

THE UNIVERSITY OF THE WESTERN CAPE

Faculty of Law

The conflicting aspects of economic development within Economic Partnership Agreements: will they promote development? A case study of the East African Community Economic Partnership Agreement

A mini - thesis submitted in partial fulfilment of the requirements for the LLM in Trade, Investment and Business Law, University of the Western Cape

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List of Acronyms

| | |
|---------|--|
| ACP | African Caribbean Pacific Countries |
| AB | Appellate Body |
| CET | Common External Tariff |
| CPA | Cotonou Partnership Agreement |
| EAC | East African Community |
| EBA | Everything But Arms |
| EC | European Community |
| ECDPM | European Centre for Development Policy Management |
| EEC | European Economic Community |
| EPA | Economic Partnership Agreement |
| FTA | Free Trade Area |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| GDP | Gross Domestic Product |
| GSP | Generalised System of Preferences |
| LDC | Least Developed Country |
| MFC | Maximum Foreign Content |
| MFN | Most Favourable Nation |
| NBT | Non-Tariff Barriers |
| PTA | Preferential Trade Agreements |
| RTA | Regional Trade Agreement |
| RoO | Rules of Origin |
| SEATINI | Southern and Eastern African Trade, Information and Negotiation Institute |
| SDT | Special and Differential Treatment |
| SPS | Sanitary and Phytosanitary standards |
| TBT | Technical Barriers to Trade |
| WTO | World Trade Organisation |

CHAPTER ONE

1.1 Introduction to Economic Partnership Agreements

After negotiations since September 2002,¹ 35 African Caribbean and Pacific (ACP) countries, out of 79 initialled new trading arrangements with the European Community (EC) in November and December 2007. For these ACP countries, the new trading arrangements replaced the 25 year Lomé Convention regime, first put in place in 1975 and extended up to December 2007 by the Cotonou Partnership Agreement (CPA) concluded on 23 June 2000.²

The CPA is not a trade agreement but a 'commitment to agree' at a later date on new reciprocal trade agreements, called Economic Partnership Agreements (EPAs). EPAs are different in nature from the Lomé Convention trade arrangements under which the trade relations of the EC and ACP were governed. Whereas the Lomé Convention arrangements were non-reciprocal, and focused on preferential access of ACP exports to the EC market, EPAs are reciprocal Free Trade Agreements (FTAs) covering both trade in goods and trade in services.³

The non-reciprocal preferential market access treatment (that is charging less, no import taxes on similar products imported from elsewhere) under the CPA was scheduled to expire on 31 December 2007, the same time the waiver

¹ The first phase of Economic Partnership Agreement (EPA) negotiations was at the all ACP-EU level, and took place in Brussels from September 2002 to October 2003, with 18 main meetings. The second phase of the negotiations took place between the EC on the one hand and groups of ACP countries on the other hand up to November and December 2007 when the new trading arrangements were initialled.

² Least Developed Countries (LDC) which did not initial EPAs could export to the EC under the Every thing But Arms (EBA) initiative, and non-LDCs under the Generalised System of Preference (GSP) or if admitted the GSP+.

³ The CPA was initially signed between 77 ACP states and 15 member states of the EC on 23 June 2000 (there are currently 79 ACP states and 25 member states of the EC). The CPA envisaged that EPAs would be negotiated between ACP countries and the EC to replace the trade provisions that expired on 31 December 2007. Article 2 of the CPA provides that the CPA is based on four main principles of partnership, participation, dialogue, mutual obligations, differentiation and regionalism.

extended to the EC by World Trade Organisation (WTO) members was to expire.⁴

The EC had been asked by the WTO to bring her trading relationship with the ACP countries into conformity with WTO rules of non-discrimination among countries trading partners unless the discrimination is under the auspices of a customs union or a FTA.⁵

The emphasis given to the WTO compatibility of future trading arrangements between the EC and the ACP states derives from various factors. First, as WTO members the concerned majority of ACP states and the EC are under an obligation to ensure the conformity of their trade policies with WTO obligations.⁶

Secondly, WTO compliance is necessary to avoid the past difficulties experienced by the EC and ACP states in securing GATT/WTO approval of the compatibility of the Lomé Conventions. The same rationale arises from the successive legal challenges made by some GATT/WTO Members to the EC's regime for the importation, distribution and sales of bananas.⁷

As such, ACP countries and the EC agreed to negotiate WTO compatible EPAs to enter into force by January 2008, unless earlier dates were agreed. This was way back in 2000 under the CPA.⁸ EPAs are FTAs⁹ between the EC on the one hand and regional groupings of the ACP countries on the other. The EPAs cover a wide scope of issues, including market access,

⁴ Nahamya S., 'An overview of the EAC-EU framework EPA; what is in it for Uganda', (2008) at 1, Ministry of Tourism, Trade and Industry. Also accessible at: <http://www.mtti.go.ug>.

⁵ (n 4 above) at 1

⁶ Onguglo B. and Ito T., 'How to make EPA's WTO compatible?', Reforming the rules on regional trade agreements', (2003)40 *European Centre for Development Policy Management* at 10 <http://www.ecdpm.org> [accessed on 14 August 2008]

⁷ (n 6 above) at 10

⁸ (n 4 above) at 1

⁹ Article XXIV (8)(b) of the General Agreement on Tariffs and Trade (GATT) provides that a free trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on substantially all trade between the constituent territories on products originating in such territories. The level of "substantially all trade" referred to in Article XXIV of GATT is often interpreted by the EU as covering an average of 90% of trade between the parties. The schedule for the formation of an FTA should be completed within a "reasonable length of time" which should "exceed 10 years only in exceptional cases".

development cooperation, agriculture, fisheries, services and trade related issues.¹⁰

The East African Community (EAC) is a regional intergovernmental organisation comprised of the Republics of Burundi, Kenya, Rwanda, Tanzania and Uganda. The EAC aims at promoting closer economic cooperation among its members as well as enhancing regional stability.¹¹

Four of the five EAC countries are also members of the Common Market for Eastern and Southern Africa (COMESA) and they were part of the negotiating process between the EC and COMESA until mid 2007 when EAC decided as a region to negotiate a separate EPA. The fifth EAC member, Tanzania, also belongs to the Southern African Development Community (SADC). This overlapping membership is due to various economic and political reasons.¹²

On the other hand the European Community (EC) is one of the three pillars of the European Union (EU)¹³ created under the Maastricht Treaty (1992). It is based upon the principle of supranationalism¹⁴ and has its origins in the

¹⁰ SEATINI, 'The implications and challenges of implementing an Economic Partnership Agreement for Uganda with particular reference to the market access cluster' (2008) at 10. EPAs are a trade regime meant to ensure the continued trade preferences by those countries that sign them on EC market beyond the expiry of the Cotonou trade regime.

¹¹ Sands P. and Klein p., *Bowett's Law of International Institutions*, 5th ed (2001) at 254. East Africa is a geographically and economically homogeneous region committed to regional integration. Burundi, Rwanda, Tanzania, Uganda are all Least Developed Countries or (LDCs) while Kenya is non-LDC.

¹² The EAC, SADC and COMESA have also formed a tripartite forum with a view to negotiating an FTA between the three organizations. Thus the situation in the EAC region remains relatively complex and the EAC is embedded in the wider region with strong links to COMESA, and in the case of Tanzania to SADC.

¹³ The EU is an economic and political union of 27 member states primarily located in Europe. The main difference between the EU and EC is that, technically speaking; only the EC has legal personality and, therefore can conclude international agreements, buy or sell property, sue and be sued in court. All these are competences which the EC has, but the EU does not. The EU comprises the EC and its Member States. The EU is the political and institutional framework in which the EC's and certain Member States competences are exercised.

¹⁴ Supranationalism is a method of decision making in multi-national political communities, wherein power is transferred to an authority broader than governments of member states. Because decisions in supranational super structures are taken by majority votes, it is possible for a member-state in those unions to be forced by the other member-states to implement a decision. Unlike in a federal supra-state, member states retain nominal sovereignty, although some sovereignty is shared with, or ceded to, the supranational body. Full sovereignty can be reclaimed by withdrawing from the supranational arrangements. A supranational authority by definition can have some independence from member state governments although not as much independence as with federal governments. Supranational institutions, like federal governments, imply the possibility of pursuing agendas in ways that the delegating states did not initially envision.

European Economic Community, the predecessor of the EU. This community pillar covers trade policy among others and the Commissioner of Trade has been responsible for negotiating the EPA on behalf of all EU member states.¹⁵

In order to avoid trade disruption on the expiry of the Cotonou trade regime all the five EAC partner states and the EC initialled a framework EPA on 27 November 2007. The framework agreement covers market access offers by the parties (EAC and EC) to each other, Rules of Origin (RoO), fisheries, development cooperation clauses and a provision for continuation of negotiations beyond the original deadline of 31 December 2007.¹⁶

The parties undertook to continue negotiations with a view to concluding a comprehensive EPA, which shall comprise the subject matters listed under chapter V, no later than 31 July 2009.¹⁷

The EAC Customs Union commenced on 1 January 2005, following successful negotiations from 2000-2004. This economic union with its Common External Tariff (CET) strengthened the reasons for the EAC group to negotiate with the EC. However, persuading partner states to abandon their other configurations was initially difficult.¹⁸

¹⁵ The politics and government of the European Union at 2 http://ec.europa.eu/world/index_en.htm [accessed on 28 January 2009]

¹⁶ Mutahunga E., 'Negotiations of the EAC-EC Economic Partnership Agreement; where we are and where are going' (2008)2 at 21 *The Uganda Trade Review*; In addition to the market access offers, the text on trade in goods addresses issues of non-tariff barriers and trade defence instruments. The text also has provisions on customs co-operation between the EAC and EC customs authorities, Most Favoured Nation treatment, circulation of goods and export taxes. In effect interim EPAs are FTAs between (the groupings of ACP countries or) ACP countries and the EC member states as part of the ACP – EC co-operation. In short, the EPAs are a trade regime meant to ensure the continued enjoyment of trade preferences by those countries that sign them on the EC market beyond the expiry of the Cotonou trade regime. The EPAs would be compatible with WTO rules in that an element of reciprocity would be introduced.

¹⁷ Article 3 (2) of the EPA

¹⁸ Kiguta P., 'The EAC interim agreement an overview', (2008)7(2), *Trade Negotiation Insights* at 6 [http:// www.acp-eu-trade.org](http://www.acp-eu-trade.org) [accessed on 14 August 2008]

But by early 2007 the danger of concluding EPAs under different groupings not only for the Customs Union but also for regional integration was clear.¹⁹ However on 27 November 2007 the East African Community (EAC) and the EC initialled a framework for an EPA, in Kampala Uganda.²⁰

Under the deal the EC granted the EAC a market access offer consisting of duty free and quota free, with transitional arrangements for rice and sugar. There is also asymmetric and gradual opening of the EAC to EC goods, taking full account of the differences in levels of development between them and the EC. On its part the EAC agreed to gradually open its market for goods from the EC over 25 years, with a two year moratorium.²¹

This suspension is to enable the EAC integration process to take root. The transition period for the Customs Union will expire at the end of 2009, and the two new partner states Burundi and Rwanda will begin implementing the Customs Union from January 2010. Therefore, tariff phase-out by the EAC shall commence from 1 January 2010, with full liberalisation for trade in goods to be achieved in 2033.²²

In my view trade between the EAC partner states and the EC is a vital aspect to the former as a development tool. The key question therefore is whether given the meagre benefits attained by the EAC partner states under the non

¹⁹ (n 18 above) at 6. Initially Burundi, Kenya, Tanzania and Uganda were negotiating under the Eastern and Southern Africa (ESA) group, a configuration of the Common Market for Eastern and Southern Africa (COMESA) member states while Tanzania was negotiating under the Southern Africa Development Community.

²⁰ SEATINI, 'The EAC-EU EPA key improvements for promoting social economic development and regional integration', (2008) at 1. The trade ministers of the five EAC partner states and the Secretary General initialled on the part of the EAC, while the EU ambassador to Uganda initialled on the part of the EC. The decision for the EAC to negotiate an EPA with EC goes back to April 11 2002, when a regional Summit directed that the EAC should negotiate as a bloc for all cooperation between ACP countries and Europe. However, in March 2003, Kenya and Uganda configured under Eastern and Southern Africa (ESA) while in August that year, Tanzania joined the Southern African Development Community (SADC).

²¹ Kazooba C., 'East Africa: Region, EU Sign Tentative Trade Deal', 28 November 2007, *The New Times (Kigali)* <http://allafrica.com/stories/2007.htm> at 1 [accessed on 8 October 2008]

²² (n 21 above) at 1: According to Article 26, 11 of the Vienna Convention on the law of treaties parties to an agreement are only under an obligation to implement its terms once it has entered into force, which takes place upon ratification or after ratification if this is specified in the treaty (This is provided under Article 45 EPA). Article 18 of the Vienna Convention on the law of treaties is to the effect that on signature, a country enters into an obligation not to defeat its object and purpose prior to its entry into force.

reciprocal trade relationship that is the Lomé Convention and Cotonou trade regime, this time round will EAC partner states significantly benefit from the reciprocal EAC EC EPA.

It is worth noting that the CPA set out five important principles which constitute the building blocks for EPAs. The first and overarching principle of EPAs is sustainable development and poverty reduction.²³ The second and perhaps most revolutionary principle of EPAs is reciprocity, for the first time ACP countries were required to open their economies to a much more trading developed partner the EC.²⁴

The third principle is regionalism; EPAs are intended to become FTAs between two regions.²⁵ The reasoning behind this principle is that regional integration is seen as a major stepping stone towards further integration into the the world economy and an instrument for stimulating investment.²⁶

The fourth principle is Special and Differential Treatment (SDT). The CPA attaches great importance to SDT in EPAs, by stating that EPAs will take into account the different levels of development of the contracting parties.²⁷ Consistent with this, EPAs as of necessity must provide sufficient scope for SDT and asymmetry.²⁸

The fifth principle is WTO compatibility, the CPA states in various articles that EPAs should be compatible with WTO rules. This principle was intended to prevent the new arrangements from being challenged by other WTO members.²⁹

²³ Article 34 of the CPA

²⁴ (n 10 above) at 10. EPAs are FTAs which were established between the EC and the regions of the ACP countries.

²⁵ EPAs were built on the basis of regional integration blocks and must support them. In spite of this the EC has not ruled out conclusion of agreements with individual countries.

²⁶ (n 10 above) at 11

²⁷ Article 35 (3) of the CPA

²⁸ In this practice this means that certain ACP countries would have to be allowed longer transitional periods before their markets are fully liberalised or that certain sectors of their economies are entirely excluded from liberalization.

²⁹ Articles 34 (4) and 36 (1) of the CPA

CPA is also based on five interdependent pillars with the underlying objective of the fight against poverty: an enhanced political dimension, increased participation, a more strategic approach to co-operation focusing on poverty reduction, new economic and trade partnerships, and improved financial co-operation.³⁰

In conclusion the CPA is a global and exemplary agreement that introduced radical changes and ambitious objectives while preserving the 'acquis' of 25 years of ACP-EC co-operation.³¹

1.2 Statement of the problem

There is little dispute that the Lomé Convention, with a few notable exceptions, had failed either to promote ACP integration into the world economy or enable ACP states to maintain their market share in the EC.³² According to Eurostat data the share of ACP exports in the EC market has fallen from 6.7% in 1976 to just 3.4% in 1994. The ACP countries also experienced a declining share of world trade, dropping from 3% in 1976 to just over 1% in 1997.³³

At the same time ACP, and particularly sub-Saharan Africa, remain dependent on EC trade. In ACP Africa, dependency on trade with the EU is higher (46.21%) than for the ACP Caribbean (18.18%) and ACP Pacific (23.27%) The ACP economies have also failed to diversify their exports, with

³⁰ Article 1 of the CPA: Also see: Venter D. and Neuland., E *Regional Integration–Economic Partnership Agreements for Eastern and Southern Africa* (2007) at 89.

³¹ A non reciprocal duty-free trade arrangement constituted the cornerstone of the conventions between the ACP countries and the EC. Another privilege of the pacts was the provision of economic assistance to the ACP countries via the European Development Fund (EDF). The EDFs also financed two commodity insurance schemes viz STABEX (from French *Système de Stabilisation des Recettes d'Exportation and stabilisation of export earning in English*) and SYSMIN, respectively for countries that were dependent on agricultural exports and on the exports of mineral products. Purposely, STABEX and SYSMIN were mitigating insurance schemes intended to maintain export capacity by compensating ACP exporters of agricultural and mineral products for short-term losses suffered in export earnings.

³² Despite the range, value and longevity of trade preferences, ACP countries failed to increase or even maintain their market share in Europe, where less preferred exporters have been able to raise their market share at the expense of ACP countries.

³³ Gibb R., 'Post-Lomé: the European Union and the South' (2000)3(21) *Third World Quarterly*, 457 - 481 at 463

most states, again with a few notable exceptions, still relying on a few primary products.³⁴

It is not surprising today that four of the five EAC partner states are least developed countries (all the EAC partner states are members of the ACP group of countries) and were described by the EC as 'only marginally involved in international trade and where the bleak outlook for tackling poverty is worrying',³⁵

The EC is still Africa's largest trading partner providing a market for 51% of Africa's non-oil merchandise exports and supplying 34% of its merchandise imports in 2006. The trade relationship between Africa and the EC is thus important for the continent's development.³⁶

Whereas under the on going WTO talks the majority of the EAC partner states do not have to open their economies as part of the talks, however EAC partner states were required to open 80% to 90% of their economies to EC goods and services.³⁷ This is cardinal requirement of Article XXIV of the GATT which regulates Regional Trade Agreements (RTAs)³⁸.

The EAC partner states and the EC were divided over the desirability and applicability of reciprocity in the EPA as provided for under Article XXIV of the

³⁴ According to Eurostat data (1998), primary products dominate ACP exports to the EU, accounting for over 60% of all ACP exports. The principal products being exported are oil (25%), diamonds, cocoa, coffee, sugar and beef (all 10% or less). Not surprisingly, EC exports to the ACP largely comprise manufactured goods (84%). Clearly, EU-ACP cooperation did not promote trade expansion in ACP countries.

³⁵ Thirty-nine of the world's 48 least developed countries (LDCs) are ACP member countries.

³⁶ World Bank, 'Africa-Economic Partnership Agreements between Africa and the European Union: what to do now?' (2008) at 1 (summary report No. 45945-AFR); The EC's tariff preferences granted to ACP countries relative importance has declined over the last two decades, but the EC is still by far the largest single market for Africa's non-oil exports, absorbing 51% (\$ 24 billion) of the total share in 2006, a share that is six times the 8% share of Africa's second largest market (the US) for its non-oil exports

³⁷ Bartels L., 'The Trade and Development Policy of the European Union', (2007)18(4) *European Journal of International Law*, 715-756 at 753

³⁸ In the WTO context, RTAs may be agreements concluded between countries not necessarily belonging to the same geographical region. However RTAs are understood as establishing an element of preference in trade between parties to the agreement. Parties to RTAs offer each other more favourable treatment in trade matters than the rest of the world including WTO members.

GATT, because they are at different levels of development.³⁹ The EC's answer to this, in the case of EPA, has been that Article XXIV has sufficient inherent flexibility to accommodate the development needs of developing countries.⁴⁰

Yet Article XXIV of the GATT has been a subject of contradiction since its inception in 1947. There are those, like the EC, who find it 'extremely elastic'; those, like the ACP group of countries, who find it 'complex', 'ambiguous' and 'vague';⁴¹ and those who want it written differently.⁴²

Scholars and WTO member states cannot bring themselves to agree on its exact specifications, let alone its origins, object, and purpose.⁴³ Therefore in a way negotiating the EPA as required by Article XXIV of the GATT EAC partner states were put between a 'rock and a hard place' since the only alternative they saw was worse.⁴⁴

That said RTAs are a major and perhaps irreversible feature of today's multilateral trading system. The number of preferential agreements as well as the world share of preferential trade has been steadily increasing over the last ten years.⁴⁵

The total number of notified preferential agreements in force is currently 170⁴⁶ approximately 20 RTAs are due to enter into force upon completion of their

³⁹ Ochieng C.M.O., 'The EU-ACP Economic Partnership Agreements and the Development Question: Constraints and Opportunities posed by Article XXIV and Special and Differential Treatment Provisions of the WTO', (2007)10(2) *Journal of International Economic Law*, 363-395 at 371: Many scholars argue that reciprocity in trade agreements only makes sense among partners with at least similar economic power

⁴⁰ (n 39 above) at 371

⁴¹ (n 39 above) at 371

⁴² Ongulo B. and Ito T., 'In Defence of the ACP Submission on Special and Differential Treatment in GATT Article XXIV', (2005)67 *European Centre for Development Policy Management* at 10

⁴³ (n 39 above) at 372: A historical analysis of the origins of Article XXIV and permissive past practices within the GATT/WTO does not suggest that it was designed for North – South FTAs.

⁴⁴ Bloomer P., 'EU put Africa between a rock and a hard place', 7 December 2007, *The New Vision News Paper* at 9

⁴⁵ Crawford J. and Fiorentino R.V., 'The changing landscape of Regional Trade Agreements', (2005)8 *World Trade Organisation* at 16 http://www.wto.org/english/res_e/booksp_e/discussion_papers8_e.pdf [accessed on 10 August 2008]

⁴⁶ This number totals notifications made under GATT Article XXIV, GATS Article V, and the Enabling Clause as well as accessions to existing RTAs; for a complete list of RTAs notified to the GATT/WTO (see also: http://www.wto.org/english/tratop_e/region_e/region_e.htm)

respective ratification procedures and a further 70 RTAs are under negotiations or proposal stage.⁴⁷

It is not surprising today that most of the multilateral trade engagements are carried out in RTAs. The delayed conclusion of the Doha Development Agenda has not helped matters. Therefore this study will examine whether the flexibilities of Article XXIV of the GATT as exercised in the EAC EC EPA will enhance development of the EAC partner states.

Since the commencement of the EAC EC EPA negotiation process it was asserted by the EC that the EPA is a development tool. However, in light of the above background this study will examine whether after the deteriorated performance arising out of the non reciprocal trade preference (Lomé Convention), the reciprocal EAC EC EPA will enhance development within EAC partner states.

1.3 Hypothesis

This study is based on the investigative assumption that if the non-reciprocal trade arrangement between EAC partner states and EC did not lead to substantive social and economic development in the EAC partner states. There is a likelihood that having signed a new reciprocal WTO compatible EAC EC EPA may not necessarily result into substantial development within the EAC partner states.

Whereas under the Lomé Convention and the Cotonou trade regime trade regime were non reciprocal preferences, the EAC EC EPA is a reciprocal WTO compatible agreement which requires EAC partner states to progressively remove barriers to trade and also enhance co-operation in trade related areas with the EC.

⁴⁷ (n 45 above) at 1. The sluggish progress in multilateral trade negotiations under the Doha Development Round appears to have accelerated further the rush to forge RTAs. Between January 2004 and February 2005 alone, 43 RTAs have been notified to the WTO, making this the most prolific RTA period in recorded history.

This study therefore seeks to investigate whether the development benchmarks included in EAC EC EPA will enhance the development prospects of the EAC partner states. This is on the premise that the EAC partner states and the EC overhauled their trade relations in a bid to boost development of the EAC partner states.

1.4 Objectives of the study

The main objective of this study is to examine whether as a result signing the EAC EC EPA economic development will be substantially enhanced within the EAC partner states. As a result this study will examine requirements of the notion of reciprocity in an FTA as specified under Article XXIV of the GATT and how it was applied in the EAC EC EPA.

The study will also analyse the sectors that were included, the liberalisation schedules of the EAC EC EPA and how this likely to impact on the EAC partner states development agenda.

The study will also examine the MFN clause that was included in the EAC EC EPA. In this regard the study will examine the meaning, application, exceptions, the economic relevancy and the likely impact of the MFN clause on trade between the EAC partner states and other southern countries.

This study will conclude by making observations, conclusions from the discussions and recommendations on how the EAC partner states can best benefit from the EAC EC EPA.

