be excluded from the EPA. Any inclusion will jeopardize or make very difficult developing countries' ability to support local suppliers, as well as domestic industrialization efforts.

	one of the CARIFORUM countries, it will be treated no less favourably than a local supplier 'on the basis of degree of foreign affiliation to or ownership by operators or nationals of any Signatory CARIFORUM State or of the EC Party.' (Article 167.1.2(ii)). The risk in this clause is that EC investors can more easily locally establish themselves in the CARIFORUM countries' markets than CARIFORUM suppliers. Hence the clause provides the EC with more advantages than the CARIFORUM countries. 2) There are extremely detailed 'transparency' provisions (Articles 168-180) setting out in minute detail, burdensome procedures for the criteria for selection which has to be pre-notified; the negotiations; and bid challenges etc. This is a huge administrative load for developing countries and a capacity-strapped procurement office (more likely the case for the ACP countries) will find that it near, if not completely impossible, to turn down a very determined EC bidder.		

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READERSHIP SURVEY QUESTIONNAIRE
South Centre Analytical Note

EFFECTING CLIMATE-RELEVANT TECHNOLOGY TRANSFER TO DEVELOPING COUNTRIES: USING TRIPS FLEXIBILITIES AND THE UNFCCC

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