1.5 Significance of the research

The value of total trade flows between the EAC and the EC is about €4.3bn (or 0.12% of EC imports), exports to the EC being dominated by a few products such as plants, flowers, coffee, vegetables, fish and tobacco. The EC mainly exports machinery, chemicals and vehicles to the EAC.⁴⁸

⁴⁸ Fact sheet on the Interim Economic Partnership Agreement: the East African Community (2009) at 2 http://ec.europa.eu/trade/issues/bilateral/regions/acp/index_en.htm [accessed on 10 April 2009]

The statistics above illustrate the fact that EAC partner states largely depend on agriculture in their trade relations with the EC. In many sub Saharan African countries the agricultural sector continues to employ 70% of the workforce, as compared to between 2-5% in EC countries, and local production is largely at subsistence level and is closely linked with people's access to food as well as ensuring food security. In Kenya, for instance, 3 million small scale farms (on less than 20 hectares), account for over 75% of the total agricultural production.⁴⁹

Despite of agriculture being the main economic activity in the EAC partner states, agriculture, fish and fishery products are the most distorted in EC. For example there are particularly high restrictions on exports of value added food products that are in competition with the products covered by various aspects of the EC's Common Agricultural Policy (CAP) and Common Fisheries Policy (CFP).⁵⁰

In light of the agricultural trade distortion it is not surprising that in many sub-Saharan African countries the percentage of population earning below US\$ 1 per day in 1990 was 46.8%, in 1999 it was 45.9% and 2004 it was 41.1%.⁵¹ As a result of the increase in poverty levels of sub Saharan African countries, this paper will examine whether the EAC EC EPA addresses the constraints faced by EAC partner states in their quest for development.

It would have sufficed if the EAC EC EPA covered goods only as per the requirements of Article XXIV of the GATT. However the EC insisted on the inclusion of '*singapore issues*', trade related issues, services and so forth. As an illustration the services sector has high potential for growth in the EAC region. The major service sub sectors are tourism and related services,

⁴⁹ Ogalo V., 'Beyond the rhetoric ensuring EPAs deliver on development', (2007) at 37

⁵⁰ (n 49 above) at 37

⁵¹ World Trade Organisation, 'Trade in a Globalizing World' (2008) *World Trade Report* at 139 http://www.wto.org/world_trade_report08_e.pdf [accessed on 9 October 2008]. See also the Millennium Development Goals Report 2007, United Nations.

education, information and telecommunication, financial services, health, energy, and construction.⁵²

In Uganda, the services sector makes up just over 42% of the GDP and has been growing at an estimated rate of 6.8% ahead of the agricultural sector, which still employs 80% of the population.⁵³ Tourism is not only a leading destination of Foreign Direct Investment (FDI), but also as the largest sub sector, it contributes over 60% annually to services. Estimates are that about 90% of the jobs advertised are in the services sector.⁵⁴

However the EAC partner states cannot compete with the multinational services giants of the EC. In fact today, developing countries control up to 70% of world trade in services, the top ten developed countries exporters control 65% of world trade in services and the share is over 90% for some sectors.⁵⁵

Much as it is widely acknowledged that trade liberalisation has the potential to help the poor increase their income and expenditure; it is also known that trade liberalisation tends to create some losers.⁵⁶ Therefore in a bid to alleviate poverty in EAC partner states the issue is whether EAC partner states should rely on trade as an engine of development.

It will also be recalled that one of the basic consideration for the introduction of EAC EC EPA relates to the poor results of the preferential and non-reciprocal trade agreements in the past. A few countries, such as Mauritius, clearly used these preferences in this case for sugar very effectively and based a successful mid-term economic strategy on them. However, generally

⁵² Mangeni F., 'Building bridges: supporting services negotiations in the East African EPA' (2009)02(8) *Trade Negotiation Insight* at 10 [accessed on 13 March 2009]; see also paragraph 24 of WTO document WT/TPR/S/171 dated 20 September 2006. Article 37 of the EAC EC EPA provides that parties will continue negotiations in the area of trade in services among others

⁵³ (n 52 above) at 10

⁵⁴ (n 52 above) at 10

⁵⁵ (n 49 above) at 27: The services sectors are financial services, computer and information services, royalties and license fees, and construction services.

⁵⁶ (n 51 above) at 139

economic performance in most ACP countries has not improved and in many cases has become worse during the decades of non-reciprocal preferences.⁵⁷

To enable trade liberalization act as an engine of growth at least three conditions must exist in addition to reductions in tariffs and trade barriers. First, there must be favourable market access. Secondly, a balance between the need to maintain important flexibilities needed by states in trade policies and need for a rule-based system from which all countries stand to benefit and lastly countries that face severe challenges like the EAC partner states assistance to increase trade growth and integration into the global economy.⁵⁸

As a consequence this paper will endeavour to examine the implication of the goods plus EAC EC EPA on the EAC regional development initiatives. In addition the study will analyse whether the EAC EC EPA contains the prerequisites to development as discussed above.

The EAC EC EPA was touted as a development tool yet it contains contains the controversial Most Favoured Nation (MFN) clause therefore this study will examine its likely impact on EAC development initiatives.

1.6 Scope of the study

EPAs are FTAs that were negotiated and initialled between the EC on one hand and regional groupings of ACP countries and in some instances individual ACP countries on the other hand. This study is limited to the EAC EC EPA.

It was the original intention of the CPA that EPAs should contribute primarily to the process of economic development and regional integration within ACP countries.⁵⁹ However, this study is limited to examining how the application of

⁵⁷ Hoestenbergh V. K. and Roelfsema H., 'Economic Partnership Agreements between the European Union and groups of Africa Caribbean Pacific Countries: Will they promote development?' (2006) 27 *United Nations University, Comparative Regional Integration Studies Occasional Paper* at 7 <http://www.cris.unu.edu> [Accessed on 25 August 2008]

⁵⁸ (n 49 above) at 16: The challenges include lack of human, institutional and production capacities, provision of adequate and well targeted Aid for Trade as assist them in their plight.

⁵⁹ Article 1 of the CPA (see also Articles 2 (a) and (b) of the EPA)

the notion of reciprocity and the MFN clause in the EAC EC EPA is likely to impact on the development prospects of the EAC partner states.

It is prudent to point out that the EAC is the only region that initialled an EPA with the same liberation schedule applying to all the partner states as result regional integration will be strengthened. This study was commenced in July 2008 and it will be finalised by May 2009.

1.7 Methodology

This study is mainly literature based as a result the sources of data will be primary and secondary sources relating to trade, investment and economic development. These include policies, treaties, declarations, books, newspapers and articles.

The paper will also make use of data and statistics compiled by the WTO, the World Bank Group, other international institutions and advocacy organisations. Some of these will be found in various libraries, on the Internet, as well as in the personal collections of individuals.

1.8 Key words and phrases

Cotonou Partnership Agreement - East African Community - Economic Development - Economic Partnership Agreement - European Community - General Agreement on Tariffs and Trade - Most Favoured Nation - Reciprocity - Regional Trade Agreements - World Trade Organisation.

1.9 Chapter outline

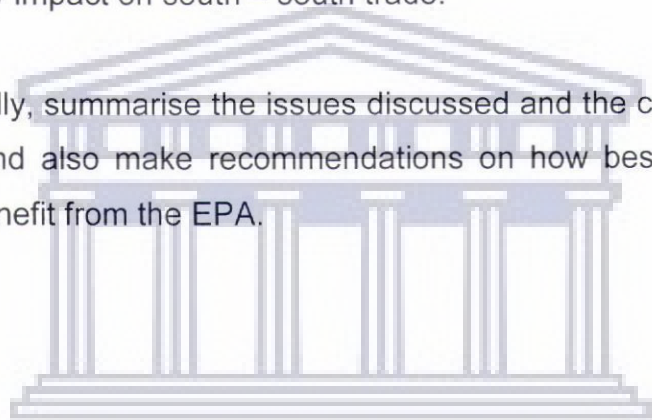
Chapter one is an introduction to the research. It defines and gives a brief background to, the trading relationship between the EC and EAC countries which led to initialling of an EPA between the two parties. Further, the aims and objectives of the study are outlined, and the chapter advances the hypothesis, gives a synopsis of the literature review, presents the methodology to be used, and outlines the out lay of the paper.

Chapter two gives a brief history of the evolution of the trade relationship between the EAC and the EC because it is pertinent to show why the EAC EC EPA has been initiated.

Chapter three examines the notion of reciprocity as provided for under Article XXIV of the GATT, what it is, how it arose, how it is applied in the EAC EC EPA, and whether as a result development will be enhanced within the EAC partner states.

Chapter four will define the principle of MFN, the application of the MFN principle, and its likely impact on south – south trade.

Chapter five will finally, summarise the issues discussed and the conclusions drawn there from, and also make recommendations on how best the EAC partner states can benefit from the EPA.



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CHAPTER TWO

Historical Background to ACP- EC Economic Relationship

'With increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent.'⁶⁰

2.1 Introduction to the history of ACP-EC economic relationship

The EC is currently the world's largest trading region.⁶¹ Europe's formal relations with the developing world are older than the EC itself. However, the shape and the content of those relations have altered significantly since the signing of the 1957 Treaty of Rome which established the EEC.⁶²

It is of course impossible to gain an understanding of the evolution of the partnership between Europe and the ACP countries without taking into account the context of decolonization (Association of Overseas Countries and Territories (OCTs) and Yaoundé Convention)⁶³, that of the new international economic order (Lomé model), the end of the cold war (updated Lomé IV) and finally the effects of globalization (Green paper and Cotonou Partnership Agreement).⁶⁴

The current relations between the EC and the ACP group of countries are the continuation of pre-existing relations between certain member states of the

⁶⁰ Frisch D., 'The European Union's development policy, A personal view of 50 years of Development Policy', (2008)15 *European Centre for Development Policy Management* at 2 <http://www.ecdpm.org/pmr15>. A declaration made by Robert Schuman, Former French Minister of Foreign Affairs on 9 May 1950 [accessed on 20 October 2008]

⁶¹ Lestrade E., 'The impact of the EU's development aid policies', (2007)13(4) *International Trade Law and Regulation* 61-66 at 61

⁶² Signed on 25 March 1957, in Part four of the Treaty of Rome and the Implementing Convention, the conditions of Association of the OCT and of France, Italy, the Netherlands, Luxembourg, West Germany and Belgium (founding members of EEC) were laid down for a five year period.

⁶³ David D., 'Forty years of Europe-ACP Relationship from economic and commercial relationship to political co-operation', (2000) September, *The Courier Special Issue-Cotonou Agreement* at 11 http://ec.europa.eu/development/body/publications/courier/courier_acp/en/en_011.pdf [accessed on 20 October 2008]. See also Article 3 of the Treaty of Rome which provided that one of the activities of the EEC was the association with the OCTs.

⁶⁴ (n 63 above) at 11

EEC and the territories that were under the jurisdiction of these states at the beginning of the European economic integration process.⁶⁵

Initially the basic purpose of the association with these territories was to promote their 'economic and social development' and to 'establish close relations' between these territories and the EEC as a whole.⁶⁶ The association agreement was characterized by two main elements, first the progressive establishment of a FTA between the EEC and the OCT, the reciprocal reduction of tariffs and quantitative restrictions.⁶⁷ Secondly, establishment of the EDF for the purpose of granting community financial aid to the OCT to promote their social and economic development.⁶⁸

The EDF was the exclusive mechanism chosen for the task of providing aid to Overseas Countries and Territories (OCTs).⁶⁹ The role of the EDF has grown significantly and it still remains one of the key instruments of Europe's policy with the developing world.⁷⁰ Trade preferences for ACP countries as well originated with the Treaty of Rome⁷¹

2.2 The Yaoundé Convention I

In the early 1960s the majority of OCTs gained their independence and new arrangements were necessary, consequently, by the mid-1960s the vast majority of African states found their relations with the EC structured through a completely new and separate treaty: the first Yaoundé Convention.⁷²

⁶⁵ Abass A., 'The Cotonou Trade Regime and the WTO Law', (2004)10(4) *European Law Journal* 440-462 at 439

⁶⁶ Matthews E.D., 'Lomé IV and ACP/EEC Relations, Surviving the lost Decade', (1991/2)22 *California Western International Law Journal* 1-58 at 13

⁶⁷ Alting von Geusau A.M.F., (ed.) *The Lomé Convention and a new international economic order*, Publication of the John F. Kennedy Institute Center for International Studies (1997) at 19

⁶⁸ Holland M., *The European Union and the Third World* (2002) at 19

⁶⁹ Part IV of the Treaty of Rome: A contractual treaty-based relationship was created that established both the basis and rationale for subsequent arrangements such as the Yaoundé and Lomé Conventions. Art. 132 (3) the contractual nature of the relationship was important as a legal obligation was established on member states to contribute to the investments required for the progressive development of OCTs

⁷⁰ (n 68 above) at 27

⁷¹ Article 131 of the Treaty of Rome provided that the purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole

⁷² (n 68 above) at 27

One of the most important problems treated during those negotiations concerned the relations with the Commonwealth countries.⁷³ In January 1963, the negotiations with the United Kingdom (UK) broke off after initialing of the Yaoundé Convention but before signing of the Convention.⁷⁴ However, this did not have any effect on the possibility of admitting developing Commonwealth countries to the group of OCT.⁷⁵ On this basis Uganda, Kenya and Tanzania appealed to be opted on the basis of the treaty of Rome.

The Yaoundé I Convention was signed on 20 July 1963 between the EEC and its member states on one hand, and the Associated African and Madagascar States (AASM)⁷⁶ on the other hand; the agreement transformed the EU – ACP relationship from a ‘licensed’ one to a ‘negotiated’ one.⁷⁷ The foundation of the convention was the recognition of the national sovereignty of the participating countries.⁷⁸

EEC Council issued a Declaration of Intent in 1963, at the time of the signing of the Yaoundé Convention, which foresaw either accession to this agreement or independent association to any country ‘which had an economic structure and production comparable to those of the Associated states’⁷⁹, which ensured an additional expansion of the EECs with the accession of the United

⁷³ (n 67 above) at 24. The commonwealth is an association of countries comprising the United Kingdom, its dependencies, and many former British colonies that are now sovereign states with a common allegiance to the British crown, including Australia, Canada, India, many countries in the West Indies and Africa. It was formally established by the statute of Westminster in 1931.

⁷⁴ (n 67 above) at 25

⁷⁵ This guarantee had been given by a declaration of intent issued by the six founding members of the EEC on April 1 February 1963, which came simultaneously into force with the signing of the first Yaoundé Convention and which was repeated at the signing of the second Yaoundé Convention.

⁷⁶ Signed in the capital of Cameroon in 1963 between the six EEC member states and eighteen African States, principally francophone countries, known as the “Associated African States and Madagascar”

⁷⁷ (n 65 above) at 440. This transformation was endorsed by the signature of the Yaoundé I Convention in 1963 between the EEC and its member states on the one hand and the Associated African and Madagascar States on the other hand and then Yaoundé II, was signed in 1969, which continued to be in effect till it was superseded by the Lomé I Convention signed between the ACP states and the EEC in 1975.

⁷⁸ (n 68 above) at 27

⁷⁹ Council Declaration of Intent issued by the six founding member states of the EEC on 1 / 2, 1963, which came simultaneously into force with the signing of the first Yaoundé Convention and which was repeated at the signing of the second Yaoundé Convention.

Kingdom to the EC⁸⁰. Pursuant to this Declaration, association agreements were concluded over the next decade with the East African Community (EAC), comprising Uganda, Kenya and Tanzania.⁸¹

The main difference between EAC association agreement of 1969 (Arusha agreement) and the Yaoundé Convention lay in the fact that no provision was made for any financial or technical aid in the Arusha agreement. The association agreement was largely a preferential trading agreement based on the principle of free trade and including institutional elements.

Interestingly, Yaoundé I created an aid and trade regime and was characterized by free access to the European market, based on the principles of reciprocity and non-discrimination. However, the GATT Working Party criticized the requirement of reciprocal advantages from less developed partners⁸²

There three distinct and original features of the convention: first, uniquely for the first time, the convention linked a range of separate development policies under a single integrated approach.⁸³ Secondly, the convention was the first example of a common contractual basis for the relations between the industrialized and the developing world. Third, the three joint institutions of the Association were created.⁸⁴ The first Yaoundé convention expired in 1969, although its provisions were renewed for a further five-year period ending in 1975.

⁸⁰ (n 37 above) at 727

⁸¹ The association agreement with Tanzania, Uganda and Kenya established on 6 June 1967 never came into effect because it was impossible to ratify it before its expiry date on 31 May 1969. However a second Arusha Treaty was concluded between the EEC and the East African countries which existed during the same period as the Second Yaoundé Convention.

⁸² (n 37 above) at 726

⁸³ (n 68 above) at 28. Also Financial aid, technical assistance and training, trade preferences and investment and capital movements were all covered.

⁸⁴ The Council, the Parliamentary Conference and the Court of Arbitration

2.3 The Yaoundé Convention II

The negotiations on the renewal of the Yaoundé 1 Convention resulted into signing of the Yaoundé II convention in July 1969. There were only a few small differences between the conventions.⁸⁵ The Yaoundé II Convention continued to be in effect till it was superseded by the first Lomé Convention (Lomé I) signed between the ACP states and the EEC in 1975. On 1 January 1973 UK, Denmark and Ireland became full members of the EC with the same rights and Obligations as the original six members.⁸⁶ The accession of the United Kingdom to EEC raised the question of Commonwealth relations which necessitated a major review of EEC external relations.⁸⁷

One of the striking features of these trade arrangements was their reciprocity in trade liberalization. At the time of the Yaoundé Conventions, however, the main reasons given for reciprocity were ideological.⁸⁸ First, it was said that only with mutual obligations could Africa negotiate as an 'equal' with Europe; second, that these obligations went 'beyond' mere contractual relations; and third, that these obligations were essential to ensure that Africa did not fall under the sway of a (non-French) economic power.⁸⁹

Overall, the economic benefits provided by the Yaoundé conventions appeared marginal and were openly criticized by the eighteen signatories and two member states, Germany and the Netherlands.⁹⁰ The Yaoundé Convention only linked Europe to a small segment of the developing world and in it the seeds of Europe's piecemeal approach to First-Third World relations can be traced.⁹¹

⁸⁵ (n 67 above) at 21. Also in order to promote the mutual trade relations, the association treaty provided for a free trade area between the community on the one hand and each of the OCT on the other hand by the gradual elimination of tariffs and quantitative restrictions that had been completed in principle on 1 July 1968.

⁸⁶ (n 67 above) at 27

⁸⁷ (n 68 above) at 28

⁸⁸ (n 37 above) at 724

⁸⁹ (n 37 above) at 724

⁹⁰ (n 68 above) at 29

⁹¹ (n 68 above) at 30

Whilst the free trade principle was seen as assisting development, in practice the limited concessions tended to maintain, even strengthen the dependency relationship. Without the principle of non-reciprocity, the charge of economic neo-colonialism was hard to refute.⁹²

Although the provisions of the Yaoundé Conventions aimed at improving trade relations between the EEC and the AASM, especially in favour of the AASM, the results of the Yaoundé Conventions, did not entirely meet expectations.⁹³ Negotiations on a successor agreement to Yaoundé II began in 1973. These negotiations were strongly influenced by the addition of twenty one Commonwealth countries and six other African countries to the nineteen Yaoundé associates⁹⁴.

The main flash point was the principle of reciprocity, which was initially defended by the EEC and a hard core of Yaoundé associates especially Senegal but strongly opposed by those joining the system⁹⁵. The opposition was successful: the EEC soon abandoned the principle, and the 1975 Lomé Convention enshrined the principle of non-reciprocal trade preferences⁹⁶.

In summary, many of the issues pertinent to Europe-Third World relations under the subsequent Lomé conventions, as well as to the future, can be traced to the earlier Yaoundé agreements.⁹⁷ From a political point of view, there was growing criticism of Yaoundé, except in the associated States: 'neo-colonialist approach', 'discrimination against those not belonging to the club'.

⁹² (n 68 above) at 31

⁹³ (n 67 above) at 22

⁹⁴ Article 1 of Protocol 22 of the UK Act of Accession (signed 22 Jan. 1972) [1972] OJ L73/177

⁹⁵ Gruhn, J., 'the Lomé Convention: Inching Towards Interdependence?', 30 *International Organisation* (1976) 241, at 251

⁹⁶ (n 95 above) at 253

⁹⁷ (n 68 above) at 33

2.4 The Lomé Conventions: I and II (1976-85)

In the mid-seventies international attention was focused on the need to develop an economic relationship between first- and third-world countries. The accession of the UK to the EEC in January 1973 made it necessary to consider how to establish relations with Commonwealth countries.⁹⁸

The Lomé Conventions were intended to promote the development of the signatory ACP states primarily via trade, economic assistance, and technical cooperation.⁹⁹ Among the other factors that helped shape the character of the original Lomé Convention, three are of particular importance to this paper. First, Lomé grew out of the need for the EC, following its first enlargement, to make provision for Britain's former colonies.¹⁰⁰ Most importantly, Lomé continued the principle of positive discrimination in favour of European ex-colonies. The roots of Lomé therefore lie in the special trading relationship established to manage the post-colonial era.¹⁰¹

As a result of the EEC expanded membership to former African and Caribbean, British colonies the EEC entered into a co-operation agreement with these states in 1975, under the first so-called Lomé Convention signed on 28 February 1975.¹⁰² The Lomé convention replaced the earlier Yaoundé Conventions of Association between the EEC, African and Malagasy associated states, the Arusha Convention between EEC and Kenya, Tanzania and Uganda, as well as special relationships between Britain and a number of Commonwealth countries.¹⁰³

⁹⁸ Lenaghan M.P., 'Trade Negotiations or Trade Capitulations: An African Experience', (2006)17 *Berkeley La Raza Law Journal* 117-137 at 129

⁹⁹ Babarinde O. and Faber G., 'From Lomé to Cotonou: Business as Usual?', (2004)9 *European Foreign Affairs Review* 27-47 at 3

¹⁰⁰ (n 33 above) at 461

¹⁰¹ (n 33 above) at 461

¹⁰² The ACP group of states was created by the Georgetown Agreement of 6th June 1975. The first Lomé Convention was signed by representatives from some fifty three countries in Lomé, the capital of Togo, on 28 February 1975. It entered into effect on 1 April 1976 and expired on 1 March 1980 (46 states on behalf of the ACP group consisting of the 18 AASM, Mauritius (which has already joined Yaoundé II in 1972), 21 Commonwealth LCD's (Bahamas, Barbados, Botswana, Fiji, Gambia, Ghana, Grenada, Guyana, Jamaica, Kenya, Lesotho, Malawi, Nigeria, Sierra Leone, Swaziland, Tanzania, Trinidad, Tobago, Tonga, Uganda, Western Samoa, Zambia) and six further African states (Equatorial Guinea, Ethiopia, Guinea Bissau, Liberia, Sudan) and the nine Member States on behalf of the EEC (Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, UK, West Germany).

¹⁰³ (n 67 above) at 15

The most distinctive feature of the Lomé Convention was a commitment to an equal partnership between Europe and the ACP.¹⁰⁴ In part, this change in approach was a response to the perception that the Yaoundé arrangements had perpetuated dependency rather than promoted development.¹⁰⁵

At the policy level, Lomé I was much more than just an extension of the preceding convention. The shortcomings of Yaoundé had been rightly criticized and Lomé sought to address these in two specific ways: first, by dropping reciprocity,¹⁰⁶ and second by introduction of an export stabilization scheme.¹⁰⁷

The Lomé II Convention was negotiated in the period 1973–75 during which a number of developments in the world economy had a profound impact on the character of the agreement. The early 1970s witnessed not only a quadrupling of OPEC oil prices but also the rapid increase in the price of many Third World commodities, including coffee, sugar, tea, phosphates and food grains. All these products were available, in potentially abundant quantities, in Europe's ex-colonies.¹⁰⁸

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¹⁰⁴ The Lomé I Convention preamble committed the signatory states to establish, on the basis of complete equality between partners, close and continuing cooperation in a spirit of international solidarity and to seek a more balanced economic order.

¹⁰⁵ (n 68 above) at 35

¹⁰⁶ Article 7 of Lomé I Convention provided that, 'In view of their present development needs, the ACP states shall not be required, for the duration of this Convention, to assume, in respect of imports of products originating in the Community, obligations corresponding to the commitments entered into by the Community in respect of imports of the products originating in the ACP states, under this Chapter'. This provision thus introduced the principle of non-reciprocity, which was a fundamental principle of the Lomé trade regime and it was included in all its successor agreements. The decision to relinquish reverse preferences and embrace non-reciprocity was of greater psychological than economic importance. The ACP states were now required to treat EC exports at least as favourably as exports from other developed nations.

¹⁰⁷ STABEX – the system for the stabilization of export earnings from agricultural commodities - was the major innovation of Lomé I. Its objective was to provide funds to ACP countries to cover production shortfalls or price fluctuations for specific agricultural products exported to Europe. STABEX can be equated with an insurance policy for the ACP: the EC guaranteed a minimum earning threshold for these specified exports and compensated for any loss of revenue caused by lower prices or loss of production. Twenty –nine products were covered under the first Convention, rising to Forty-four in Lomé II.

¹⁰⁸ (n 33 above) at 461

As a consequence, the EU was encouraged by developments taking place in the world economy to make important trade concessions to ACP demands. As well as the principle of non-reciprocity being firmly embodied in the Lomé trading agreement, a number of commodity trading regimes were established that, on the one hand, helped stabilise commodity prices for Third World producers while, on the other hand, locking those producers into servicing the European market.¹⁰⁹

Third, in order for the EC to establish a single agreement with its former colonies, the Lomé negotiations brought together a diverse group of African, Caribbean and Pacific states for the first time.¹¹⁰ Lomé also established a political infrastructure to support and legitimise the ACP group, including an ACP secretariat, and joint ministerial and ambassadorial committees.¹¹¹

The Lomé II convention varied little from the Lomé I convention framework institutionally and in basic approach: two developments were: however, introduced – a greater emphasis on the LDC and the introduction of SYSMIN.¹¹² An assessment of the impact of the first decade of the Lomé Convention has to begin by acknowledging its foresight in its commitment to partnership and desire to help integrate the economies of the developing countries into the global market.¹¹³

In my view the first decade of the Lomé Convention did not help ACP countries to integrate in the global market. The EC introduced a price stabilisation fund (STABEX and SYSMIN) for ACP countries which in effect increased their dependence on the EC rather than integrating ACP countries into the global market.

¹⁰⁹ (n 68 above) at 38

¹¹⁰ Article 4 of the 1975 Georgetown Agreement institutionalized the ACP group and gave it a permanent structure; the General Secretariat located in Brussels, Belgium headed by a Secretary General who is vested with executive powers.

¹¹¹ (n 100 above) at 462

¹¹² Under Lomé II convention SYSMIN was introduced, for mineral exports based on similar principles as STABEX.

¹¹³ (n 68 above) at 39

2.5 The Lomé Conventions: III and IV (1986 – 2000)

The Lomé III Convention sought to 'promote and expedite the economic, cultural and social development of the ACP states and consolidate and diversify relations in the spirit of solidarity and mutual trust'.¹¹⁴ In concrete terms, however, there were comparatively few innovations to the Lomé framework and as such it failed to address adequately the development crisis that engulfed the Third World during the 1980s.¹¹⁵

Unlike previous conventions, Lomé IV was a ten-year agreement (with a mid-term financial review) expiring in the year 2000.¹¹⁶ Once again, changes in the international environment were to dictate the content and direction of policy. The collapse of communism compounded the plight of ACP countries as the EC's more immediate development priority shifted to the former communist states in Eastern and Central Europe.¹¹⁷ Indeed there is a strong case that rather than heralding a new interdependence, after fifteen years Lomé had merely re-established North-South dependency.¹¹⁸

A key element in the Lomé IV was the renewed emphasis on conditionality – economic and political. For the first time, aid was explicitly earmarked for Structural Adjustment Support with financial resources coming from the existing EDF budget.¹¹⁹

Only minor modifications were made to the trade preferences of Lomé IV – despite the erosion of the so-called pyramid of privilege for ACP states – although some relaxation in the 'rules of origin' for manufactured products were gained. The only significant EU concession was to extend the basis of STABEX and SYSMIN, although this fell far short of ACP expectations.¹²⁰ By

¹¹⁴ Article 1 of the Lomé Convention

¹¹⁵ (n 68 above) at 41

¹¹⁶ After fourteen months of negotiations the new Convention between Twelve EC member states and Sixty-eight ACP states was signed on 15 December 1989 once again in the Togolese Capital of Lomé.

¹¹⁷ (n 68 above) at 41

¹¹⁸ (n 68 above) at 41. Also the more significant change was the application of conditionality, something that the ACP had previously resisted.

¹¹⁹ (n 68 above) at 44

¹²⁰ (n 68 above) at 45

the time of the scheduled 1995 mid-term review, the global development context had significantly shifted from the parameters that had set the 1989 agreement – and the shift further disadvantaged developing countries.¹²¹

By the mid-1990 the old uncertainties pertaining to development policy were under threat and a new global agenda began to shape the EC's policy towards the third world. The EC and ACP states subsequently resorted to a GATT waiver to allow the EC to maintain the Lomé trade arrangements.¹²² The GATT waiver from the obligation under Article I:1 of the GATT was granted to the EC to apply the Fourth Lomé Convention from 9 December 1994 until 20 February 2000.¹²³

The Mid-term review took place in 1994-1995, in the context of major economic and political changes in ACP countries (democratization process, structural adjustment), in Europe (enlargement, increasing attention to East European and Mediterranean partners), and in the international environment (Uruguay Round Agreement).

In response the EC issued its discussion Green paper in November 1996 on the future of Lomé, the implications were to prove far reaching to Europe and the developing world.¹²⁴

Although technically the EC Green Paper was just a consultative document, four options were outlined which suggested that a substantive, perhaps paradigmatic, change was anticipated. In the course of ACP-EC negotiations on the successor agreement to the Fourth Lomé convention, attempts were

¹²¹ Only the mid-term renewal of the financial protocol of Lomé IV Convention was mandatory, however, largely on the EC insistence, the review process was extended beyond funding issues in response to the changing global context for example the effect of liberation on the erosion of preferences and problems associated with the actual implementation of the Lomé system.

¹²² Onguglo B. and Ito T., 'How to make EPAs WTO compatible?', Reforming the rules on regional trade agreements', (2003)40 *European Centre for Development Policy Management* at 15 <http://www.ecdpm.org> [accessed on 17 November 2008]

¹²³ WTO Decision of 9 December 1994 (L/7604) http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_acp_ec_agre_e.htm [accessed on 17 November 2008]

¹²⁴ (n 68 above) at 170

made to find solutions that were WTO compatible and sufficiently flexible for ACP states.¹²⁵

The main amendments introduced were respect for human rights; democratic principles and the rule of law become essential elements of the Convention. This means that ACP countries that did not fulfill these criteria risked the retrieval of allocated funds.¹²⁶

The Lomé Conventions, which provide a legal framework for the ACP-EU partnership, are reputed to be 'the largest, the most comprehensive, and the most enduring North-South multilateral accords in the world to date.'¹²⁷ Under the Lomé Conventions, which have been revised on many occasions, ACP countries were generally entitled to non-reciprocal duty-free access to EC markets, technical and industrial cooperation, economic assistance under the EDF scheme¹²⁸ and insurance schemes to compensate Lomé states for fluctuations in earnings from primary commodity exports to the EU.¹²⁹

The Lomé convention was traditionally the major development framework: the rationale was largely historical rather than rational. What became clear during the last five years of Lomé IV was that the ACP countries could no longer rely upon either privileged access or continued financial aid from this special relationship.¹³⁰

¹²⁵ European Commission, Green Paper on relations between the European Commission and the ACP countries on the eve of the 21st century – challenges and options for a new partnership (COM(96)570final), Brussels, 20 November 1996. The first option was the continuation of the Lomé trade arrangement with variations that would allow for improvements in market access together with a relaxation of rules or agreements in a number of trade-related areas, the second option was the integration of the Lomé trade arrangement into the Generalized System of Preferences (GSP), thereby reducing the convention to an aid package, the third option required all ACP countries to extend reciprocal trade treatment to the EC, thereby promoting the integration of the ACP into the international economic system and fourth option allowed for the conclusion of agreements in various trade related areas and an agreement on services.

¹²⁶ (n 37 above) at 738

¹²⁷ Udombana J.N., 'Back to Basics: The ACP-EU Cotonou Trade Agreement and Challenges for the African Union', (2004)40 *Texas International Law Journal* 60-109 at 65

¹²⁸ The EDF is made up of voluntary contributions from the EU member states and which is the financial envelope traditionally covering each five-year Lomé Convention

¹²⁹ (n 107 and n 112 above)

¹³⁰ (n 68 above) at 51

Despite this resilience Lomé IV provoked concern about the longer-term viability of its preferential philosophy. The Uruguay round of GATT drew attention to Lomé inconsistencies with the broad principles of trade liberalization. By the year 2000 the incremental policy-making style of the Lomé convention was forced to address a globally more contemporary approach to relations with the developing world.¹³¹

In conclusion, the Lomé convention was traditionally the major development framework: the rationale was historical rather than rational. What became increasingly clear during the last five years of Lomé IV was that the ACP countries could no longer rely upon either privileged access or continued financial aid from this special relationship.

2.6 The Cotonou Partnership Agreement

On 23 June 2000, in Cotonou Benin, months of intensive negotiations culminated in signing of a new partnership agreement between the EC and its associated states from ACP¹³² for a period of 20 years commencing on 1 March 2001.¹³³

The Cotonou Partnership Agreement (CPA) was intended to serve as a transitional arrangement along the journey from Lomé-type¹³⁴ arrangements to a more reciprocal arrangement underpinning the integration of ACP economies into the global economy.¹³⁵ Thus the continuation of non-

¹³¹ (n 68 above) at 51

¹³² Matambalya A.S.T.F. and Wolf S., 'The Cotonou Agreement and the Challenges of Making the New EU – ACP Trade Regime WTO Compatible', (2001)35(1) *Journal of World Trade* 123-144, at 123

¹³³ Art. 95 (1) CPA

¹³⁴ Mutahunga E., 'The ACP-EU partnership Agreement and current Negotiations of EPAs. A presentation to the fifth course on introduction to Trade and Trade Policy Analysis organised by the Ministry of Tourism, Trade and Industry and the Uganda Programme for Trade Opportunities and Policy 2006 at 10. Art.36 (3) of the CPA provides that in order to facilitate the transition to the new trading arrangements, the non-reciprocal trade arrangements applied under the Fourth ACP-EC Convention shall be maintained during the preparatory period for all ACP countries, under the conditions defined in Annex V.

¹³⁵ Hylton G.A., 'Beyond Lomé; Challenges and Prospects for ACP countries', (2003)2(1) *Trade Negotiation Insight* at 1 <http://www.acp-eu-trade.org> [accessed on 15 August 2008]

reciprocal trade preferences constituted one transition pillar of the economic and trade cooperation under the CPA.

Therefore to continue the Lomé-type non-reciprocal tariff preferences, the EC, with the support of Tanzania and Jamaica acting on behalf of ACP states, submitted a new waiver request to the WTO in March 2000.¹³⁶ The Waiver was granted by the Fourth WTO ministerial Conference on 14 November 2001.¹³⁷

The CPA sets out five important principles which constitute the building blocks of the EPAs. First, article 34 of the CPA provides for sustainable development and poverty reduction, the second and perhaps most revolutionary principle of EPAs is reciprocity, for the first time would be required to open their economies to a much more developed partner the EU.¹³⁸

Thirdly, EPAs were intended to become FTAs between the two regions. The fourth principle of S&DT treatment is that international trade rules should be adapted to the particular economic situation of developing countries (article 35: 3 of the CPA).¹³⁹

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¹³⁶ Art. IX (3) of the Marrakesh Agreement establishing WTO Agreement provides that the ministerial conference may decide to waive an obligation imposed on a member by the WTO agreement or any of the multilateral trade agreements provided that any such decision shall be taken by three fourths of the members. The waiver was initially requested only from the GATT Article I:I derogation, as was done for the Fourth Lomé Convention. However, in June 2001 the EC also requested for another waiver for its preferential treatment in quota allocation under the banana import regime given the ambiguity as to whether it was covered by GATT Art. I:I.

¹³⁷ WTO Decision of 14 November 2001 (WT/MIN (01)/15) the waiver in effect exempted the EC from its obligations under paragraph 1 of GATT 1994 until 31 December 2007. The Decision of 14 November 2001 (WT/MIN (01)/16) a Waiver granted for EC –transitional regime for the EC Autonomous Tariff rate quotas on imports of Bananas. http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_acp_ec_agre_e.htm [accessed on 20 November 2008]

¹³⁸ (n 10 above) at 10

¹³⁹ Within the WTO S&DT has taken two forms: first, with respect to market access commitments, S&DT has been implemented through non-reciprocal trade preferences intended to provide preferential access for developing countries for developing country exports to developed country markets. Secondly, with respect to rules and disciplines, S&DT treatment developing countries can be exempted from the need to implement multilaterally agreed rules or might be asked to accept less onerous obligations. In the Uruguay Round S&DT treatment also meant offering developing countries longer implementation periods and possibly technical assistance to meet multilaterally agreed commitments.

The fifth principle is WTO compatibility, the CPA stresses in the various articles of the agreement that EPAs should be compatible with WTO rules. This principle was intended to prevent the new arrangements being challenged by other members of the WTO.¹⁴⁰

The CPA also provides for the differentiation of LDCs and non-LDCs.¹⁴¹ Article 85 (1) of the CPA specifically provides that least developed ACP states shall be accorded special treatment in order to enable them overcome the serious economic and social difficulties hindering their development so as to set up their respective rates of development. In 2002, the EU unilaterally began providing complete tariff-free, quota-free market access for all imports, except arms and ammunition from 49 LDCs the so called 'Everything But Arms (EBA) initiative'.¹⁴²

The rules of origin (RoO) under both the CPA and EC's GSP (for example EBA) are very restrictive.¹⁴³ The EC has long argued that the objective of such demanding RoO is industrial development and integration of the developing countries. However, after two decades of restrictive RoOs have not induced integrated industrial development in ACP countries or contributed to more dynamic performance.¹⁴⁴

Uganda chose to pursue an EPA with the EC as opposed to EBA initiative for two main reasons: first, the EBA is unilateral because it was not negotiated, but simply given under terms and conditions decided by the EC thus it can be withdrawn or modified anytime. Secondly, an assessment of Uganda's export

¹⁴⁰ (n 134 above) at 11

¹⁴¹ Least Developed Countries (LDCs) refers to a category of countries officially defined as such by the United Nations. It is important to stress that '*Least Developed*' is an official classification, not a neutral measure of poverty. Within the EAC Uganda, Tanzania, Rwanda, and Burundi are listed among the LDCs well as Kenya is listed as a Developing Country.

¹⁴² Article 37 (9) of the CPA provided that the EC had to start by the year 2000, a process which by the end of multilateral trade negotiations and at the latest 2005, would allow duty free access for essentially all products from all LDCs. This was building on the existing trade provisions of the 4th ACP-EC convention.

¹⁴³ The Generalised System of Preferences is an arrangement that formally allows developed countries to offer non-reciprocal preferential access to their markets for goods from qualifying developing countries. For example under the EBA initiative LDCs were granted DFQF market access to the EC, except for armaments and munitions (subject to rules of origin)

¹⁴⁴ (n 134 above) at 27

trade figures to the EC indicate that about 99% of Uganda exports preferred the Cotonou arrangement over the EBA initiative mainly because of the stringent RoO under the EBA initiative (**see annex I for a comparison of the RoOs under the EBA initiative**)¹⁴⁵

The stringency arises because under the EBA, cumulation¹⁴⁶ is only between the beneficiaries that is LDCs and with the EC. For example, if a Burundian exporter uses inputs sourced from Kenya which is not a LDC that go beyond a certain threshold, the Burundian exporter loses preferential treatment under the EBA. The exporter will have to pay the normal taxes levied on similar products from other countries such as Brazil, Australia and so on.¹⁴⁷

It will be recalled that in the period 1996 – 2000, the EC imposed three bans on all fish imports from Uganda (Tanzania and Kenya were also affected) because of what it considered poor sanitation facilities, inadequate health and environmental conditions, and a lack of basic infrastructure for processing fish. Indeed as investigations later revealed, the technology used by the fishermen in Uganda were rudimentary and did not meet international standards.¹⁴⁸

Fish-landing sites lacked elementary infrastructure for example ice, portable water, adequate shelter to protect fish from contamination, electricity to run sanitation equipment, and lavatories. At factories where fish were cleaned and filtered, sanitary, health, and environmental conditions were inadequate and layouts and structural designs were unsatisfactory.¹⁴⁹ The above scenario shows how Non-tariff barriers aggravate market access difficulties and reduce EAC partner states market opening opportunities.

¹⁴⁵ (n 4 above) at 1

¹⁴⁶ Cumulation means that a preference receiving country is permitted to use materials from other specified countries, which will then be considered as locally sourced when establishing the 'originating' status of final product so as to qualify for preferential treatment.

¹⁴⁷ (n 4 above) at 1

¹⁴⁸ (n 134 above) at 28

¹⁴⁹ (n 134 above) at 29

The CPA also included a limited MFN Declaration carried over from previous Lomé Conventions. This MFN provision only kicked-in if the ACP countries granted more favourable treatment to other developed States, which the EC would have typically perceived as its competitors.¹⁵⁰ Declaration XXXI of the CPA stated that:

‘...the ACP States shall grant the Community treatment no less favourable than that which they grant to developed States under trade agreements where those States do not grant the ACP States greater preferences than those granted by the Community.’

Though the CPA was built on the ‘*acquis*’ of twenty-five years experience;¹⁵¹ however, its text differs substantially from the Lomé Conventions in a number of ways.¹⁵² These differences are reviewed below.

The CPA is explicit as to its objectives: the reduction and eventual eradication of poverty is the prime goal of the cooperation, ‘consistent with the objectives of sustainable development and the gradual integration of the ACP countries in the world economy’, which shall be in conformity with the provisions of the WTO, this is more precise and different from the Lomé IV convention.¹⁵³

For three decades, Lomé conventions granted the ACP group non-reciprocal preferences that were more generous than the other preferential systems the EU operated.¹⁵⁴ There were two options for ACP countries to replace this after 2007. Regional groups of ACP countries could negotiate EPAs with the EC

¹⁵⁰ Baugh K., ‘The EPA and the Most Favoured Nation clause’ The Jamaica Observer 27 July 2008 at 3 <http://www.jamaicaobserver.com/columns/html> [accessed on 17 January 2009]

¹⁵¹ The CPA is based on a corpus of shared objectives and principles, as well as the trade and financial benefits, which have expanded overtime to become the Lomé ‘*acquis*’. Yet, the partnership has kept apace with an ever changing international environment to best respond to ACP needs.

¹⁵² (n 68 above) at 197

¹⁵³ Art. 167 (1) of Lomé IV provided that the main objective of the convention was to promote trade between the ACP states and the EC, taking into account their respective levels of development, while, Art. 1 of the CPA well as Article 1 of Lomé IV provided that the parties central objective was ‘to promote and expedite the economic, cultural and social development of the ACP States and to consolidate and diversify their relations . . .’ It was only in Article 15 (a) of the Lomé IV-bis that improving international competitiveness was included as an objective of trade development, but it was not an overall objective as in the Cotonou Agreement. Well as Article 34 (1) and (4) CPA provides for the smooth and gradual integration of ACP states into the world economy.

¹⁵⁴ Desta M.G., ‘EU – ACP Economic Partnership Agreements and WTO: An experiment in North – South inter – regional agreements?’, (2006) 43(5) *Common Market Law Review* 1343-1380 at 1344

that liberalize trade in a reciprocal way during a ten to twelve year period.¹⁵⁵ Least developed ACP countries could opt for the continuation of non-reciprocal preferences under the EU's preferences for the LDCs that cover almost all products.¹⁵⁶

Non-LDC ACP countries that were not in a position to conclude an EPA could try to export under the EC's Generalized System of Preferences (GSP) after 2007, which is also non-reciprocal in nature.¹⁵⁷ These options are WTO-compatible, and do away with the discrimination based on history and geography, that favoured the ACP group.

The CPA was regarded as a significant departure from the Lomé method in three ways, the nature of the partnership; the objectives to be focused on; and the ways of achieving these.¹⁵⁸ The actual innovations, however, were not quite as novel as suggested by the ECs rhetoric only the further application of good governance as a 'fundamental element' of the relation and the responsibility and accountability of ACP in this respect was new. Importantly, in contrast to Lomé's uniformity, the CPA differentiates between the levels of development of ACP states.¹⁵⁹

In my view though the CPA differed from the Lomé Conventions in that it provided for the integration of the EAC ACP countries into the global economy as opposed to mere development, it did not achieve either of the objectives. This is because EAC ACP countries did not substantially benefited from ECs preferential trading system. However it is worth pointing out that a handful of

¹⁵⁵ (n 100 above) at 472

¹⁵⁶ The aim of GSP was to remove selective trade preferences (like Lomé) while at the same time giving developing countries better access to industrialised markets. This system is indicated as the Everything But Arms (EBA) initiative with the exceptions are arms, and, temporarily, some temperate zone agricultural products. The EBA is unilateral, that is, it was not negotiated but simply given under terms and conditions decided by the EC-thus, it can be withdrawn or modified any time.

¹⁵⁷ (n 65 above) at 458

¹⁵⁸ (n 68 above) at 208

¹⁵⁹ The concept of partnership was as much the defining characteristic of Lomé conventions as it is of Cotonou Agreement. The LDCs remain principally governed by the traditional Lomé Convention approach, whilst the more economically able ACP states have the new conditions for liberalised economic partnerships applied to them.

countries like Nigeria and South Africa benefited from the ECs preferential trading system mainly due to their mineral exports.

In conclusion the CPA extended the lifetime of the non-reciprocal preferential trade arrangements of Lomé IV convention and also set an agenda for the negotiation of new trading arrangements called EPAs that replaced the CPA trade provisions as from 1 January 2008.

2.7 Comparison between the CPA and the Lomé Conventions

The CPA is different from the Lomé Conventions in four major areas. Firstly, while the Lomé Conventions aimed at promoting trade between the EC and ACP states, CPA aims at fostering the smooth and gradual integration of EAC ACP states into the global economy. The CPA is therefore not just about providing preferential trade regimes for EAC ACP countries, but also promoting their sustainable development and making substantial contribution to poverty eradication.¹⁶⁰

Secondly, the Lomé Conventions aimed at improving EAC ACP countries access to EC markets. The CPA goes further and aims at assisting EAC ACP states to enhance their production, supply and trading capacities, and helping them increase access to foreign direct investment (FDI).¹⁶¹

The CPA recognizes the important role that non-state actors play in an economy. The CPA defines non-state actors to include the private sector, civil society, local authorities and trade unions. The CPA also makes provision for their involvement in EAC ACP-EC relations through consultations and implementing programmes in their areas of concern¹⁶² well as this was not the case under the Lomé conventions.

¹⁶⁰ Mutahunga E., 'The multilateral trading system; a focus on the ACP-EU trade relations' (2006) at 6, *A paper presented at the fifth course on introduction to trade and trade policy analysis, organized by Ministry of Tourism, Trade and Industry and the Uganda Programme for Trade Opportunities and Policy*(Unpublished)

¹⁶¹ (n 160 above) at 6

¹⁶² Articles 6 and 7 of the CPA

Lastly, the CPA provides the option of broadening the scope of trade co-operation with EAC ACP states through Regional Economic Partnership Agreements. The CPA also provided for continued preferential access to the EC market for an eight year transitional period (which expired on 31 December 2007), and the framework for the negotiation of new arrangements (EPAs) that were meant to be compatible with WTO agreements.¹⁶³

2.8 From Lomé to Cotonou

The successive Lomé Conventions were a unique model in the North-South relations, combining a negotiated system of trade preferences and considerable amounts of aid.¹⁶⁴ A non-reciprocal duty-free trade arrangement constituted the cornerstone of the conventions. However the factors discussed below contributed to the abandonment of the Lomé Convention framework.

One of the distinguishing features of Lomé Conventions was the discriminatory character of its trade agreement. Thus, the Lomé Conventions discriminated positively in favour of Europe's ex-colonies at the expense of other developing countries excluded from the convention but at a similar level of development, such as Guatemala and Honduras.¹⁶⁵

Therefore, more than 90 percent of ACP exports, predominantly primary commodities, qualified to enter the EC duty free. On the one hand, the developing countries that did not enjoy the special preferences regime wanted such benefits to be extended to them. Those already benefiting from them (ACP countries), on the other hand, demanded assurances that their acquired rights would be respected, and asked the EC to support their claims.¹⁶⁶

¹⁶³ (n 160 above) at 6

¹⁶⁴ Moreau F., 'The Cotonou Agreement – new orientations', (2000) *The ACP-EU Courier Special Issue Cotonou Agreement* at 6
http://ec.europa.eu/development/body/publications/courier/courier_acp/en/en_020.pdf [accessed on 23 October 2008]

¹⁶⁵ (n 33 above) at 457

¹⁶⁶ (n 65 above) at 442

However, between the inception of Lomé Convention in 1975 and its expiration in 2000, we should have seen evidence of improvement in, say, economic growth, and capacity development and so on.¹⁶⁷ The evidence, however, is that the share of ACP products in total EC imports from third countries precipitously declined from roughly 8 per cent in 1980 to about 3 per cent in 2001.¹⁶⁸ Not only did the Lomé framework fail fundamentally to improve the economic positions of the vast majority of ACP states, some critics suggested that the historic pattern of first-third-world dependency had even become more deeply embedded.¹⁶⁹

The poor outcome of the Lomé system had also underlined the need for reform. The funding under the successive EDFs, STABEX scheme, SYSMIN scheme and the trade preferences did not prove to be sufficient to promote development in the ACP countries. These unsatisfactory results had contributed to the creation of a crisis of legitimacy amongst the donors and 'aid fatigue'¹⁷⁰

Another compelling argument for not renewing the Lomé Convention was the recognition that any new EAC ACP–EU arrangement had to be fully compatible with GATT/WTO rules. The preferential trade regime of the Lomé accord, particularly the non-reciprocal duty free entry of EAC ACP products into the EC market was a violation of the MFN principle of the GATT/WTO that aspires to establish and advance Non-discrimination among its member states.¹⁷¹

The changing of parameters of the global environment presented new opportunities and dangers based around technology and the globalisation of trading and financial systems. Crucially, the pervasive trend towards trade

¹⁶⁷ (n 65 above) at 442

¹⁶⁸ (n 99 above) at 34

¹⁶⁹ (n 68 above) at 169

¹⁷⁰ Salama C.M. and Dearden S., 'The Cotonou Agreement, A paper reviewing the negotiation process that led to the signing of the Cotonou Agreement', at 3 <http://www.e-space.mmu.ac.uk/e-space/bitstream/2173/1872/2/Dearden%20dp20.pdf> [accessed on 20 October 2008]

¹⁷¹ (n 99 above) at 28

liberalisation and the WTO orthodoxy were at odds with the traditional preferential aspects of Lomé.¹⁷²

In addition to the multilateral pressures outlined above, the debate was launched by the publication in November 1996 of the EC Green Paper on relations between the EC and ACP countries, setting out various options for the future of EC-ACP relations.¹⁷³ The fundamental questions at the heart of the debate were the geographical coverage of the new agreement and its trade arrangement.¹⁷⁴

The EC's Green paper on the future of Lomé also blamed supply-side inadequacies within ACP countries for the failure of the Lomé Conventions to promote ACP integration into the world economy. In particular, the absence of sound micro- and macro-economic policies, good governance, secure and stable investment and taxation regimes and a political economy open to foreign direct investment are all considered by the EC to be key factors behind the lack of development.¹⁷⁵

The collapse in 1989-1990 of the communist regimes of the erstwhile Soviet block and the resultant end of the cold war was an impetus for transforming ACP-EC relations. On the one hand, it broadened the horizon and scope of the external economic relations of the EC, that is, the Union had to re-define its relationship with its Central and Eastern Europe neighbours, but in the broader context of its overall external economic relations.¹⁷⁶ In other words, ACP countries would now have to compete for the attention (and resources) of the EC, because of a more immediate and urgent need in the backyard of the EC.

¹⁷² (n 68 above) at 169

¹⁷³ Forwood G., 'The Road to Cotonou: Negotiating a successor Agreement to Lomé', (2001)39(3) *Journal of Common Market Studies* 423-442 at 427

¹⁷⁴ The differences between members of the ACP were at the root of Lomé Convention incompatibility with the GATT. While the 1979 enabling clause allows for preferential trade regimes for developing countries where all developing countries are treated equally, the Lomé Conventions favoured only those in the ACP group.

¹⁷⁵ (n 33 above) at 468

¹⁷⁶ (n 49 above) at 31

In conclusion, despite the generous preferences, the potential of EAC ACP countries to expand, diversify and fully take advantage of the EC preferences were seriously constrained by four main factors; first, the persistence of barriers to market access such as highly restrictive rules of origin (RoO) applied to preferences and problems of tariff escalation. Secondly, the persistence of barriers to market entry such as non-tariff barriers related to health and safety regulations. Thirdly, severe domestic competitiveness problems and supply side constraints such as lack of infrastructure, investment and skilled labour and lastly¹⁷⁷ preference erosion associated with zero MFN rates¹⁷⁸

In my view, the above global economic conditions and factors within the EAC ACP countries combined to hinder substantial economic development resulting from the preferential trade opportunities offered by the EC. Therefore in light of the above, it was inevitable to renegotiate the EAC ACP – EC trade regime.

2.9 The New ACP-EC Economic Relationship

The main challenge for the EC was how to achieve a trade and development policy that met three conditions: it must be justified in terms of economic needs, it must be WTO compatible, and it must be sensitive to the needs of those countries which have become dependent on historical preferences.¹⁷⁹

The CPA preferences, like those under the preceding Lomé Conventions, did not comply with the WTO's '*enabling clause*'.¹⁸⁰ This clause permits developed WTO member countries to give unilateral preferential treatment to

¹⁷⁷ (n 49 above) at 17

¹⁷⁸ Preference erosion occurs when the difference between the tariffs applied to non-preference receiving countries (MFN applied rate) and that applied to preference recipients continuously narrows. As this margin approaches zero, the value of being a preference holder is eroded and at zero, the reference recipient country is said to face zero MFN. The erosion of EU preferences has been caused by continued negotiation in market access for other developing countries through bilateral and regional FTAs and multilateral trade agreements progressively lowering tariffs of all countries.

¹⁷⁹ (n 37 above) at 716

¹⁸⁰ Paragraph 1 and 2 of the WTO decision of 28 November 1979 (L/4903) on differential and more favorable treatment, reciprocity and fuller participation of developing countries enable GATT/WTO members to accord preferences to developing countries without necessarily extending such preferences to other GATT/WTO members http://www.wto.org/english/docs_e/legal_e/tokyo_enabling_e.pdf [accessed on 30 December 2008]

imports from only two groups of developing countries: either all LDCs or all developing countries. The CPA trade preferences were inconsistent with the enabling clause because they, like the earlier Lomé preferences, were not extended to all developing countries and because some EAC ACP countries were not LDCs.¹⁸¹

The primary driver of the interim EPAs has been the incompatibility of the CPA unilateral trade preferences for the EAC ACP countries with WTO rules.¹⁸² Although CPA does not specifically define EPAs, it gave quite a few important clues about them.¹⁸³

The option of EPAs under the CPA presented a key challenge for ACP states.¹⁸⁴ The challenge was particularly significant with regard to the design of the adequate terms of reciprocity and flexibility¹⁸⁵ vis-à-vis the EC, while ensuring compliance with prevailing WTO disciplines.¹⁸⁶ The EPAs are the new framework for trade cooperation between member countries of the ACP and the EC.¹⁸⁷ This co-operation is built around trade liberalisation. It involves

¹⁸¹ 'Africa: Economic Partnership Agreements between Africa and European Union; What to do now?', (2008)45945-AFR *World Bank Report* at 3 http://www.acp-eu-trade.org/library/files/WB_EN_1008_WB_Africa-EPAs-What-to-do-Now.pdf [accessed on 30 November 2008]

¹⁸² (n 181 above) at 3

¹⁸³ Article 34 (4) of CPA provides that EPAs are to be implemented in full conformity with WTO law and article 36 (1) CPA provides that the parties agree to conclude new WTO compatible trading arrangements.

¹⁸⁴ Articles 36 and 37 of the CPA provide for EPAs as the major instrument of economic and trade co-operation between ACP and EC. Therefore, EPAs are the instruments for one of the three interlinked pillars of the Cotonou Agreement. These other pillars are the Political Dialogue and Development Cooperation.

¹⁸⁵ Flexibility refers to a degree of policy discretion entitled to parties to a trade agreement with regard to its provisions and does not presume asymmetrical treatment between parties to the agreement. However, when applied to the modality of trade negotiations, where reciprocity is the norm, it may amount to Special and Differential Treatment (SDT) as the deviation from reciprocity would lead to certain asymmetry between the negotiating parties in the level of rights and obligations.

¹⁸⁶ Onguglo B. and Ito T., 'How to make EPAs WTO compatible?', Reforming the rules on regional trade agreements', (2003)40 *European Centre for Development Policy Management* at 31, <http://www.ecdpm.org> [accessed on 7 December 2008]

¹⁸⁷ An EPA is a FTA between regions in the ACP (for example EAC) and the EC. The EAC EPA come into force in January 2008 after the expiry of the waiver by the WTO (in December 2007) on the preferential market access of the ACP countries into the EC as provided under the CPA. Art. 95 (1) of the CPA provided that the CPA would expire after twenty years commencing on 1 March 2000 (that is in year 2020) therefore the EPA will be implemented simultaneously with other pillars of the CPA. However, it should be noted while the CPA has an expiry date, the EPA once signed has no expiry date. The EPA negotiations at all ACP level are in six clusters which include; market access issues, agriculture and fisheries; development issues; trade in services; trade related areas and legal issues.

among others asymmetry, in favour of the EAC party, in liberalisation of trade, in the application of trade related measures and trade defence instruments.¹⁸⁸

In conclusion, the CPA is now quickly approaching its second revision, due to take place in 2010. This time round there multiple pressures on the existing ACP-EC partnership many of which are discussed above. With the economic and political changes in the world it is increasing becoming apparent that the CPA is no longer taken seriously as it was in the past. It is worth noting that the main strength of the group is its collective bargaining and political power, gained by individual members negotiating as a bloc at the international fora. Therefore the revision in 2010 provides a good opportunity to anticipate, prepare and redefine the future of the ACP-EC relations taking into account key areas of shared interests.

Annex I illustrating a comparison of key RoO elements in the EBA initiative and CPA

| RoO Aspects | EBA initiative | CPA |
|---|---|---|
| Cumulation | <ul style="list-style-type: none"> • Bilateral cumulation • Diagonal cumulation (within four regions) | <ul style="list-style-type: none"> • Bilateral cumulation • Diagonal cumulation with SA • Full intra-ACP cumulation • Cumulation with certain 'neighbouring developing countries' |
| Tolerance/de minimis | 10% of ex-works price | 15% of ex-works price |
| Costs of documentation | Prohibitive (particularly transit) | Prohibitive (particularly transit) |
| Level of processing/value addition | Similar | Similar |
| Complexity to of general and product-specific rules | Lower | Lower |

¹⁸⁸ Article 4 (3) of the EPA

CHAPTER THREE

The notion of reciprocity

3.1 Introduction and Background to the notion of reciprocity

For the past two hundred years, trade liberalization has been gradually promoted upon the principle of reciprocity. Before World War II, reciprocal trade agreements were commonly used for tariff reduction between two states. During the post war period, how to apply reciprocal relationships among the member states had been the centrepiece of discussion on the table of the GATT.¹⁸⁹

Reciprocity originated in the equality of sovereignty. However, it is established neither as a legal system nor as a substantial regulation of international law. It can be considered merely as a basis for negotiation.¹⁹⁰ In the early history of the GATT, it could be described as a guiding beacon for nations to begin the process of dismantling trade protectionism. The principle of reciprocity, however, faced serious challenges as the GATT process developed.¹⁹¹

Reciprocity is defined as a fundamental rule by which plural parties maintain the balance of treatment by means of granting the same or equivalent rights and benefits and, or undertaking obligations to each other.¹⁹² Reciprocity is the give-to-get rule, typified by 'If I give you a break on a trade barrier on this good, then you must give me an equivalent break on the same or different good'. Reciprocity embodies the principle that altruism, giving a trade break, is practiced for selfish reasons, to get a break in return.¹⁹³ Reciprocity is that ideal which promotes exchanges of trade concessions. If one member lowers

¹⁸⁹ Yanai A., 'Reciprocity in Trade Liberalisation', (2001)1(2) *Institute of Developing Economies APEC study centre* at 1 http://www.ide.go.jp/English/Publish/Apec/pdf/apec12_trade_02.pdf [accessed on 18 November 2008]. Though the GATT was not an institution established under a treaty-based instrument like the United Nations but merely a general agreement, it has had an actual secretariat and has functioned as a de facto international institution. In this paper, therefore, the term 'the GATT' will be used as an institution and 'the GATT agreement' as an international agreement.

¹⁹⁰ (n 189 above) at 7

¹⁹¹ (n 189 above) at 7

¹⁹² (n 189 above) at 1

¹⁹³ Smith L.F., 'The GATT and International Trade', 39 (1991) *Buffalo Law Review* 919-990 at 919

a trade barrier, a country that benefits is expected to lower its own barriers in an equivalent, if not identical, way.¹⁹⁴

Under the principle of reciprocity negotiations result in tariff adjustments that generate for each participant an equal change in the volume of its imports and exports.¹⁹⁵ This principle is often denounced as reflecting unsound mercantilist reasoning. But in fact it can promote efficient trade agreements, as it serves to fix the world price between negotiating partners, so that neither partner experiences a terms-of-trade loss when tariffs are reciprocally liberalized.¹⁹⁶

3.1.2 Reciprocity in the process of drafting the ITO charter

In applying the reciprocity principle, it became questionable whether equal treatment of unequal partners in trade negotiations could ever be considered reciprocal. The first draft of the International Trade Organisation (ITO) charter in December 1945 incorporated the idea of one set of rules applying to all countries, and it contained no special provisions for developing countries.¹⁹⁷

Therefore, when the United States presented the proposed ITO charter, developing countries, such as India, China, and Latin-American countries, raised objections and demanded to insert special rules or exceptions for developing countries. After repeated negotiations and compromises between developing countries and the United States, the ITO charter contained provisions for developing countries in the third chapter of Economic Development and Reconstruction.¹⁹⁸

¹⁹⁴ (n 193 above) at 936

¹⁹⁵ The principle of reciprocity is represented in GATT/WTO practice in two ways. First, it is often associated with the broad manner in which government negotiators approach trade-policy negotiations. Second, it appears in GATT articles (e.g., GATT Article XXVIII) as a means of determining the compensation that may be sought when a trading partner modifies or withdraws a previous concession.

¹⁹⁶ Bagwell K. and Staiger W.R., 'Multilateral trade negotiations, bilateral opportunism and the rules of GATT/WTO', (2004)63 *Journal of International Economics* 1-29 at 2

¹⁹⁷ (n 189 above) at 9

¹⁹⁸ (n 189 above) at 10

Though the ITO Charter never came into force, some provisions of the draft ITO Charter survived in the GATT.¹⁹⁹

At first, the GATT was regarded as a provisional agreement until the ITO was formally established. However, it subsisted as a permanent agreement ruling the world trade system in place of the ITO Charter.²⁰⁰ The GATT did not take into consideration differing levels of economic development among participants, and it had started as an institution based on liberalism, reciprocity and formal equality.²⁰¹

3.1.3 Treatment of Developing Countries

For almost fifty years, GATT and the GATT Secretariat were at the core of the international trade system. GATT's central tenet is the promotion of free trade²⁰², and it accomplished this goal through a system that laid the foundation for an open and level playing field liberated from non-economic barriers.²⁰³ Underlying the premise of a market driven trade regime is the theory of comparative advantage according to which each nation concentrates on producing what it makes most efficiently and trades to obtain the products it makes less efficiently.²⁰⁴

¹⁹⁹ In March 1948, the ITO Charter was adopted at the United Nations Conference on Trade and Employment in Havana. Since only two countries ratified the Charter, the plan to establish the ITO lost momentum. However, in order to enforce the results of the round, parts of the ITO Charter were selected to form the core of the General Agreement

²⁰⁰ (n 189 above) at 7

²⁰¹ (n 189 above) at 10

²⁰² Free trade is an economic theory that contends that everyone in the world will be better off if each nation eliminates tariffs and other barriers to the flow of products across borders. The practice of 'free trade' departs from theory by including the export of money either for investment purposes or speculation. With firms able to move both money and products around the world, the benefits of lower prices and higher wages have not been enjoyed by most people. In addition, under recent FTA, the concept of barriers to trade has been expanded to include domestic regulations, public health and human rights measures, and environmental protection laws which inhibit business activity.

²⁰³ GATT employed four fundamental legal principles to achieve its goal of free trade. First, tariffs were declared the only acceptable trade barrier, and they were progressively reduced through a series of multilateral trade rounds. Secondly, under the MFN principle, GATT generalized tariff concessions by requiring that any tariff concessions granted to one party apply to all parties. Thirdly, the national treatment obligation sought to level the playing field between imported and domestic products. Fourthly, GATT regulated the use of quantitative restrictions (quotas) and other non-tariff barriers (NTBs), and barred subsidies, dumping, and other acts considered unfair trade practices. Of course, GATT did incorporate exceptions allowing parties to deviate from obligations when necessary.

²⁰⁴ Gordon R., 'Sub-Saharan Africa and the Brave new world of the WTO Multilateral Trade Regime', (2006)8 *Berkeley Journal of African-American Law and Policy* 79-124 at 82

Third World countries have had an uneven relationship with the world trade system. They were largely absent at the birth of GATT and through most of its evolution and growth. For African and other Third World nations, the concern during the GATT period was development, and they considered GATT to be a rich nation club rather than an ally in their development.²⁰⁵

In the preamble to GATT, the governments of the original contracting parties to the agreement state their specific objectives and the arrangement under GATT that are expected to contribute to these objectives. The preamble states:

‘Recognising that their relations in the field of trade and economic endeavour should be conducted with a view of raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding production and exchange of goods...’. ‘Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to elimination of discriminative treatment in international commerce...’.²⁰⁶

It is notable that governments don't set forth the goal of free trade, instead, governments advocate for the less ambitious goals of reciprocity and non discrimination.²⁰⁷

The principle of reciprocity, however, faced serious challenges as the GATT process developed. First, there was a problem with free riding,²⁰⁸ which originated from the contradiction between two core principles of the GATT:

²⁰⁵ (n 204 above) at 82

²⁰⁶ The GATT preamble, a similar preamble is included in the agreement establishing the WTO, the successor organisation to GATT.

²⁰⁷ Bagwell K. and Staiger W.R., ‘Reciprocity, Non-discrimination and Preferential Agreements in the Multilateral Trading System’, (2001)17 *European Journal of Political Economy* 281-325 at 282

²⁰⁸ Free rider is a casual term used to imply that a country, which does not make any trade concessions, profits from tariff cuts and concessions made by other countries in negotiations under the most-favoured-nation principle

non-discrimination and reciprocity. Concessions such as reducing tariffs and elimination of non-tariff measures given by unconditional MFN are not reciprocal but unilateral. One side that gives concessions can not expect returns from the other side.²⁰⁹

In this point, the principle of non-discrimination embodied in the unconditional MFN clause contradicts the principle of reciprocity, which is explained as one side giving to the other and the other returning with equivalency. The notion of diffuse reciprocity was able to resolve this contradiction because it regards as enough equivalents that one side gives unconditional MFN treatment and the other side gives in return commitment of unconditional MFN treatment.²¹⁰

3.1.4 The GATT Review Session (1954-55)

The GATT review session (1954-55) made no major changes in legal relations between developed and developing countries because the former still had the majority at the time and the latter had neither negotiating power nor theoretical force to cause the basis of the GATT system to be reconsidered.²¹¹

3.1.5 The late 1950s

In the late 1950s, questions arose whether the liberalism on which the GATT system was based was appropriate as a guiding principle. The primary reason was that the export performance of developing countries never improved. Most of them changed their industrial policies from import substituting industrialization to export orientation. In order to secure markets for exports, developing countries begun to demand that developed countries opened their markets unilaterally. They insisted on exceptions for reciprocity and that they be treated specially and differentially as well; they criticized strict application of reciprocity because it is extremely difficult to require the same level of concessions between states at different levels of economic development.²¹²

²⁰⁹ (n 189 above) at 8

²¹⁰ (n 189 above) at 8

²¹¹ (n 189 above) at 10

²¹² (n 189 above) at 11

In 1957, the GATT established an experts group to study the issue of trade and development. The experts group submitted the Haberlar report in October 1958, which recognized the necessity to expand market access for economic development and insisted that developed countries should liberalize and reduce tariffs, especially those on primary commodities from developing countries.²¹³

Based on the report an action programme to the GATT ministerial meeting was adopted with two goals. One was to persuade developed countries to negotiate at the round without insisting on too much reciprocity from developing countries. The other was to appeal directly for unilateral trade liberalization by developed countries). Both of these demands implied changing the concept of traditional reciprocity or permitting exceptions to reciprocity.²¹⁴

3.1.6 In the early 1960s

At the Ministerial Meeting in November 1961, the contracting parties agreed that a more flexible attitude should be taken with respect to the degree of reciprocity to be expected from developing countries, and adopted the Declaration on Promoting the Trade of Least Developed Countries, which asserted the need for unilateral concessions by developed countries.²¹⁵

One of the reasons for the concessive attitude of developed countries was that they became aware of the risk of applying strict reciprocity to developing countries. In the Cold War period, the western industrialized countries, especially the United States, came to recognize the need for unilateral

²¹³ The Haberlar report was worthy of note in that it treated the issue on trade expansion of developing countries, while Article XVIII of the GATT aimed only at restriction of imports. However, there was criticism that it took the view of establishing developing countries as suppliers of primary commodities based on the theory of comparative costs.

²¹⁴ (n 189 above) at 12

²¹⁵ The Declaration proclaimed that governments of the major industrialized areas, on whose markets the LDCs must necessarily largely depend, recognize a particular responsibility in this respect of adopting a sympathetic attitude on the question of reciprocity and also taking into account the special needs of LDC. Furthermore, at the Trade Ministerial Meeting in May 1963, the ministers accepted the objective of duty free access for tropical products with no expectation of reciprocity.

concessions as aid to developing countries which they wanted to co-opt to their camp.²¹⁶

3.1.7 Reciprocity at the Kennedy Round (1964-65) and Tokyo Rounds (1973-79) Negotiations

The most successful result of the Kennedy Round for developing countries was the special and differential treatment (SDT) embodied in the additional Part IV of the GATT. Part IV described the significance and necessity of taking into account economic differences in development. Article XXXVI (8) of the GATT 1947 setting forth exceptions to reciprocity said:

'The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties'.

This clause originated from the fundamental principle of the international law of development, which claimed that every country should gain the same profits in substance.

After long negotiation, numerous exceptions to reciprocity were granted by the industrialized GATT signatories in favour of developing countries at the Kennedy Round and the subsequent Tokyo Rounds (1973-79) as well. On June 25, 1971, the GATT granted a 'waiver' for a ten-year period to developed, preference-giving countries which could justify their deviation from the MFN clause on the basis of having to implement a GSP.²¹⁷ It was not until the adoption of the Enabling Clause in 1979 that developed countries could

²¹⁶ (n 189 above) at 13

²¹⁷ The incorporation of a GSP into the GATT system was strongly attributed to the UNCTAD elaboration of the 'Agreed Conclusion of the Special Committee on Preferences', which initiated the establishment of GSPs in the global trading system.

avoid criticism that they were deviating from their obligations under the MFN clause in giving SDT to developing countries.²¹⁸

These exceptions are referred as SDTs. It was remarkable that the GATT accepted such provisions as dividing the contracting parties into the categories of developed and developing countries, because the GATT had declared respect for the sovereign equality principle.²¹⁹

However SDTs had no effect at the tariff negotiation for the following reasons. First, Part IV of the GATT is set merely as a suggested target, and it does not prescribe any right of developing countries or any duty of developed ones. Developed countries were not obliged to give any preference to developing countries. Second, developing countries had no chance to participate in the negotiation because the Kennedy Round was conducted only by reciprocal negotiations among developed countries.²²⁰

The language on reciprocity in the body of the GATT is clear: governments seek a balance of concessions and when presented with the withdrawal of a trade concession, its trade partner is permitted to withdraw a substantially equivalent concession.²²¹ Article XXIV of the GATT 1994 also includes language that could be interpreted as pertaining to reciprocity, in that it calls for trade barriers to be eliminated with respect to substantially all trade between the constituent territories.²²² Thus, by definition, preferential trade agreements involve some degree of reciprocity because both sides are expected to make full trade concessions.²²³

²¹⁸ Yanai A., 'Legal Frameworks for North – South RTAs under the WTO system', (2004)3/4(6) *APEC Study Centre Institute of Developing Economies JETRO* at 10 http://www.ide.go.jp/English/Publish/Apec/pdf/apec15_wp6.pdf [accessed on 17 August 2008]

²¹⁹ (n 189 above) at 14

²²⁰ (n 189 above) at 14

²²¹ Freund C., 'Reciprocity in Free Trade Agreements' *World Bank Trade Development Research Group* at 1 http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/07/22/000094946_03070804204789/Rendered/PDF/multi0page.pdf [accessed on 31 August 2008]

²²² Article XXIV (8) (b) of the GATT 1994

²²³ (n 221 above) at 2

It is notable that the member governments do not set forth the goal of free trade; instead, they advocate the less ambitious goals of *reciprocity* that is reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and *non-discrimination* that is the elimination of discriminatory treatment in international commerce.²²⁴ It is also argued that reciprocity in trade agreements only makes sense among partners with at least similar economic power.²²⁵

3.2 Reciprocity in the EAC EC Economic Partnership Agreement

After thirty years, the Cotonou Preferences did not deliver a growing share of ACP exports to Europe. The ACP share of the EC market fell drastically in comparison to other developing countries over this period and the majority of exports come from comparatively prosperous South Africa and mineral rich Nigeria.²²⁶

The broad stages of the gradual and deeper integration of the EAC are the formation of a customs union (formed on 1 January 1995), a common market (to be formed on 1 January 2010), a monetary union (to be formed by 2012), and political federation (proposed shortly thereafter). Negotiations for the common market have commenced in earnest on the basis of a draft protocol commissioned by the EAC secretariat, which is expected to be completed by June 2009. According to the Treaty and the draft protocol, the common market will be characterised by free movement of goods, services, labour, and capital, and the recognition of the right of establishment and residence.²²⁷

²²⁴ (n 207 above) at 282

²²⁵ Markov H., Changing the system: a review of trade preferences, 7(2008)6 *Trade Negotiation Insight* at 4, <http://www.acp-eu-trade.org> [accessed on 18 October 2008]

²²⁶ Kabuleta P. and Hanson V., 'Good from far but far from Good', (2007/8)8(6) *Trade Negotiation Insight* at 1, <http://www.acp-eu-trade.org> [accessed on 18 October 2008]

²²⁷ Mangeni F., 'Investing in East Africa: The role of negotiations in the EAC-EU EPA', (2008/9)7(10) *Trade Negotiation Insight* at 10 <http://www.acp-eu-trade.org> [accessed on 30 December 2008]. See also Article 104 of the Treaty establishing the EAC.

The EAC configuration is an EPA negotiating region that emerged only in the final months of the five year process.²²⁸ The overall objective of the EPA is to achieve sustainable development of EAC, promoting the smooth integration and gradual integration of the EAC into the global economy and eradication of poverty.²²⁹

EPAs are intended to consolidate regional integration initiatives within the EAC ACP countries, and to provide an open, transparent and predictable framework for goods and services to circulate freely, thus increasing competitiveness of the EAC ACP countries and ultimately facilitating the transition toward their full participation in a liberalised world economy²³⁰.

There are four foundations to the EPAs which include: the fact that the EPAs serve as partnerships, that imply rights and obligations for both sides; secondly EPAs serve to foster regional integration into the world economy; thirdly EPAs foster development for these poverty stricken countries; and EPAs provide a link to the WTO, facilitating integration of the ACP countries into the world economy, thereby building on the WTO rules and defining the framework for the rules so that closer integration between the EC and ACP results.²³¹

On the one hand there are those who hold the opinion that EPAs will, in principle, be detrimental to the economies of EAC ACP states while, on the other hand, there are those who hold the opinion that EPAs could be a useful mechanism for accelerating the economic development and regional integration of the EAC ACP regions.²³²

²²⁸ Stevens C. Meyn M. Kennan J. and Others., 'The new EPAs: comparative analysis of their content and the challenges for 2008', (2008) *European Centre for Development Policy Management* at 4 <http://www.ecdpm.org/pmr14> [accessed on 7 December 2008]

²²⁹ Article 2 of the EPA

²³⁰ Justice E., 'The African Union: Building a dream to facilitate trade, development and debt relief', (2003) 12 *International Trade Law Journal* 127 - 151 at 133

²³¹ (n 230 above) at 133

²³² Pearson M., Perspectives for the EPA negotiations – challenges for the Eastern and Southern Africa Region', (2004)3(2) *Trade Negotiation Insight* at 1 <http://www.acp-eu-trade.org> [accessed on 15 August 2008]

The EC advanced two main arguments in support of its demand for the creation of FTAs between itself and regional groupings of ACP countries. The first is legal, that this is the only arrangement acceptable to the WTO. The second is economic, that such FTAs will stimulate economic development in EAC ACP countries.²³³ In EC eyes, the EPAs would provide a means to harness trade without affronting other developing countries at the WTO.²³⁴

There are a number of problems with the EC's conception of reciprocity in EPAs. Firstly, the principle of reciprocity as intended in the GATT/WTO does not necessarily carry over to North-South trade agreements, since small countries have not been required to offer reciprocal concessions to industrial countries in multilateral negotiations.²³⁵ The 1979 'Enabling Clause' also calls upon industrialised countries not to seek reciprocal concessions inconsistent with the development, financial and trade needs of individual developing countries.²³⁶

Secondly, reciprocity between developing and developed countries can be very damaging to the former because the asymmetries in economic size mean that developing countries have to make relatively larger concessions and bear disproportionately high costs of adjustment than the developed countries.²³⁷

Premature trade liberalisation can also contribute to deindustrialisation in developing countries, characterised by a decline in manufacturing, the collapse of industries, and a loss of jobs and 'tacit knowledge'. The proposition that the gap in development between EC and EAC ACP countries

²³³ Ochieng C. and Sharman T., 'Trade traps: Why EC – ACP Economic Partnership Agreements pose a threat to Africa's development', (2007) *Action aid International* at 6 <http://www.actionaid.org> [accessed on 24 September 2008]. See also: Lamy P., 'Opening of the negotiations for the Economic Partnership Agreement (EPA) between the Caribbean Forum of ACP States (CARIFORUM) and the European Union', (2004) statement by Pascal Lamy, Kingston, Jamaica, 16 April 2004, http://europa.eu.int/comm/commissioners/lamy/speeches_articles/spla220_en.htm.

²³⁴ (n 226 above) at 1

²³⁵ (n 233 above) at 6

²³⁶ Paragraph 5 Decision of 28 November 1979 (L/4903)

http://www.wto.org/english/docs_e/legal_e/tokyo_enabling_e.pdf [accessed on 29 January 2009]

²³⁷ (n 233 above) at 7

can be addressed through 'asymmetrical reciprocity or liberalisation' may not be convincing.²³⁸

Therefore in a more fundamental way EPAs go beyond what has been agreed at the WTO. By demanding reciprocal liberalisation, they contravene the long-fought for concepts of S&DT and non reciprocity, which have been embedded at the WTO since the Punta del Este ministerial declaration.²³⁹

It is also important to look at what is required for the agreements to be WTO compatible. WTO law sets minimum requirements covering free trade in goods. It does not require the inclusion of liberalisation 'multiplier' clauses, such as MFN or standstill clauses. It also does not require progression to full EPAs or the inclusion of other trade related issues, such as services or investment.²⁴⁰

The pillars of the GATT are nondiscrimination and reciprocity. Article XXIV of the GATT 1994 allows for the formation of trade blocks, has been derided as antithetical to the GATT because it permits members of a trade block to discriminate against nonmembers.²⁴¹ It is also notable that the governments agree through GATT Article XXIV to grant an important exception to MFN. This article provides conditions under which countries may form preferential agreements, which can be established as free trade areas.²⁴²

Article XXIV of GATT 1994 contains the most important rules of the WTO system on RTAs. Article XXIV authorizes derogation from the MFN principle for two types of RTAs that is FTAs and customs unions or interim agreements

²³⁸ (n 233 above) at 7. The principle of asymmetry posits that EPAs entail asymmetric and sequenced liberalisation between both parties. Asymmetry will take into account the specific economic, social, environmental and structural constraints of the EAC ACP countries including their development policy objectives and capacity to adapt to the EPA process. This implies that an EPA should be economically, socially and environmentally acceptable with regards to the development needs of EAC ACP countries.

²³⁹ Stuart L., 'Why the European Commission is wrong about EPAs', (2005)4(2) *Trade Negotiation Insight* at 3 <http://www.acp-eu-trade.org> [accessed on 15 August 2008]

²⁴⁰ Bartels L., 'The legal status of the initialled EPAs', (2008)7(3) *Trade Negotiation Insight* at 4 <http://www.acp-eu-trade.org> [accessed on 15 August 2008]

²⁴¹ (n 221 above) at 1

²⁴² (n 207 above) at 282

leading to the formation of either of these two.²⁴³ The main difference between these two forms of RTAs relates essentially to the level of integration attained or envisaged by their respective members.²⁴⁴ Article XXIV of the GATT is supplemented by the understanding on the interpretation of Article XXIV which lists several conditions, including notification to the GATT contracting parties and what is referred to as the internal trade requirement and the external trade requirement.²⁴⁵

The internal trade requirement is that '*duties and other restrictive regulations of commerce*', with some exceptions, must be eliminated on substantially all the trade within the FTA.²⁴⁶ The external trade requirement is that duties and other regulations of commerce imposed on non-FTA members may not be higher or more restrictive than they were before integration, or the interim agreement.²⁴⁷

The key provision of Article XXIV is the principle of reciprocity that all parties to a regional trade agreement must liberalise trade between them²⁴⁸. In effect, they must enter a FTA. The two main aspects to gauge reciprocity in an RTA

²⁴³ (n 154 above) at 1350

²⁴⁴ Art. XXIV 8 (a) of GATT provides that a customs union is defined as the substitution of a single customs territory for two or more territories with free movement of goods across borders within the customs union and a common external trade regime towards third parties. Art. XXIV 8 (b) of the GATT provides that a free trade area, on the other hand is an arrangement between countries which seeks to create conditions for the free flow of trade amongst themselves while preserving the independent customs territories of the constituent parties and with no need for harmonizing their respective foreign trade regimes vis-à-vis non-FTA countries. Art. XXIV 5 (C) of the GATT and the Understanding on the Interpretation of Article XXIV of the GATT 1994, paragraph 3 provides that Interim agreements in case of a customs union and a FTA are required to include "a plan and schedule" for the formation of the intended customs union or FTA within a reasonable length of time, which has later been defined to mean a period not exceeding 10 years unless justified by exceptional circumstances.

²⁴⁵ Trebilcock J.M., *Regulation of international Trade*, 3edn (2005) at 199

²⁴⁶ Art. XXIV 8 (b) of the GATT (The expression 'other restrictive regulations of commerce' has been unclear since the GATT 1947 and in the WTO, however, going by views of WTO members over the years it can be extended to cover measures referred to in Articles 1 and 3 of the GATT and national treatment – charges of any kind, method of levying duties, importation rules and formalities, internal taxes, laws and regulations affecting sale, charges on imports other than customs duties, quantitative restrictions and rules of origin)

²⁴⁷ Art. XXIV 5 (b) of the GATT

²⁴⁸ Trade liberalisation entails the elimination of 'cross border policy barriers' between countries such as tariffs, quotas and other restrictions on trade. Trade liberalisation can impact a country's development prospects through various channels which may include government revenue and spending, food security, policy space, households and markets, and economic growth.

are liberalisation of '*substantially all trade*' and implementation of concessions over a reasonable length of time.²⁴⁹

As '*substantially all trade*' has not been defined anywhere in the WTO, the only source of interpretation is the Appellate Body report in *Turkey – Textile*²⁵⁰ (DS34). Paragraph - 48 of the report states that:

'...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 trade*' is not the same as all the trade, and also that '*substantially all trade*' is something considerably more than merely some of the trade... Thus we agree with the Panel that the terms of sub-paragraph 8(a)(i) offers 'some flexibility' to the constituent members of a customs union when liberalizing their internal trade in accordance with this subparagraph'.

It should be stated here that the above ruling clarifies Art. XXIV (8)(i)(a), which covers Custom Unions and not FTAs which are covered by Art XXIV(8)(b) of the GATT. However, since the terms '*substantially all trade*' have a similar function in both subparagraphs and that the relevant difference between a Custom Union and a FTA in this connection is only on the origin of covered goods, it can be assumed that Appellate Body's interpretation of Art. XXIV (8) (a) (i) can also be applied to Art. XXIV (8) (b)²⁵¹ in this connection, EU understands '*substantially all trade*' to cover almost 90% of total volume of trade.²⁵²

²⁴⁹ South Centre, 'Understanding the Economic Partnership Agreement', (2007) *SC/AN/TDP/EPA/1* at 8 <http://www.southcentre.org> [accessed on 31 August 2008]

²⁵⁰ Paragraph 48 of the Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, (*Turkey – Textile*), WT/DS 34/AB/R, adopted on 19 November 1999 DSR 1999: VI, 2345

²⁵¹ Alavi A. Gibbon P. and Mortensen N.J., 'EU-ACP Economic Partnership Agreements: Institutional and Substantive Issues', (2007) *Danish Institute for International Studies* at 17 <http://www.diiis.dk> [accessed 24 September 2008]

²⁵² Within the on-going WTO negotiations on Article XXIV, EC has argued that 90% of volume of trade corresponds to '*substantially all trade*'. According to the EC some products would be excluded from the list however since the Doha negotiations are not concluded, there is no consensus on this issue.

In my view, many ACP countries were hesitant to sign EPA with EC because they are used to receiving non reciprocal trade preferences yet under EPAs EAC ACP countries are required to reciprocate. A number of ACP countries are LDCs which an option to use the Every But Arms initiative well as the other developing countries would have used the Generalised System of Preferences (GSP) certifying the WTO compatibility requirements however the EC was not willing to consider these options.

3.3 Trade and Tariff liberalisation in EAC EC EPA

The framework agreement (EAC EC EPA) covers primarily trade co-operation between the parties focusing on market access as the main area of contention and to some extent the fisheries cluster. The agreement is by its nature interim pending the conclusion of a comprehensive EPA in 2009.

According to Peter Kiguta (the EAC Director General of Customs and Trade), under the EAC EC EPA framework agreement, the EC granted the EAC partner states duty and quota-free (DFQF) market access²⁵³ with transitional arrangements for rice and sugar from 1 January 2008.²⁵⁴ On their part, the EAC partner states agreed to gradually open their markets for goods from the EC over 25 years (It covers 100% of EC tariff lines and 74% of EAC tariff lines), with a 2 year moratorium.

This suspension is to enable the EAC integration process to take root. The transition period for the Customs Union will expire at the end of 2009, and the two new partner states Burundi and Rwanda will begin implementing the Customs Union from January 2010. Therefore, tariff phase-out by the EAC partner states shall commence from 1 January 2010 with full liberalisation for

²⁵³ Market access was initially the only subject of an FTA. Services and Intellectual Property Rights were introduced to the multilateral trading system through the Uruguay Round that concluded in 1994. Investment, Government Procurement and Competition Policy known as Trade Related Issues or Singapore Issues were first introduced into the WTO through its ministerial conference in 1996 held in Singapore.

²⁵⁴ (n 18 above) at 6. In order to prevent any trade disruption the framework agreement maintains the same Rules of Origin, Fisheries, Development Co-operation clauses of the Cotonou trade regime during the period of the negotiation for the comprehensive EPA.

trade in goods to be achieved in 2033.²⁵⁵ The EAC EPA configuration is also the only African region in which all signatories have identical schedules.²⁵⁶

The EPA promises to provide greater certainty of market access than can voluntary preferences. Under the GSP (for example the EBA) is subject to periodic review and withdrawal, creating uncertainty that deters private sector investment needed to diversify export production in EAC ACP countries.²⁵⁷ The analysis below further discusses the potential benefits and constraints that are likely arise as a result of the initialed EAC EC EPA.

Table 1: summary of the schedule for liberalization by EAC (source)²⁵⁸

| GOODS/PRODUCTS TO BE LIBERALISED | EAC CET | PERIOD OF LIBERALISATION | OF VALUE, US \$, LIBERALISED | % OF TRADE LIBERALISED |
|--|---------|--------------------------|------------------------------|------------------------|
| 2008-2009 (Transition Period) | | | | |
| Raw materials and Capital goods | 0 % | By 2010 | 1,725,753,302 | 64% |
| Intermediate Products | 10% | 2015-2022 | 416,830,776 | 16% |
| Finished Products | 25% | 2020-2032 | 65,507,218 | 2% |
| Total trade to be liberalised by EAC | | | 2,208,091,296 | 82% |
| Total trade not to be liberalised by EAC | | | 469,750,967 | 18% |
| Total EAC Imports from EC | | | 2,677,842,263 | 100% |

In light of the above EAC EC EPA liberalisation schedule, one can note that liberalization will occur in three tranches. In the first phase by 2010, the EAC partner states will liberalise 64% of imports from the EC. The products covered at this phase are already zero-rated under the EAC customs unions common external tariff (CET). This covers mainly industrial inputs or raw

²⁵⁵ (n 18 above) at 6. The year 2010 was chosen because of the need to allow new members of the EAC customs union that is Burundi and Rwanda to fully implement instruments of the customs union.

²⁵⁶ (n 228 above) at 23

²⁵⁷ (n 10 above) at 27

²⁵⁸ (n 18 above) at 6

materials and capital goods (for example machinery and pharmaceuticals etc).²⁵⁹

In the second phase (2015-2023) the EAC partner states will liberalise 16% of imports from the EC so that after so that after 15 years from January 2008, 80% of the exports from the EC will enter the EAC market duty free. The products covered at this phase will include intermediate good used in the production process as well as goods whose availability at lower costs would enhance competitiveness for example spare parts, instruments for use by small scale enterprises, data transmission apparatus such as telephone sets for the telephony; videophones(excluding line telephone sets with codeless handsets and entry-phone systems).²⁶⁰

Finally in 2020-2033, the EAC partner states will liberalise 2% of imports from the EC. These will include finished products whose availability at lower costs is deemed to have consumer welfare-enhancing effects or products that are deemed to have a potential to contribute to exploitation of the EPA. Thus after 25 years from the date the EPA enters into force 82% of imports from the EC will be liberalized.²⁶¹

This makes the EAC EC EPA the one with the longest transition period.²⁶² These are all based on reductions from the EAC CET and none requires a country to start removing any positive tariffs until 2015. Any liberalisation before that date, therefore, needs to be judged as a customs union effect rather than an EPA effect.²⁶³

It can be noted that EAC partner states will not be subjected to substantial revenue losses in the first phase of liberalization since the liberalized products

²⁵⁹ SEATINI 'Implication of the EAC-EU Economic Partnership Agreement for Uganda's fisheries sector', (2008) *SEATINI* at 33 (A study commissioned by SEATINI also available at www.seatini.org)

²⁶⁰ (n 259 above) at 33

²⁶¹ (n 259 above) at 33

²⁶² (n 228 above) at 23

²⁶³ (n 228 above) at 23. The CET effect is defined in the case of the EAC, liberalisation commitments are expressed not in relation to the current applied tariff but in relation to the agreed CET of the customs union until 2010, any changes from the *status quo* needed to reach the agreed levels after 2010 is the EPA effect).

are zero-rated. In the second phase though the EAC partners states will suffer revenue losses this will be balanced by the fact that the products will be used in the production processes therefore enhancing competitiveness of the local industries, small and medium enterprises. In the last phase the EAC partner states will face substantial revenue losses because of the nature of the liberalized goods and in addition, locally produced goods will face stiff competition from European goods.

The EAC offer has an exclusion list of 18% of substantially all trade with EC. The proportion of imports (in 2004 – 2006) that are being excluded from liberalisation for the region as a whole is 18%, but this varies between countries (because they import different things) from a low for Uganda (of 17.3) to a high for Burundi (of 23%).²⁶⁴ The exclusions of the EAC EPA include: agricultural products, wines and spirits, chemicals, plastics, wood based paper, textiles and clothing, footwear, glassware.²⁶⁵

The criteria for including products on the exclusion list included contribution to rural development, employment, livelihood sustainability, promotion of food security, fostering infant industry and contribution to government revenues. Care was also taken to include products subsidised by the EC on the sensitive products list. Products which were deemed to contribute or to have a potential to contribute to increased production and trade competitiveness were excluded from the list.²⁶⁶

Therefore, liberalising the remaining 82% is based on the CET which has three tariff bands, namely: 0% (raw materials, capital goods and essential imports such as medicines); 10% (intermediate goods); and 25% (finished goods). The EAC also has a sensitive list of 59 items that attract additional protection above the maximum tariff rate of 25% (see table).

²⁶⁴ (n 228 above) at 26

²⁶⁵ European Centre for Development Policy Management 'EPA negotiations: where do we stand?' (2008) *ECDPM* at 6 <http://www.ecdpm.org/epa> [accessed on 9 August 2008]

²⁶⁶ (n 4 above) at 3

There is a *de facto* seven year moratorium on this liberalisation (as it does not begin until 2015) and it occurs over 18 years. The lock-in of raw materials and capital goods at 0% in 2010, which represented 64% of EAC-EU trade, was consistent with the Ugandan national trade policy's view of competitiveness enhancing measures for local enterprises.²⁶⁷

For these categories of goods, the private sector saw '*policy space*' as policy uncertainty. It was thus deemed more beneficial to leverage this category to get a moratorium period in line with national competitiveness strategies. A mechanism to assure asymmetry between LDCs and non-LDCs was built into the EAC's list of sensitive products.²⁶⁸

In my view under the first and second tranche of EAC EC EPA liberalisation, the goods are zero rated for example medicines and subjected to 10% CET (that is intermediary goods) respectively so as to encourage the long development and competitiveness of the local industries. However the concern is whether with such liberalisation and after the establishment of local industries within the EAC, the local industries will be position to favourably compete with goods from the EC in the long run. In case the local produce can not compete with goods from the EC, this will hinder manufacturing activities within the EAC consequently increasing unemployment in the region and economic dependence on the EC.

The EC also insisted on the inclusion of a standstill clause,²⁶⁹ which is not required under WTO rules. This freezes tariffs on all trade between parties, regardless of whether these products are subject to liberalisation. As a result, even if a product is on the 'exclusion list' and therefore privy to liberalisation, the tariff cannot be raised after entry into force of the agreement.²⁷⁰

²⁶⁷ Haywood K., 'Uganda's EPA: getting the process right', (2008)7(2) *Trade Negotiation Insight* at 7 <http://www.acp-eu-trade.org> [accessed on 18 October 2008]

²⁶⁸ (n 4 above) at 7

²⁶⁹ Article 13 of the EPA provides that except for measures adopted according to Articles 19 and 21, the parties agree not to increase their applied customs duties in their mutual trade.

²⁷⁰ Ong'wen O., 'Understanding Kenya: post election crisis, land and the interim EPA', (2008)7(5) *Trade Negotiation Insight* at 10 <http://www.acp-eu-trade.org> [accessed on 15 August 2008]

The removal of export taxes was another request made by the EC. Export taxes have been used for raising revenue in some developing countries, accounting for more than 20% of government income in Burundi. Yet, the EPA forbids the introduction of new taxes including export taxes with only limited carve outs.²⁷¹ In agricultural value chains, the use of export taxes can prove particularly worthwhile in maintaining supplies to processing industries during times of periodic drought. Failure to ensure the flow of raw materials to processing industries could discourage investment and limit 'value added' processing activities.²⁷²

On export taxes, the agreement preserves EAC's right to continue to levy existing export-related taxes (for example on hides and skins), while allowing the introduction of new export-related taxes in order to foster the development of domestic industry (that is value addition) or for foreign exchange stability. (In this respect, the EAC EPA is different from other regional EPAs where the practise is prohibited altogether)²⁷³

3.3.2 Revenue Loss

The EC argues that revenue losses from tariff elimination constitute 'short-term adjustment costs' which would be overcome quickly through, for instance, re-structuring African tax systems, which have long been viewed as inefficient. This argument is fundamentally flawed. Admittedly, shifting taxation away from tariffs has proved extremely difficult for many African governments tariffs accounted for 31% of total tax revenue in Africa in 1975, yet by 1995 had declined by only 4% to 27%.²⁷⁴

While some African countries have inefficient tax systems, many have undergone significant restructuring since 1995, through a range of tax measures aimed at expanding the tax base and making them more efficient.

²⁷¹ (n 267 above) at 10

²⁷² Rumpf H., 'Accommodating regional realities and challenges for the SADC EPA configuration'(2008)7(3) *Trade Negotiation Insight* at 6 <http://www.acp-eu-trade.org> [accessed on 15 August 2008]

²⁷³ Article 15 of the EPA

²⁷⁴ (n 233 above) at 20. See also Keen M., and Ligthart J.E., 'Coordinating Tariff Reduction and Domestic Tax Reform', (1999) *International Monetary Fund* at 3.

These include for example the introduction of the value-added tax (VAT), taxes directed at farmers and other low-income groups, as well as local state or council taxes.²⁷⁵

One of the best known types of costs that the entry into force and implementation of EPAs that will generate concern is the loss of customs revenue due to the elimination of import tariffs.²⁷⁶ The reduction and eventual elimination of tariffs collected on EC imports is indeed likely to result in significant losses in government revenue. The extent of the impact of tariff reduction on government revenue is difficult to quantify as it depends on several variables.²⁷⁷

However, two of the most significant elements determining which countries will be most affected include the relative weight of tariffs within a country's fiscal revenues, that is, the more a government relies on customs revenue, the greater the impact is likely to be; and, the relative importance of the EC as a trading partner for a specific EAC ACP country. Since tariffs will be eliminated only on EC imports (not imports from other countries), the impact will be greater where the EC is a country's main source of imports.²⁷⁸

Hypothetical revenue loss is obtained by applying the base applied tariff (where known) to the value of imports in the reference year in order to produce the hypothetical revenue currently being collected. In other words, if imports are € 100 and the tariff is 15%, the hypothetical revenue is €15. This assumes that collection is 100% efficient and that there are no rebates, which is unrealistic. It also assumes that all tariffs are known, which the case is not always.²⁷⁹

²⁷⁵ (n 233 above) at 20

²⁷⁶ Article 6 of the EPA defines a customs duty to include any duty or charge of any kind imposed on or in connection with the importation of goods, including any form of surtax or surcharge in connection with such importation.

²⁷⁷ South Centre 'EPAs and development assistance: Rebalancing rights and obligations', (2008)12 *SC/AN/TDP/EPA/19* at 9 <http://www.southcentre.org> [accessed on 30 December 2008]

²⁷⁸ (n 277 above) at 9

²⁷⁹ (n 228 above) at 15

Table 2: Hypothetical revenue loss in EAC partner states (source)²⁸⁰

| Country | Hypothetical revenue (\$000) on all items being liberalised | Hypothetical revenue (\$000) on 2 nd tranche items | 2 nd tranche share |
|----------|---|---|-------------------------------|
| Burundi | 4,827 | 4,368 | 91% |
| Kenya | 39,515 | 26,884 | 68% |
| Rwanda | 3,019 | 2,144 | 71% |
| Tanzania | 16,718 | 12,906 | 77% |
| Uganda | 8,746 | 6,721 | 77% |

In the EAC none of the countries will liberalise any positive duty tariff during the first tranche the table indicates the proportion of hypothetical revenue that will be lost by the end of the second tranche. In other words, the impact indicated in the table will not be felt until 2023, giving countries a relatively long time to adjust. But by that time all countries will have had to put in place alternative revenue sources since they will have lost the greater part of their tariffs on imports from the EC.²⁸¹

In the case of Rwanda it is noted that the possible tariff revenue losses would not be too significant given that a majority of goods from the EC market already enter Rwandan markets either duty-free or with relatively low tariffs. At the same time, some of the goods with the highest tariff revenue generation will be excluded from liberalisation according to the tariff schedule.²⁸²

However, Rwanda far from diversifying its production or markets, country will become further entrenched in its dependence upon EC markets and agricultural commodities and its potential to industrialise undermined. Moreover, other countries in the region will also suffer as a result of increased EC imports of industrial goods into the region. Kenya, for example, is attempting to diversify and has been developing light industries producing

²⁸⁰ (n 228 above) at 23

²⁸¹ (n 228 above) at 23

²⁸² Sodipo B., 'The EAC interim EPA and Rwanda', (2008)7(2) *Trade Negotiation Insight* at 10 <http://www.acp-eu-trade.org> [accessed on 15 August 2008]

small electrical equipment as well as car spare parts, but this diversification strategy could be hampered by the EPAs reform.²⁸³

Although the liberalisation schedules are the same, their impact is determined by the level and distribution of imports from the EC in the recent past. Countries that import from the EC large quantities of items that will be liberalised earlier in the EPA process will face a more rapid adjustment shock than those that do not.²⁸⁴

Given the prominence of the EU imports into these countries and the reliance of majority of African countries on tariff revenues, the tariff dismantlement will result in all cases in significant revenue shortfalls.²⁸⁵ The EPAs, if no appropriate measures are put in place to forestall the macroeconomic imbalances that are likely to result from the falling revenues, will have the possibility of undermining the developmental objectives of the EAC ACP countries.

In my view the EC is the largest trading partner with EAC ACP countries in terms of volume of trade, the elimination of tariffs only relates to imports from the EC and not third countries. Therefore EAC partner states will continue to obtain revenue from imports originating in China, USA, Japan and several other countries that export to the EAC.

The EC was not prepared to grant full DFQF market access to EAC partner states in 2008. Exports of rice will continue to attract a tariff until 1 January 2010 at which point it will become duty free while exports of sugar will continue to attract a tariff until 1 October 2009. Between 2008 and 2009, EAC partner states will be granted a quota of 15,000 tonnes of white sugar which is additional to the current quotas under the sugar protocol. Products where the

²⁸³ Weller C., 'The real cost and benefits of Economic Partnership Agreements' (2007) at 3 <http://www.traidcraft.co.uk/OneStopCMS/Core/CrawlerResourceServer.aspx?resource> [accessed on 31 August 2007]

²⁸⁴ (n 228 above) at 23

²⁸⁵ United Nations Economic Commission for Africa, 'The economic and welfare impacts of the EU-Africa Economic Partnership Agreements', (2005) *Trade Negotiation Insights* at 5 <http://www.acp-eu-trade.org> [accessed on 18 October 2008]

EC has previously levied taxes on EAC imports now do not attract ant taxes when exported to the EC.²⁸⁶

In conclusion, therefore, the initial impression of the EAC liberalisation schedule is that the approach and provisions of the EPA support EAC regional integration, the EPA effect will not start until 2015 and will be completed over 26 years from now, giving the region a good period of time within which to adjust, the effects of the EPA induced liberalisation on producers and consumers will be end loaded because the cuts will be from the CET, with most of the highest tariff items being reserved for the final tranche. However, the revenue impact will be faced in the middle of the implementation period and will be severe. Therefore there is a need to restructure and diversify the revenue sources of EAC partner states in order to adjust under the new reciprocal trade system.

3.4 Fisheries

There are a number of factors that compelled the EC to push for an agreement in the fisheries sector which has a bearing on EAC ACP countries as well. First, it is common knowledge that the commercial fish stocks (mainly the demersal species) in the EC waters have significantly declined over the last 25 years due to over fishing. Another factor behind the EC interest in fisheries negotiations is the increasing fish-supply deficit in the EC market (due to over-fishing and the closure of some fisheries for purposes of stock recovery).²⁸⁷

The fisheries sector is very important for the economies of EAC partner states, fish and fishery products have increasingly become a major source of foreign exchange in the region. This makes fisheries a critical part of the economic development prospects of the region. At the same time the sector

²⁸⁶ (n 4 above) at 2

²⁸⁷ (n 259 above) at 25. It is also estimated that the annual fish production in the EC in recent years is at 6.9 – 8 million tonnes. Over the last few years an additional 9 million tonnes of fish were needed to meet the demands of the fish processing industry and domestic consumer demand. Consequently, the EC has been compelled to import 60% of its fish requirements.

provides employment and food for the respective countries. The EC provides a lucrative market for fish from the EAC partner states.²⁸⁸

Fish exports and fisheries products have therefore become one of the few areas in which EAC partner states have seen their participation in world trade growing. For example in 2006 the value of fish exports from Uganda to the EC stood at US\$ 146 million.²⁸⁹ In this respect, the parties will cooperate for the sustainable development and management of the fisheries sector while taking into account the economic, environmental and social impacts.

All products of fish and fish products to the EC will not attract any import duty, whereas imports of similar products from countries having no preferential trade agreements with the EC would be subjected to import taxes. For example, live fish imported into the EC from Uganda would be rated at 0% while a similar product from another country not having a preferential trade agreement with the EC would attract an import tax of 16%. This rate rises to 18% for fish fillets, while Uganda's fish fillets attract a 0% duty.²⁹⁰

In my view the status quo in the EC fisheries sector have important consequences for the development of the EAC partner states fisheries sector. In the area of resource management the EAC partner states should ensure sustainable exploitation of the fish resources. This will ensure food security within the EAC partner states and renewable commercial exploitation of the fisheries products.

3.4.2 Policy Space

When today's developed countries were still developing, they had the benefit of virtually unlimited policy space unbound by the wide-ranging set of multilateral rules and obligations that currently characterize the global economic order. This wide open policy space allowed today's developed countries to adopt trade and economic development policies that would be

²⁸⁸ (n 259 above) at 28

²⁸⁹ (n 259 above) at 28

²⁹⁰ (n 4 above) at 4

contrary to today's prevailing trade and economic orthodoxy (such as disregarding intellectual property rights, discriminatory trade treatment, provision of subsidies to domestic industries, high tariff walls, strict rules on foreign investments, and so forth).²⁹¹

To now require developing countries to adopt harmonized rules and economic approaches that would limit their policy space²⁹² would be hypocrisy applied on a global historical scale. This will simply lock weaker countries into existing unsatisfactory and unfavourable relationships that fail to address their developmental problems in view of the unequal economic and political power relations currently prevailing between the North and the South.²⁹³

While it may be argued that committing to the EPAs reduces policy flexibility for governments, the reality is that policy making and negotiating in trade is often about trade-offs and compromises and the choice has to be made between policy flexibility and policy certainty.²⁹⁴ Therefore ideally, a balance between the need for retaining strategic flexibilities and the need for maintaining the inherent value of a rules-based system would be very beneficial to all countries.²⁹⁵

In my view, much as the availability of policy will allow some freedom of choice for EAC partner states to promote policy objectives such as economic diversification, promotion of new industries and food security among others for achieving sustainable and equitable development. The EAC partner states will have to bear in mind that any benefits obtained out of trade negotiations they have to give concessions in return.

²⁹¹ South Centre, 'Policy space for the development of the South', (2005)1 *T.R.A.D.E Policy Brief* at 3 <http://www.southcentre.org> [accessed 31 August 2008]. See also Ha Joon Chang, 'Kicking Away the Ladder: How the economic and intellectual histories of capitalism have been re-written to justify neo-liberal capitalism', (2002) 15 *Post-Autistic Economics Review* at 3 <http://www.paecon.net/PAEtexts>.

²⁹² Policy Space refers to the scope for domestic policies, especially in the areas for trade, investment and industrial development and reflects the idea that governments should have the leeway to evaluate the trade-off between the benefits of accepting international rules and the constraints posed by the loss of policy space. Policy Space therefore is essentially a fusion of three key principles in international law and policy. These are: the principle of the sovereign equality of states, the right to development and the principle of special treatment for developing countries.

²⁹³ (n 291 above) at 3

²⁹⁴ (n 283 above) at 10

²⁹⁵ (n 49 above) at 19

3.4.3 Rules of Origin

Rules of Origin (RoO) define the economic as opposed to the geographical origin of products. That is, they define what an importing country considers the amount of value added in a good or service in a given exporting country sufficient for it to be counted as an export from that country.²⁹⁶

RoO have one essential task to avoid *'trade deflection'* by ensuring that the goods on which import taxes are reduced or eliminated are the ones intended by the lawmakers. They should prevent firms from a non preferred state establishing shell companies in a preference receiving state to import almost fully finished goods and re-export them with minimal processing solely in order to obtain the tax break. This task can be achieved by RoO set at a level normal for firms in commercial situations.²⁹⁷

In addition, RoO can restrict the number of countries from which an exporting country may source its non-originating raw materials or components (if permitted to use these), while still having its products defined as originating.²⁹⁸

Countries (or Customs Unions) normally have two distinct sets of RoO, one applied to MFN trade, and one applied to Preferential Trade Agreements (PTAs). Individual preference-granting countries' PTA RoO tend to have a high level of similarity across agreements. Theoretically, the reason for this is to prevent *'trade (and, in some versions of the argument, investment) deflection'*.²⁹⁹

RoO are the *'small print'* of trade preference and regional trade agreements any favourable treatment that they promise applies only to goods that meet

²⁹⁶ (n 251 above) at 39

²⁹⁷ (n 228 above) at 2

²⁹⁸ (n 251 above) at 39

²⁹⁹ Trade deflection involves transshipment of a good or service via a preference-holding country in order for it to obtain the margin of preference available under the PTA.

the rules.³⁰⁰ Therefore in instances where raw materials are wholly obtained in the EAC partner states RoO would not be a major issue. However in instances where production requires global sourcing of inputs then RoO play a major role.

The EPA provides that the parties shall continue negotiations in outstanding trade and market access issues including RoO.³⁰¹ In order to prevent any trade disruption, the Framework Agreement maintains the same Rules of Origin during the period of the negotiations for the comprehensive EPA. One significant exception to this is in the area of Apparels and Textiles – EAC and EC agreed on a simplification of the rules of origin to allow EAC companies to source fabric from anywhere in the world and still be able to export the garments made into the EU free of duties or quotas.³⁰²

In order to make the EC's rules of origin more flexible and transparent, simplification of the system is needed. The EC has proposed replacing its various requirements for formulating rules of origin such as maximum foreign content, change of tariff classification, and technical requirements with a single criterion: maximum foreign content (MFC). This rule defines the degree of transformation required to confer origin to a product in terms of the maximum amount of value that can come from the use of imported parts or materials.³⁰³

In principle, the MFC rule is more transparent and logical, even though applying a set level involves restrictions for certain sectors. But the heart of the problem lies in the official accounting requirements for recording local or foreign content. This, combined with full cumulation and the traceability of manufactured goods, can be a burden for small businesses in LDCs. Yet it

³⁰⁰ Stevens C., 'Creating development friendly Rules of Origin in the EU', (2006)12 *Overseas Development Institute* at 1 www.odi.org.uk/publications/briefing/bp_ROO_nov06_refs.pdf [10 August 2008]

³⁰¹ Article 37 (b), Article 12 and Protocol 1 of the EPA

³⁰² Mutahunga E., 'An overview of African, Caribbean and Pacific Group of states – European Union Agreements' (2008), A presentation delivered at a training workshop of lawyers on Regional Trade Agreements organised by the Uganda Law Society (unpublished) at 12

³⁰³ Cadot O. and Melo D.J., 'Rules of origin: The case for a single set of criteria', (2007)6(7) *Trade Negotiation Insights* at 11 <http://www.acp-eu-trade.org> [accessed on 18 October 2008]

should be possible to solve this problem with suitable programmes to help build local capacity, possibly in cooperation with the private sector. For a number of reasons, including the security of importing countries, traceability is likely to be a growing requirement in international trade.³⁰⁴

Introducing a variation in MFC levels according to product should be avoided as far as possible. Indeed, this would allow manipulation based on personal interests, and lead to discrimination among countries, owing to the different export structures in place (countries exporting goods which have restrictive levels should be penalised more than others, even when the same rules apply).³⁰⁵

Therefore, I am of the opinion that EAC and EC should negotiate and agree on RoO that promote cumulation by permitting use of production inputs (and raw materials for that matter) from within ACP countries. In this regard value addition of raw materials produced in ACP countries will be promoted as opposed to trans-shipment.

3.4.5 Technical barriers to trade and Sanitary and Phytosanitary standards

Non-Tariff Barriers are regarded as 'any device or practice other than a tariff which directly impedes the entry of imports into a country and which discriminates against imports, but does not apply with equal force on domestic production or distribution' The term, therefore, denotes a residual category that is all trade obstacles which are not due to import or export duties (see annex I for an attempted classification)³⁰⁶.

Sanitary and Phytosanitary standards (SPS) are regarded by many as the number one non-tariff barrier (protection) in international trade today. The rise

³⁰⁴ (n 303 above) at 11

³⁰⁵ (n 303 above) at 11

³⁰⁶ Werth A. Bakunda G. Twineyo R.E and Owomugasho D., 'Sectoral and analytical studies to guide Uganda in the EPA negotiations' (2005) Uganda Programme for Trade Opportunities and Policy (services contract SX 93/06/04/01) at 52. (Like its definition, there is no universally accepted classification of NTBs).

in the prominence of SPS issues has been driven by an increasing level of concern regarding food safety among European and other consumers about the presence of chemicals and various additives in their food (exacerbated by the mad cow disease and avian flu among others).³⁰⁷

At the fourth ordinary session of the African Union ministers of trade, it was noted that market access openings have been significantly undermined by health, SPS, technical and market standards maintained by the EC partners. It was further noted that many of the EC standards go beyond what would legitimately be appropriate.³⁰⁸

Of particular relevance is the requirement that all trade between the EPA partners is 'reciprocal' and that consequently, EAC ACP countries will lose the ability to protect their markets through tariff levels. Unless ACP sectors are able to deliver a level of food safety equivalent to their EC competitors then they will inevitably lose market share and potentially ownership of their domestic markets.³⁰⁹

The EAC EC EPA provides that parties agree to continue negotiations in the area of Technical barriers to trade (TBT) and SPS.³¹⁰ SPS provisions of the CPA (Articles 47 and 48) are based in essence on the WTO SPS Agreement, and it also seems very likely that the SPS provisions of EAC EC EPAs will also be largely based on WTO SPS Agreement.³¹¹ However, the WTO SPS Agreement contains areas of ambiguity that allow the EC to introduce measures that, whilst not at variance with the wording of the Agreement, can have a result that may arguably be viewed as contrary to the underlying intention that is not to interfere unnecessarily with international trade.³¹²

³⁰⁷ Doherty M., 'Is SPS the silver lining?' *Economic Partnership Agreements*, (2008/9)7(10) *Trade Negotiation Insight* at 6 <http://www.acp-eu-trade.org> [accessed on 30 December 2008]

³⁰⁸ Paragraph 4 of the Nairobi Declaration on Economic Partnership Agreements (TI//TMIN/Decl.2(IV) African Union conference of ministers of trade 4th ordinary session (2006) <http://www.africa-union.org/root/AU/Conferences/Past/2006/April/TI/Nairobi%20Declaration%20on%20EPAs.pdf> [accessed on 30 December 2008]

³⁰⁹ (n 307 above) at 6

³¹⁰ Article 37 (c) of the EPA

³¹¹ (n 251 above) at 52

³¹² (n 307 above) at 6

According to article 5 (7) of the SPS Agreement, members may adopt temporary, precautionary bans to prevent the introduction of risks when sufficient scientific evidence is absent. The problem here does not lie with this provision, but rather with how to remove the provision once it is triggered. The SPS Agreement is silent on the steps that a member country, which has lost international market access because trading partners have invoked this provision, must take. Greater clarification is required in the SPS Agreement on how long is 'temporary' and on the quantity and type of scientific evidence that is deemed sufficient.³¹³

The SPS Agreement also sets a regulatory floor but not a ceiling. Members are committed to both the international harmonisation of SPS measures and the mutual recognition of measures employed by other members. With respect to mutual recognition, a member is committed, in principle, to granting equivalence to the SPS measures adopted by an exporting country if the exporting member objectively demonstrates to the importing member that its measure achieve the importing member's appropriate level of SPS protection.³¹⁴

The problem is provided that the national treatment provision is met the SPS agreement is silent on limits for country regulations that are substantially above those of other member states. Therefore, while there is a minimum level of SPS measures that must be met, is there a maximum defining the point that importing member countries cannot legitimately expect potential exporting members to achieve? It is arguable that in exercising their right to require higher than international norms importing countries also incur an associated obligation to provide a higher than normal level of scientific evidence.³¹⁵

³¹³ (n 307 above) at 6

³¹⁴ Article 4 (1) of the Agreement on Sanitary and Phytosanitary standards

³¹⁵ (n 307 above) at 7

Three current areas of discussion concerning EC SPS measures and developing countries can further be identified. Firstly, the EPA negotiations have coincided with the adoption and the first stages of implementation of what is widely acknowledged to be a new EC Food (and animal feed) Safety regime. The central elements of this regime are six new regulations covering traceability,³¹⁶ food and feed hygiene, special rules for food of animal origin, and controls for verification of compliance with food and feed law.³¹⁷

Secondly, the EPA negotiations also coincide with two further EC legislative processes that impact directly on developing country producers.³¹⁸ A third area of concern raised in relation to EC SPS measures is the proliferation and widespread adoption within the EC of private standards for food production, which are used prescriptively to fill the gaps within the legislative framework.³¹⁹

SPS measures, covering food safety and animal and plant health standards, affects the EAC ACP countries' ability to export these products to the EC, whose standards are significantly higher than the minimum standards set by the WTO. Compliance with SPS measures may cost exporters between 2-10% of their turnover.³²⁰ The much-vaunted Kenyan cut flower export industry is reportedly at risk from a change in regulation regarding the use of

³¹⁶ Traceability refers to the ability to trace, follow and identify uniquely a product unit or batch through all stages of production, processing and distribution.

³¹⁷ The regulations in question are EC 178/2002 (traceability), 852/2004 (food hygiene), 853/2004 (food of animal origin), 854/2004 (controls for food of animal origin), 882/2004 (controls for verification of compliance with food and feed law) and 183/2005 (feed hygiene) http://eur-lex.europa.eu/pri/en/oj/dat/2002/l_031/l_03120020201en00010024.pdf [accessed on 30 December 2008]

³¹⁸ These are the Minimum Residue Level (MRL) Harmonization Programme for pesticides and the Pesticide Approvals Review Programme. The former is aimed at establishing common and mandatory MRLs across the EU for all active ingredients introduced after 1993, while the latter is aimed at reviewing the registration of the 823 active ingredients approved within the EU prior to 1993. There is particular concern that key post harvest fungicides commonly used in developing countries will not be registered, and therefore that products using them will be excluded at EU borders.

³¹⁹ These standards tend to be designed by major retail chains or consortia of them for example proprietary standards of the UK supermarket Tesco's 'Nature's Choice' and conformity to them becomes a *de facto* entry requirement to the more remunerative parts of the EU market.

³²⁰ (n 283 above) at 3

pesticides. Moreover, there is little predictability in these issues: EC standards and import rules are often changed during the course of a few months.³²¹

The EC can not be challenged on its right to protect its citizens from potentially harmful food. This is irrespective of whether countries that supply the food lack the capacity to meet the standard being established.³²² Even with an EPA, it is likely that EAC ACP exporters will continue to face stringent rules-of-origin, which limit the number of exports that can receive preferential treatment ever increasing SPS, which make it very hard for their exporters to break into European markets.³²³

In light of the above, the failure to comply with SPS has a direct impact on the economy for example people employed in the fish industry will lose their jobs due to lack of market for their products and also this will cause revenue short falls for the country. A number of factors have contributed to the failure to implement TBT and SPS measures in the EAC partner states which include resources constraints, lack of expertise and limited notifications being made and so forth.

3.5 Development Co-operation

The development component of the EPAs is fiercely contested, while ACP countries would like to see a binding commitment to additional funding for the planned reforms, the EC would like to keep additional funding voluntary but make binding regulations that address 'behind the border' issues such as competition, investment and government procurement³²⁴.

³²¹ Mold A., 'Trade Preferences and Africa: The State of Play and the issues at Stake', (2005)12 *Africa Trade Policy Centre* at 30 http://www.uneca.org/atpc/theme_month.asp [19 December 2008]

³²² (n 119 above) at 6

³²³ Oxfam International, 'Unequal partners: How EU-ACP Economic Partnership Agreements could harm the development prospects of many of the world's poorest countries' (2006) *Oxfam International Briefing Note* at 5 http://www.oxfam.org/en/policy/bn0609_unequal_partners_EPAs[accessed on 8 August 2008]

³²⁴ Meyn, M 'Economic Partnership Agreements: A historic step towards a partnership of equals?', (2008)288 *Overseas Development Institute* at 8 http://www.fes.de/cotonou/OTHER_BACKGROUND_TRADE/ODI_EPA_PAPER_2APRIL2008.PDF [accessed on 31 August 2008]

It is argued that EPAs do not offer any significant new money for infrastructure development nor do they compensate the tariff revenue losses and the additional compliance costs. On the contrary, the deals repackage existing aid promises and impose further costs.³²⁵

Yet an example within the EAC partner states the infrastructure is in a dilapidated state. Most upcountry airports if not in a state of despair are completely dysfunctional. The road, railway and water transport are hardly modern which hinders the movement of goods and service delivery.

Therefore at the national level, the manufacturing sector has to contend with constraints such as poor infrastructure, poor institutional infrastructure (institutions that stimulate and support industrial development), and poor access to credit and so on.³²⁶ This illustrates the importance the EPA should play as a tool of development.

In my view much as EAC partner states (and ACP countries in general) are faced with corruption, one of the major causes of underdevelopment is the lack of basic infrastructure and services. Most of the infrastructure in EAC ACP countries is in a dilapidated state; there is no electricity in most areas, there few doctors and nurses in health facilities, no fertilizers or high yield seeds and other things that constitute the first step out of extreme poverty are also lacking.

At the fourth ordinary session of ministers responsible for trade, of the member states of the African Union, held in Nairobi Kenya the ministers re-

³²⁵ Jones E and Perez J., 'Partnership or power play? EPAs fail the development test', (2008)7(4) *Trade Negotiation Insight* at 3 <http://www.acp-eu-trade.org> [accessed on 15 August 2008]. The adequacy of the development cooperation provisions was and remains a highly debatable question, in particular the volume of the financial assistance, which was only marginally increased and remains inadequate. The EU, with its longstanding European Development Fund (EDF) aid programme towards the ACP region, could not agree to increasing funds to deal with implementation and adjustment costs. The main concerns under the development dimension of EPAs include securing additional funding (a separate EPA facility), avoidance of diverting the EDF resources away from pre-existing legitimate priorities, addressing the effectiveness of use of EC's aid instruments, support to fiscal and economic restructuring to address the cost of adjustments.

³²⁶ SEATINI 'A critical analysis of the study of the impact and sustainability of Economic Partnership Agreement for the economy of Uganda' *SEATINI* (2005) at 13

iterated that EPAs with the EC should be tools for the economic development of Africa. They also expressed their profound disappointment at the stance taken by negotiators of the EC in so far as it does not adequately address the development concerns that must be the basis of relations with Africa.³²⁷

Article 37 (h) of the EAC EC EPA provides that the parties agree to continue negotiations in the area of economic and development co-operation leading to a comprehensive EPA text. Both parties also affirmed their recognition of EAC development needs and the commitment to ensure that the EPA is an appendage for development that will promote and consolidate regional and global integration. The EC also confirmed that it will contribute to the resources required for development under the 10th EDF Regional Indicative Programme, Aid for Trade and the EU budget³²⁸

In my view market entry requirements rather market access is the main reason why EAC partner states have not benefited from prior trade preferences. Market entry is hindered mainly by supply side constraints leading to fluctuation in production and production of poor quality products, infrastructure bottlenecks implying that a big percentage of agricultural produce can not expeditiously reach the lucrative European market and so forth. Therefore trade liberalisation alone will not lead to economic development of the EAC partner states.

Therefore there is an urgent need to enhance EAC partner states production capacities by mainly addressing the supply side constraints faced in the region. I think that EAC ACP countries ought to ensure quality and sustainable production, and then will they be in position to benefit from the market access opportunities granted by the EC.

³²⁷ (n 308 above) paragraph 2

³²⁸ (n 18 above) at 6

3.6 Agriculture

Two factors combine to make agricultural trade liberalisation a critical concern of African countries. Firstly, agriculture is the mainstay of many African economies, accounting for the bulk of national income, providing livelihoods for 80-90% of the population, and supplying about 20% of Africa's merchandise exports. Secondly, the agricultural sector is the most distorted market in world trade, partly as a result of the protectionist policies of developed countries.³²⁹

Agriculture is one of the most complex multilateral negotiating areas within the WTO. This complexity is due, firstly, to the specific role played by this sector, and, secondly, to the refusal of the richer countries to give up some of their policy space and reduce the distortions they have introduced in the trade of agricultural products.³³⁰

EC provides agricultural subsidies to the tune of between €50 billion to over €70 billion a year. Studies have already shown that by their sheer volume, these supports do distort trade. The World Bank has also noted that the decoupling of farm payments which is what the last Common Agricultural Policy reforms did is only effective if these payments are one-time buyout programmes to compensate farmers for the transition.³³¹

If there are no time limits, decoupled payments will have the same detrimental and distorting effects as other subsidy programmes. Also investment aids are part of the 'Green Box', yet they are first and foremost used to increase international competitiveness to unwanted and subsidized import surges, by forcing tariffs down or by only affording a weak safeguard, they will remain a major challenge for the development of African countries.³³²

³²⁹ (n 233 above) at 11. Women are the back bone of agriculture in Africa. In sub Saharan Africa, 70% - 80% of household food production is attributed to women and they constitute about 60% of agricultural labour generally.

³³⁰ Kotcho J., and Abega M., EPAs: 'what is at stake for agriculture and development in Central Africa?', 7(2008)6 *Trade Negotiation Insight* at 7 <http://www.acp-eu-trade.org> [accessed on 18 October 2008]

³³¹ Kwa A., 'African countries and EPAs: Do agricultural safeguards afford adequate protection?', (2008)25 *South Centre* at 3 <http://www.southcentre.org> [accessed on 30 December 2008]

³³² (n 331 above) at 3

Dumping of cheap EU agricultural surpluses (diary products, cereals, beef etc) will threaten the viability of agriculture and agro-processing industries, particularly for small scale farming sector which does not receive state support. Rural economies will collapse hence increased impoverishment and food insecurity. Women will be mostly affected.³³³

This is more explained by the complex EC mechanism of agricultural support to its farmers which will expose Tanzania and EAC agricultural markets to the intense competition of subsidized EC exports. Considering the limited resource capacity of countries in East Africa, it is unlikely that they will be able to balance this 'unfair' competition by providing additional support to their own agriculture, and this would be costly.³³⁴

Trade liberalisation under EPAs would pose two main problems to African agriculture. Firstly, African producers would find it hard to compete with European products benefiting from EC subsidies and other forms of support. More importantly, as Africa largely remains an agrarian economy, agricultural trade liberalisation would affect household welfare in more ways than one.³³⁵

As households are both producers and consumers, welfare gains on the consumption side could easily be offset by losses in production if the household is a net producer of non-tradables. Similarly, poor infrastructure might leave African countries unable to realise new market opportunities, even in commodities where the continent has a competitive edge. There would therefore be minimal gains for producers.³³⁶

In my view the EAC partner states agricultural sector is not ready to compete with EC agricultural sector. The major obstacle faced by farmers in the EAC partner states are the supply side constraints, poor technological innovations

³³³ Kabwe Na Z.Z., 'The Economic Partnership Agreements (EPA): Challenges for Tanzania', at 5 http://www.chadema.net/makala/kabwe/zitto_4.html [accessed on 30 December 2008]

³³⁴ (n 333 above) at 5

³³⁵ (n 233 above) at 11

³³⁶ (n 233 above) at 12

in areas such as land preparation, post harvest management and poor storage facilities. This has led to a decline in agricultural production in many regions of the EAC partner states as compared to the highly mechanised and productive farms of the EC.

It is argued by many that for African countries generally to benefit from the multilateral trading system, they should stop exporting products in their primary form but add value to products before exporting the products. For example instead exporting 1 kilogramme of coffee beans to Europe at \$ 3 (US dollars), 1 kilogramme of instant coffee exported to Europe may approximately earn \$ 15 (US dollars). However the EAC EC EPA does not address the issue of tariff escalation.

Therefore it is my opinion that the reciprocal trade regime between EAC partner states and the EC (EPA) may cause devastating effects on agriculture in the EAC partner states. Further dumping of cheap subsidised agricultural imports from the EC will undermine agricultural efforts like the government's Plan for Modernisation of Agriculture in Uganda. This may lead to increased food insecurity and revenue loss suffered by the EAC partner states.

3.6.2 Trade Defence Instruments

Trade defence measures provide for circumstances appropriate for either EAC partner states or EC to impose temporary barriers to trade, including tariffs. The barriers would be triggered if an increase in imports from the trading partner causes serious harm to certain industries or to the economy. However it is argued that the safeguards included in the EPAs are too weak to be effective, unnecessarily exposing small farmers to sudden surges of competition from imports. Women farmers will bear the brunt.³³⁷

The practice of dumping can involve deliberately exporting a product at a price below the cost of production in order to destroy the industry in the importing country. Controversially, it can also involve exporting products

³³⁷ (n 333 above) at 3

which have low export prices because they are exported from a country where the wages are extremely low or the level of working conditions is very poor.³³⁸

The EPA permits the imposition of anti-dumping and countervailing measures in accordance with the relevant WTO agreements.³³⁹ Countervailing duties are used to prevent unfair competition between subsidized imports and unsubsidized competing domestic products of the importing country.

Anti-dumping and countervailing duties can be levied on exporters who engage in 'unfair' trading practices that cause material injury to domestic producers. These unfair trading practices can take the form of selling products below their 'normal' price or of benefiting from government-provided subsidies. Safeguard actions can be taken even if there is no unfair trade practice so long as imports have increased to an extent that serious injury has been suffered by domestic producers.³⁴⁰

The EAC partner states and the EC party are permitted to invoke the WTO safeguard clause subject to the terms and conditions of the Article XIX of the GATT 1994, the Agreement on Safeguards and Article 5 of the Agreement on Agriculture.³⁴¹ Multilateral (WTO) safeguards have not been useful at all for most African countries, in contrast to the multilateral safeguards for the EC.

African countries can in theory utilize the General Agreement on Safeguards of the WTO. However, doing so requires countries to provide proof of a causal linkage between an import surge or price decline and the injury caused to the local industry. Proving this causal linkage has not been easy for developing countries, and as such, this general safeguard agreement has been little used.³⁴²

³³⁸ 'The EPA at a Glance: An overview of the CARIFORUM-EC Economic Partnership Agreement', (2008) *Caribbean Regional Negotiating Machinery Information Unit* at 16 <http://www.crnw.org> [accessed on 8 October 2008]

³³⁹ Article 19 of the EPA

³⁴⁰ Teh R. Prusa J.T. and Budetta M., 'Trade remedy provisions in Regional Trade Agreements', (2007)03(ER50) *WTO Economic Research and Statistics Division* at 3 http://www.wto.org/english/res_e/reser_e/ersd200703_e.htm [accessed on 30 August 2008]

³⁴¹ Article 19 of the EPA

³⁴² (n 331 above) at 1

The Agreement on Agriculture, adopted during the Uruguay Round, provided for an automatic safeguard for agriculture. However, it was only provided to those countries which converted non tariff barriers to tariffs in that Round. As such, only 16 developed countries and 22 developing countries can avail of this Special Safeguard Provision (SSG). In Africa, only a small number of countries have access to the SSG these include; Botswana, Morocco, Namibia, South Africa, Swaziland and Tunisia.³⁴³

The EC also has access to the SSG. In fact, the SSG covers 31 percent of EC's agricultural tariff lines (i.e. should prices drop or a volume surge take place) on the selected 31 percent of products, the EC can slap on much higher tariffs. Since 1995, the EC has used the SSG frequently up to 61 times in 1996, 60 times in 1997, and 44 times in 2001.³⁴⁴

The EAC partner states and EC have resort to certain other safeguards not disciplined by the rules of the GATT for a limited period of time in the event that importation of goods causes or threatens to cause serious injury to domestic industries; sectoral disturbances that cause major social problems; and disturbances to agricultural markets or mechanisms that regulate those markets.³⁴⁵

Article 21 of the EPA provides for Bilateral safeguards, which are more constraining than the SSG, further it is puzzling that the EPA bilateral safeguard for African countries is much more restrictive than the SSG the EC has thus far enjoyed through the WTO. The differences include: first the SSG allows for countries to invoke a safeguard if there is a volume increase, but also price declines. The latter is not included in the EPA bilateral safeguard. Yet, safeguards to counter price declines are important.³⁴⁶

³⁴³ (n 331 above) at 1

³⁴⁴ (n 331 above) at 2

³⁴⁵ Article 20 of the EPA

³⁴⁶ (n 331 above) at 3

Secondly the EPA bilateral safeguard is not 'automatic' in the way the WTO's SSG has been. For the SSG, there is no requirement on the part of the EC to provide information about the situation that might be causing injury. Yet this is required under Article 21(2) of EAC EPA and they are more or less subject to a decision by the joint Committee or Council. Clearly, this provides EAC ACP countries with much less flexibility.

The EC continues to heavily subsidise the agricultural sector therefore the playing field is not level between the EC and African countries. The subsidies provided by the EC to its farmers act as a form of '*natural safeguard*'. By providing these supports, the EC is lowering prices domestically, and this has the same effect as raising tariff levels.

According to agricultural expert Jacques Berthelot, reducing domestic agricultural prices by 50 percent has the same impact as an increased duty of 40 - 50 percent. EC agricultural supports on the whole are trade distorting, even if the EU is increasingly classifying them under the WTO's Green Box.³⁴⁷

Yet reciprocal liberalisation will force ACP companies most of which are small or medium sized, lack access to advanced technologies and are unable to exploit large scale economies to compete with well equipped and sometimes subsidised EC companies. Such an increase in competition could affect relations between local EAC ACP producers and importers, and once again threaten food security.³⁴⁸

3.7 Trade-related Issues

The trade related issues cover trade facilitation, government procurement, investment, and competition policy. Under the WTO negotiations, they are also known as the '*Singapore issues*' or the '*new issues*'.

³⁴⁷ (n 331 above) at 3

³⁴⁸ Rodriguez A.L., 'Agricultural safe guards measures in the EPAs', (2007)6(7) *Trade Negotiation Insight* at 6 <http://www.acp-eu-trade.org> [accessed on 18 October 2008]

The '*Singapore issues*' are now off the WTO negotiating agenda, at least for the duration of the Doha work programme. With the exception of trade facilitation, developing countries have successfully excluded these issues from the remit of WTO negotiations. ACP countries have collectively stated that they do not want to include the '*Singapore issues*' in the EPA negotiations and described their disagreement with the EC on these issues as of a '*fundamental nature*'.³⁴⁹

According to Joseph Stiglitz (a former chief economic adviser at the World Bank) the imposition of the '*Singapore issues*' on developing countries would 'almost certainly impede development'.³⁵⁰ On the contrary, according to Emmanuel Mutahunga (a Senior Commercial Officer, External Trade Department, Ministry of Tourism, Trade and Industry in Uganda) there is no evidence that any negotiation on trade-related issues would negatively affect Uganda's economy. Mutahunga further states that there is evidence as to the importance of trade-related issues, especially regarding creating a predictable environment in which the private sector can operate and be more competitive.³⁵¹

3.7.2 Investment

Investment is the obvious example of the problematic nature of the '*Singapore issues*'. As Cambridge Economist Ha-Joon Chang has observed, it was Korea's ability to set its own domestic policy on investment insisting on upstream and downstream benefits, or spill over that allowed the country to develop a world class economy.³⁵²

Many developing countries opposed the introduction of an investment agreement in the WTO, as they were concerned this would prevent or reduce their policy space to determine their own investment policies, such as choice

³⁴⁹ (n 323 above) at 6

³⁵⁰ (n 239 above) at 2

³⁵¹ Mutahunga E., 'Negotiations of the EAC – EC Economic Partnership Agreement (EPA); where we are and where we are going', (2008)2 *Uganda Trade Review* at 23

³⁵² (n 239 above) at 2

of and conditions for foreign investment, including entry requirements, equity requirements, performance requirements, regulation on funds transfer, etc.³⁵³

The African Union's trade ministers' conference in Cairo in June 2005 adopted a Declaration on EPA (that they are negotiating with the EC) that the three 'Singapore issues' (investment, competition and government procurement) should remain outside the scope of the EPA agenda and negotiations. This is despite the fact that these issues had been listed as agenda topics. The reason put forward is that these issues were recently rejected as negotiation topics by the members of the WTO.

The EC argues that by entering a binding investment agreement, EAC ACP countries would benefit from an influx of foreign direct investment, which would stimulate economic growth.³⁵⁴ According to Karl F. Falkenberg (Director, Trade Directory General, the EC), the 'Singapore issues' are all essential subjects of development so are the EPAs.³⁵⁵

To date, this appears to be little more than conjecture. There is a large body of evidence which led the World Bank to conclude that countries that have investment agreements are no more likely to receive additional investment flows than countries without such a pact. Surveys suggest that the primary disincentives for investors in sub-Saharan Africa are concerns surrounding political stability, security, and unreliable electricity supply, rather than a lack of binding investment agreements.³⁵⁶

At the African Union Ministerial, ministers re-iterated their earlier concerns raised at the WTO which led to the removal of 'Singapore issues' from the Doha Work Programme and called for these issues to stay 'outside the ambit

³⁵³ Khor M., 'Bilateral and Regional FTA: Some critical elements and development implications', (2007), *UNDP Regional Trade Workshop Penang - Malaysia* at 18 <http://www.twinside.org.sg/title2/par/Bilateral.and.regional.free.trade.agreements.doc%20-> [accessed on 31 October 2008]

³⁵⁴ (n 323 above) at 6

³⁵⁵ Falkenberg K.F., 'EPAs and Doha Development Agenda: Parallelism or Crossroads?', (2004)3(4) *Trade Negotiation Insight* at 3 <http://www.acp-eu-trade.org> [accessed on 15 August 2008]

³⁵⁶ (n 323 above) at 6

of EPAs'.³⁵⁷ On the other hand the EC continues to insist that there will be 'no EPA without investment rules'.³⁵⁸

At present, many developing countries would argue that giving favourable treatment to locals is in fact pro-competitive, in that the smaller local firms are given some advantages to withstand the might of foreign giants, which otherwise would monopolise the local market. Providing the giant international firms equal rights would overwhelm the local enterprises which are small- and medium-sized in global terms.

However, such arguments will not be accepted by the developed countries, which will insist that their giant firms be provided a '*level playing field*' to compete '*equally*' with the smaller local firms. They would like their interpretation of '*competition*' (which, ironically, would likely lead to foreign monopolisation of developing-country markets) to be enshrined in WTO law or in the FTAs.³⁵⁹

In case investment is to be negotiated as part of an EPA on a '*non discriminatory*' basis as currently proposed by the EC, EAC ACP countries would lose any similar right not only to protect their industries, but also more broadly to set their own industrial policy. While it is vitally important to encourage investment in sub-Saharan Africa, this must be done in a manner which allows regulation that maximises host-country benefits.³⁶⁰

3.7.3 Government Procurement

Government procurement covers all purchasing activities of government authorities for everything from pencils and paper clips to computer systems, telecommunications equipment, consulting services and so on. Typically this

³⁵⁷ (n 308 above) at paragraph 14

³⁵⁸ (n 323 above) at 3

³⁵⁹ (n 353 above) at 36

³⁶⁰ (n 239 above) at 2

accounts for significant share of Gross Domestic Product (GDP) (10 – 15%) for developed countries and up to 20% in some developing countries.³⁶¹

As procurement is a trillion-dollar business, the developed countries are determined to break into this business for their companies. They are thus now including a full-fledged procurement chapter (dealing with market access and national treatment) in their FTAs.³⁶²

Government procurement has been excluded from the rules of the WTO, such as market access and national treatment. There is only a plurilateral agreement on government procurement in the WTO, which is not compulsory for WTO members to join, and almost no developing country has signed up to it.³⁶³

Government procurement and policies related to it have very important economic, social and even political roles. First, the level of expenditure and efforts to direct it to locally-produced materials is a key macroeconomic instrument especially during recessions to counter economic downturns.³⁶⁴ Governments often change the level of expenditure as the major tool of fiscal policy to steer the level of demand and growth in the economy.³⁶⁵

Secondly, there are national policies to give preference to local firms, suppliers and contractors in order to boost the economy and participation of locals in economic development. Thirdly, it allows government to identify certain groups or communities, especially those that are under-represented in economic development.³⁶⁶ In this way, procurement is a major policy tool for attaining greater balance in the participation shares among various communities within a nation.

³⁶¹ (n 10 above) at 37

³⁶² (n 353 above) at 27

³⁶³ (n 353 above) at 26

³⁶⁴ (n 10 above) at 37

³⁶⁵ (n 353 above) at 31

³⁶⁶ (n 10 above) at 37

Finally, where foreign firms are involved in a bid, government can give preference to firms from particular countries (for example other developing countries, or particular developed countries, with which there is a special commercial or political relationship).³⁶⁷

The inclusion of government procurement in an EAC EC EPA has therefore very serious implications. Uganda for example as a matter of policy has been encouraging indigenous firms and companies to bid for infrastructure projects, such as roads in order to develop local capacity. However, now it means Uganda (and the other EAC partner states) will not be able to give preference to local companies for the supply of goods and service or to grant any concessions for implementing projects.³⁶⁸

3.7.4 Competition Policy

There is no common understanding or agreement among countries on the meaning of the concept of competition in the context of the WTO especially in terms of its interaction with trade and its relationship with development. The whole set of issues of competition, competition law and competition policy is quite complex.³⁶⁹

At first glance competition policy is taken to mean restricting the power and scope of activities of the large corporations, especially transnational companies. However, competition is usually taken to mean something different by trade officials of developed countries. They have been trying to make use of competition policy as a concept linked to market access, in which foreign firms and their products and services should have the right to '*free competition*' vis-à-vis local firms in markets of developing countries. '*Free competition*' would, in their approach, mean that the preferences given to local

³⁶⁷ (n 10 above) at 37

³⁶⁸ (n 10 above) at 38

³⁶⁹ (n 10 above) at 39

firms, and any advantages or assistance they enjoy, should be curtailed or eliminated, so that the foreign firms can compete on a level playing field.³⁷⁰

There is no doubt that in appropriate forms, competition law and policy can be beneficial to the EAC partner states in general. From the EAC's perspective, it is important to curb the mega-mergers and acquisitions which would threaten the competitive position of local firms in the region. From the EC perspective, competition is about providing EU firms national treatment and a free competition environment in the host country. However, each country should have the flexibility to choose the pattern of competition and competition policy (law) that is suitable to their level of development and priorities.³⁷¹

Having an appropriate model is especially important in the context of globalisation and liberalisation where local firms are already facing intense foreign competition. Along the same lines, from a development perspective, a competition and development framework requires that local firms and farms must build up the capacity to become more and more capable of competing successfully, starting with the local market, and then, if possible internationally.³⁷²

At the moment in Uganda there no competition laws nor anti competition regulatory agency, any regulation being carried out is done in piecemeal. This makes it difficult to prove any anti competitive behaviour let alone taking action against multi national corporations exploiting consumers. In addition, most of EAC ACP countries have such small private sectors that the costs of implementing new competition laws would often not be commensurate with any potential benefits.

³⁷⁰ (n 353 above) at 33

³⁷¹ (n 10 above) at 40

³⁷² (n 353 above) at 35

3.7.5 Trade Facilitation

Trade facilitation essentially refers to simplification, harmonisation and automation of import and export procedures, reduced documentation, and increased transparency.³⁷³ The EC argues that a WTO agreement on trade facilitation is needed because inefficient and unnecessary procedures impede trade flows.

Therefore the less red tape developing countries maintain, the lower the cost. But beyond that, if the EC and the EAC ACP countries successfully reduce red tape, it increases dramatically the potential of the existing infrastructure for international trade. If ships can be customs cleared faster in ports, it increases the available port capacity, for instance.³⁷⁴ According to article 37(a) of the EPA, the parties agreed to continue negotiations in the area of customs and trade facilitation.

It is clear that EC is pushing offensive interests in the EPA negotiations, against the explicit wishes of the EAC partner states (ACP) and with no clear developmental benefits. There are other areas besides the 'Singapore issues' where the EC is seeking to gain more ground at the bilateral level than has been achieved at the WTO. The first of these is services³⁷⁵

The United Kingdom has now stated that it believes that Europe should not pursue its short-term commercial interests at the expense of development, and hopefully other member states will take a similar attitude. In any case the EAC partner states have little capacity to analyse and negotiate on these issues.³⁷⁶

³⁷³ (n 10 above) at 35

³⁷⁴ (n 355 above) at 3

³⁷⁵ Article 37 (d) of the EPA which provides for the rendez-vous clause whereby the parties agreed to continue negotiations in the area of trade in services

³⁷⁶ (n 239 above) at 2

3.8 Services

In the EAC partner states, the services sector has become an increasingly important contributor to economic growth and, specifically, to poverty eradication programmes through employment generation, remittances from abroad, and internal linkages with other sectors. In Kenya, the tourist sector contributes more than 64 percent of the GDP, subject to occasional fluctuations caused by security alerts and the recent political instability.³⁷⁷

Services cover a wide range of economic and social activities that is communications (postal, courier, telecommunications and audio-visual), transport, finance, health, education, tourism and travel related services, recreation, and environmental services. These services are key drivers of economic growth and they influence greatly the capacity of countries to trade.³⁷⁸

Trade in services was first brought into the GATT for the first time in the Uruguay Round although developing countries had their misgivings on this matter. They failed to block the General Agreement on Trade in Services (GATS) and finally agreed to a compromise that is a 'bottom-up' approach so that each member would have the right to decide which sectors if any they would open, the pace and extent of the market opening and the limitations to liberalisations in each sector.³⁷⁹

³⁷⁷ (n 52 above) at 10. The liberalisation of the telecommunications sector has had considerable results. In Uganda for instance, according to the Uganda Communications Commission, the mobile telephone lines increased from 3,000 in 1996 to 5,163,414 by December 2007, fixed telephone lines rose from 45,145 in 1996 to 165,788 by December 2007.

³⁷⁸ (n 10 above) at 33. Due to higher poverty levels in rural communities, some commercial key services are less available; poverty eradication initiatives must squarely target these areas for example information and telecommunication to assist e-commerce for instance, financial services to provide reasonably prices and adequate credit, transportation to assist national and regional trade and interconnectivity, and energy to assist efficiency and modernisation, all must benefit rural areas as well.

³⁷⁹ (n 10 above) at 34. The WTO has a positive list approach that is to say a country commits only what it puts on the schedule as against the more drastic negative list approach in which everything is committed to be opened unless specified in the schedule. The positive list approach was insisted on by the developing countries to enable them to have more flexibility and policy space as to what and when to commit. It is also less risky than the negative list approach as a country may not be aware of the full range of sectors, nor on what it should select to exclude.

Under article 37(d) of the EPA, the EAC and the EC agreed to continue negotiations of trade in services. In light of the discussion above, the EAC partner states have been subjected to enormous pressure to liberalise in many sectors even where they can not compete. Liberalisation of trade in services will involve making market access commitments and removing restrictions that discriminate against foreign suppliers.³⁸⁰

On the other hand currently, there are significant barriers to entry in the EC services market. This is particularly true in respect of modes 3 (where a foreign firm establishes commercial presence in the export market) and mode 4 (where the natural persons selling services move to the market). EC liberalisation under mode 4 has been limited in the context of the GATS and is biased towards skilled personnel.³⁸¹

Yet the main trade objective of EAC partner states has been to secure enhanced access to the EC market for natural persons (mode 4 in GATS), covering both professional and non-professional persons. In this regard, an appropriate relaxation of the extensive restrictions in the EC has been sought.³⁸²

The other modes of interest for the EAC partner states include the establishment of commercial presence (mode 3 of the GATS) particularly in the tourism sub-sector for operators and agents, as well as cross border supply (mode 1 of the GATS) in the information and telecommunications and business services sub-sectors. Priority sub-sectors for exportation to the EC include tourism, information and telecommunications, professional services, construction, and health-related and social services.³⁸³

In my view the EAC partner states stand to enormously benefit if trade barriers to the movement of natural persons were to be relaxed by the EC this is due to the abundance of both skilled and unskilled labour personnel. In the

³⁸⁰ (n 10 above) at 34

³⁸¹ (n 10 above) at 34

³⁸² (n 52 above) at 11

³⁸³ (n 52 above) at 11

same vain the EAC partner states should advocate for the establishment of predictable and substantial quotas and a special user-friendly business visa system in order to facilitate the ease of movement of personnel from the EAC partner states to EC.

3.8.2 Intellectual Property Rights

The introduction of Intellectual Property Rights (IPRs) as an issue with binding rules within a trade agreement was very controversial, and remains so, after the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement was incorporated within the WTO. There is also an attempt by the developed countries to seek the forum of the FTA to remove or reduce the flexibilities in the TRIPS agreement and to establish even higher standards of IPRs in developing countries therefore intellectual Property is thus a major item in bilateral FTAs.³⁸⁴

Since then, many economists ranging from Joseph Stiglitz to Jagdish Bhagwati have decried the inclusion of IPRs and TRIPS in the WTO. There is also a growing realisation that high IPR standards, promoted by TRIPS to developing countries, are inappropriate to the development needs of developing countries.³⁸⁵

The African Union trade ministers have called upon the EC not to introduce in the EPA negotiations any TRIPs plus proposals (which go beyond existing TRIPs obligations) which would compromise these flexibilities. If such proposals are advanced, they should be rejected.³⁸⁶ The TRIPS has little to do with trade. In fact, it stymies trade by allowing the patent holder to maintain their monopoly over potential competitors. It widens the divide between those that have the technology and those that do not.³⁸⁷

³⁸⁴ (n 353 above) at 45

³⁸⁵ (n 353 above) at 45

³⁸⁶ Paragraph 9 'African Union Ministerial declaration on EPA negotiations', (2005) AU/TI/MIN/DECL.(III), *African Union* Cairo, Egypt http://www.african-union.org/root/au/AUC/Departments/TI/EPA/DOC/de/EPA_Decl_Cairo_EN.pdf [accessed on 15 January 2009]

³⁸⁷ (n 49 above) at 26

Whilst the rationale for TRIPS is that there should be a proper balance between the right of the investor and public interests, the 20 year patents stipulated by the WTO Agreement on TRIPS give all the power to the patent holders.³⁸⁸ There is now a movement by developing countries to clarify some aspects of TRIPS or to amend them, to reduce the more developmentally negative aspects.

Article 37(e) (IV) of the EPA provides that the EAC and the EC will continue negotiations in the area IPR. Given the concerns above about the impact of stronger intellectual property protection on development, including access to knowledge, developing countries should be very cautious about entering any treaties that require stronger intellectual property protection and cross-sectoral consultations and detailed cost-benefit analyses should be conducted before any decision is made.³⁸⁹

In light of the above discussion and an analysis of article 37 of the EPA providing the '*rendez vous* clause', it is clear that the EAC EC EPA covers a few topics in comparison with other EPA configurations and consequently, with a bulkier built-in agenda. Major issues related to customs and trade facilitation, TBT, SPS, '*Singapore Issues*' and development cooperation are supposed to be negotiated, to reach a comprehensive EPA before July 2009. However, given the divergent positions and the pace of the negotiations it is unlikely that a comprehensive EPA will be signed within the agreed timeframe.

3.9 The likely impact of the EAC EC EPA on development

In Africa, 340 million people, or half the population, live on less than US \$1 per day. The mortality rate of children under 5 years of age is 140 per 1000, and life expectancy at birth is only 54 years. Only 58 per cent of the population have access to safe water. The rate of illiteracy for people over 15 is 41 per cent. There are only 18 mainline telephones per 1000 people in

³⁸⁸ (n 49 above) at 26

³⁸⁹ (n 353 above) at 51

Africa, compared with 146 for the world as a whole and 567 for high-income countries.³⁹⁰

For poor nations, the subject is permanently and continually development, and thus these nations enter the trade construct through their encounters with the development paradigm. These states are members of the WTO because they have been convinced, or forced to believe, that trade will be the answer to their development constraints and that being outside of this regime will be economically fatal. Hence, for the poorest nations, the issue is how trade policy will assist in the modernization quest.³⁹¹

By definition, development supposes some deficiency that must be corrected, and presumes inferiority and being substandard to the other that is developed. It also assumes that a particular kind of modernization is the inevitable course that all nations and peoples must pursue, for there is no question that it is preferable, superior and indeed the only path; no other way of life or being is even worthy of discussion.³⁹²

All those who cannot reach given development benchmarks, must somehow be inept, undeveloped, inadequate, and in need of betterment by the West, now termed the international community which comes in the guise of international financial institutions such as the World Bank, the International Monetary Fund and now the WTO.³⁹³

The WTO is now an integral part of this project. Indeed, the preamble to the Agreement Establishing the WTO recognizes the need for:

³⁹⁰ The New Partnership for Africa's Development (2001) Abuja http://www.uneca.org/eca_resources/ [accessed on 8 March 2009]

³⁹¹ Gordon R., 'Contemplating the WTO from the margins', (2006)17, *Berkeley La Raza Law Journal* 95-117 at 99

³⁹² (n 391 above) at 107

³⁹³ (n 391 above) at 107. The United Nations has also proclaimed the existence of a human right to development. This right refers not only to economic development but also to human welfare, including health, education, employment, social security, and a wide range of other human needs. UN Declaration on the right to development, Res. 41/128/(1986), available at <http://www.unhchr.ch/html/menu3/b/74.htm>; UN General Assembly Resolutions 2542 and 2586 (XXIV 1969) and 2626 (XXV 1970).

'...positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development'.³⁹⁴

The WTO and global trade have become integral components of the development paradigm and it is development theory that rules the collective existence of poor Southern tier nations.³⁹⁵ WTO agreements also include special provisions for Developing and Least Developed Nations, and the WTO has entered into agreements with the World Bank and the IMF.³⁹⁶

It is not surprising that a correlation between trade and development also happens to be the paradigm emanating from the development community, for it is the developers that decide the current development thesis, not the countries that are its objects. With the Washington Consensus, development has now been explicitly and firmly linked to trade, and to becoming part of the global economy.³⁹⁷

Poor countries are to liberalize their economies by making tariff concessions that open their markets to imported goods, and to undertake measures that will make their economies friendly to international capital. Foreign entities will then be more inclined to invest in their economies and help them build and

³⁹⁴ Paragraph 2 of the Preamble of the Marrakesh Agreement Establishing the WTO in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M 1125, 1145

³⁹⁵ (n 391 above) at 99

³⁹⁶ Article III (5) of Marrakesh Agreement Establishing the WTO in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M 1125, 1145 (See Also: Agreement between the WTO, IMF and the WB of 18 November 1996, WT/L/194, http://www.wto.org/english/thewto_e/coher_e/wtl194.doc [accessed on 30 December 2008])

³⁹⁷ (n 391 above) at 99. Also according to the WTO Secretariat globalization has increased the need for closer cooperation between the multilateral institutions with key roles in the formulation and implementation of different elements of the framework for global economic policy, in particular the IMF, the WB and the WTO. Each of these organizations has a mandate for such cooperation in the agreements under which they have been established. They also have signed agreements among themselves, for mutual cooperation and regular consultation, which identify mechanisms designed to foster greater coherence in global economic policy-making. http://www.wto.org/english/thewto_e/coher_e/coher_e.htm.)

expand upon their comparative advantage, which is currently agricultural products, exhaustible natural resources and pools of very cheap labour.³⁹⁸

African nations have become part of the international trade regime because they believe, or have been forced to believe, that it will assist in achieving their perpetual objective of development. The more explicit aspiration is the eradication of poverty, certainly, a worthy goal that is now to be achieved by becoming part of the global economy and being fully engaged in the international trade regime that the WTO personifies.³⁹⁹

Therefore, economic development is the primary conduit through which sub-Saharan Africa (SSA) intersects with the international economy and trade ideology, and these nations now consider trade to be a central consideration in their economic development.⁴⁰⁰

Africa is endowed with plenty of natural resources, a pleasant climate, cultural diversity, and a rich historical past, yet it remains marginalized in the economic development process and global political scene. Although Foreign Direct Investment (FDI) to developing countries has been increasing in the last decade, Africa accounted for only about one percent of that investment in 1998.⁴⁰¹

Trade within the sub-Saharan region of Africa is meagre, unable to develop, and hampered by foreign market obstacles, thereby causing substantial stagnation and eventual decline. Currently, Africa predominately trades primary products, has economies burdened by exchange rate fluctuations that have profound effects on the developing countries' trade flows, and continues to experience difficulties in foreign competitive markets because of industrialized countries' influential trade policies.⁴⁰²

³⁹⁸ (n 391 above) at 99

³⁹⁹ (n 391 above) at 107

⁴⁰⁰ (n 204 above) at 79

⁴⁰¹ Nyikuli P.K., 'Unlocking Africa's Potential: Some Factors Affecting Economic Development in Sub-Saharan Africa', (1999)30 *Law and Policy International Business* 623-632 at 623

⁴⁰² (n 230 above) at 132

A true partnership in trade could radically transform the lives of one-third of all people living in poverty. But, far from restructuring economic relationships to stimulate development, the current trade deals kick away the development ladder that countries around the globe have used to build their own economies. They risk locking EAC ACP countries into current patterns of inequality and marginalisation and away from the increasing opportunities global trade is already offering.⁴⁰³

One of the key challenges for Uganda (and the EAC partner states in general) relates to how to finance the adjustment costs and accompanying reforms to implement the EPA. The main funding options available are; EDF financing, other parallel or complementary sources from the EC funding, EU member states and other donors.⁴⁰⁴ The adjustment costs and trade related reforms are required to address terms of market opening, erosion of preferences, tariff revenue losses, supply side constraints and so forth.

3.9.2 Positive Developments

The EPA is likely to have a positive impact on the development of the region, initially it will lead to a closer economic integration between EAC partners states, and the EC and thereby further enlarge the market of these countries. This enlarged market, governed by a stable, transparent and predictable framework for trade, will allow for economies of scale, will improve the level of specialisation, will reduce production and transaction costs and will, altogether, help to increase competitiveness. This, in turn, will lead to an increase in trade flows, technology and investment in the countries and hence promote sustainable development and contribute to poverty reduction.⁴⁰⁵

The loss of government revenue is taken as a short term and static consequences of EPA since long term more dynamic consequences are more important. These long term dynamic effects are improvement in the economies of scale, increased efficiency and productivity changes as a result

⁴⁰³ (n 325 above) at 3

⁴⁰⁴ (n 10 above) at 44

⁴⁰⁵ (n 33 above) at 3

of greater competition, enhanced possibilities of absorbing technologies from the EC, and increases in domestic and foreign investments.

Trade creation is envisaged to generate associated benefits of lower prices of products for consumers and intermediate goods for producers in East African countries. This fall in prices is a result of more competition whereby high cost produced goods and services will be replaced by efficiently produced goods and services. This could result in the welfare gains as a result of an increase in consumer's surplus to the extent that the domestic price paid by consumers in the country falls commensurate to the fall in the import prices.⁴⁰⁶

Despite the expectation on both the EU and ACP sides that in some sectors liberalisation will have dramatic consequences, impact assessments to date have been superficial and of variable quality, failing to quantify the effects on levels of production, employment, or the future competitiveness of productive sectors in ACP countries.⁴⁰⁷ Increase in competition among domestic producers and other suppliers on the domestic ACP markets, is likely to trigger lower prices due to either trade creation or trade diversion.⁴⁰⁸

3.9.3 Negative Developments

It is argued that the EPA might have sounded good in theory reforming EAC ACP economies to create the right conditions for development, with appropriate aid from the EC.⁴⁰⁹ However in a study by Oxfam analysed from a development perspective the goods, services, investment, and intellectual property chapters of the 'initialled' EPA deals concluded at the end of 2007.⁴¹⁰

⁴⁰⁶ (n 333 above) at 3

⁴⁰⁷ (n 325 above) at 5

⁴⁰⁸ (n 333 above) at 2. Trade creation refers to the extra trade generated by the reduction or complete removal of the tariffs on goods imported. This means once tariffs are reduced or removed, traders will import more from the EU (as compared to other countries) since it is cheaper than before the reduction or removal of tariffs. Trade diversion refers to the trade diverted following the substitution from suppliers from the rest of the world to those from the EU. These suppliers from the rest of the world could have been more efficient but blocked by the existence of tariffs against their products) see rules of origin footnote

⁴⁰⁹ (n 226 above) at 1

⁴¹⁰ (n 323 above) at 3. See also Oxfam International, 'Partnership or Power Play?', (2008) www.oxfam.org.uk/resources/policy/trade/downloads/bp110_epas.pdf

The assessment is clear these initialled deals fail any objective test of development. It seems that, for its trade deals with the EAC ACP countries, Europe has chosen power politics over partnership. EC aims are closer to the 'global Europe' strategy than to the 'Cotonou spirit'.⁴¹¹

The most obvious cost is the unfavourable shifts in revenue structures, heralded by losses in government revenues due to foregone customs revenues and the economic restructuring. Therefore there are costs such as fiscal costs, adjustment costs, and losses due to negative dynamic effects (of shifts) in the domestic production and investment base.⁴¹² Significant decline in government revenues will result in less budget funding for social and human development and would result into higher tax burden for citizens (as a way of adjustment).

Research conducted in Kenya by Action Aid suggests that reciprocity represents a major threat to development and poverty reduction in Africa because EPAs are propelled mainly by EC market access interests. Much of the threat will come from processed imported products from the EC because agriculture, industrial and service sectors in African economies are so intertwined and inter-dependant that the 10% 'protective window' proposed under EPAs is highly unlikely to protect these countries' long-term development needs.⁴¹³

While consumers in ACP countries may benefit from a wider variety of cheaper goods and services entering ACP markets under import liberalisation, an EPA would threaten livelihoods in key agricultural and manufacturing sectors. The removal of tariffs on EC imports will put products (often highly subsidised) from one of the world's most economically advanced regions in direct competition with producers in some of the world's poorest countries.⁴¹⁴

⁴¹¹ (n 323 above) at 3

⁴¹² (n 333 above) at 2

⁴¹³ (n 233 above) at 14

⁴¹⁴ (n 325 above) at 5

The EPA also fails to help tackle food insecurity though EAC ACP products are offered lower tariffs into the EU market, but fail to provide significant services opening. However, tariff gains are undermined by restrictive rules of origin, and they are also temporary, as Europe is set to open up to the ACP's competitors.⁴¹⁵

The EPA fails to support economic diversification away from low value agricultural production by restricting the choices of EAC ACP governments to support the development of new industries, through the inclusion of ambitious tariff liberalisation schedules, and of a standstill clause that prohibits the ACP countries to ever raise tariffs. (While the texts include 'infant industry' safeguards, these may be difficult to trigger and are ill-suited to supporting the development of *new* industries.)

The EPA is unlikely to attract quality new investment but it will tie ACP governments' hands investors interests are placed above those of the public.⁴¹⁶

Investment measures that prohibit restrictions on repatriation of profits will result in continued capital flight from Tanzania. Due to WTO rules for which as a rule EPA must be compatible, would block the governments to give special treatments to local entrepreneurs as a means of supporting them to survive competition. European companies will definitely dominate the economy and hence conflicts could results.⁴¹⁷

EAC ACP countries face a major problem of capacity not only to supply services domestically and for export, but also to effectively regulate the operation of liberalised sectors.⁴¹⁸

While the texts include 'infant industry' safeguards, these may be difficult to

⁴¹⁵ (n 325 above) at 3

⁴¹⁶ (n 325 above) at 3

⁴¹⁷ (n 333 above) at 4

⁴¹⁸ South Centre 'Demystifying trade in services: A strategic guide for ACP EPA Negotiators', (2007) *SC/AN/TDP/EPA/5* at 18 <http://www.southcentre.org> [accessed on 31 August 2008]

trigger and are ill-suited to supporting the development of *new* industries. The closing of local manufacturing ventures, especially SMEs as a result of competition from cheap products from EC. This will result into job losses, unemployment poverty and hence loss of livelihoods.

Local retail sector will collapse due to establishments of supermarkets from Europe. The small and medium sized business, where the majority of formal sector workers are employed, will be the most vulnerable because it is easy to undercut them. Local economic actors, particularly SMEs and women will be put to the margins as informal sector operators.

Opening up to European competition for all Government tenders is another worrying consequence of the EPA in Tanzania (and the EAC partner states in general). Local companies who derive their income from government contracts (supplies, services etc) will have to compete with EU companies in bids and profits from these transactions will be repatriated as a result of investment protection deals.

The effect of trade liberalisation on poverty reduction depends on: how much poor people produce exported goods and consume imports, the degree of labour mobility, the state of domestic industries and the state of income distribution. Depending on these factors, trade liberalisation can create winners and losers, aggravating or reducing gender, income or regional disparities.⁴¹⁹

A successful or pro-poor trade liberalisation strategy is one that ensures that the winners' gains outweigh the losers' losses (i.e. the winners can compensate the losers). The experience of the East Asian 'tigers' demonstrates that successful trade policies must be aligned with, rather than pursued in isolation from, development strategies.⁴²⁰

⁴¹⁹ (n 233 above) at 9. Also see UNECA, 'Africa economic report', (2004) New York and Winters A., 'Trade policies of poverty alleviation', (2002), in Hoekman B. and Matoo A., 'Trade, Development and the WTO', (2002) *World Bank Washington D.C* <http://www.worldbank.org>

⁴²⁰ (n 233 above) at 9. Also see Amsden A., 'Asia's next giant OUP', (1989) Oxford; Chang H.J., 'The political economy of industrial policy in Korea', (1993)16(2) *Cambridge Journal of Economics*.

Despite of the several concessions made by the EC to EAC partner states within the EPA for example asymmetrical liberalisation, DFQF access to the European market, excluding 18% of sensitive products, the EC has made reciprocity its most prominent ultimate goal.

Lastly, while it is logical to argue that the principle of reciprocity is acceptable indeed encouraged in an economic relationship between parties of equal strengths and means, it is an aberration in a partnership among unequal parties. However this may be a blessing in disguise for EAC ACP countries to improve their competitiveness. This is on the premise that the non reciprocal trade arrangements between EAC ACP countries and the EC failed to yield the much desired development in the latter.

The conclusion of FTAs between EC and groups of ACP member countries will bring a dramatic change in the trade relationship between north and south. This is due to the fact that the relationship will now be reciprocal. These regionalised FTAs will act as a stepping stone towards the integration of the economies of the ACP into the world economy. Proponents of this scheme argue on the conventional gains of market integration, where liberalization brings gains of static welfare nature and dynamic nature. Static welfare gains are due to the price advantages. That means the consumers will benefit from the reduction of the prices of goods and services following the opening of markets and due competition among firms.

In conclusion the EAC EC EPA presents EAC partner states with immense trade opportunities with the EC (the biggest trading bloc in the world), and to consolidate the EAC integration into the world economy. However, deliberate efforts must be expended in order to exploit and benefit from these opportunities. The efforts should be directed at increasing production and trade capacity to address supply side constraints, compliance with and enforcement standards, energy (efficiency and reliability), Infrastructure improvement and development (road, rail, air, telecommunication and cold storage facilities among others).

Annex I illustrating major categories of NTBs

| | Category of NTB | Non-tariff measure |
|---|--|--|
| 1 | Sanitary and Phytosanitary Measures | Health and sanitary regulations, quality standards, safety, industrial standards and regulations |
| 2 | Technical barriers to trade | Packaging and labelling, including trademarks, advertising and media regulation |
| 3 | Government participation in trade, restrictive practises and more general policies | Subsidies and other aids, government procurement policies, state trading, government monopolies and exclusive franchises, government industrial policy and regional development measure, government financed research, development and other technological policies, national systems of taxation and insurance, macroeconomic policies, competition policies, foreign corruption policies, immigration policies, rules of origin and domestic content requirement |
| 4 | Customs procedures and administrative practises | Customs valuation procedures, customs classification procedures, customs clearance procedures, consular formalities and sample requirement |
| 5 | Quantitative restrictions and similar specific limitations | Import quotas, export limitations, licensing (import and exports), voluntary export restrains, prohibitions (import and export), exchange and other financial controls, domestic content and mixing requirement |
| 6 | Non-tariff charges and related policies affecting imports | Variable levies, advance deposit requirements, anti-dumping levies, countervailing duties and border tax adjustment. |

CHAPTER FOUR

The Most Favoured Nation principle in the EAC EC Economic Partnership Agreement

4.1 Introduction and Background to the MFN principle

The Most Favoured Nation (MFN) principle has been a central pillar of trade policy for centuries.⁴²¹ At first, MFN provisions were used in commercial treaties on a limited basis as a link between specialised groups of states. After the demise of mercantilism, MFN provisions were broadly applied to concessions granted to all countries.⁴²² The MFN principle is also often referred to as the cornerstone of the multilateral trading system (the MFN status is sometimes referred to as non discrimination).⁴²³

The MFN obligation calls for a country to grant to every other country with which it has signed an MFN treaty the most favourable treatment that it grants to any other country with respect to imports, exports and related regulations.⁴²⁴ The MFN treatment means essentially an obligation to treat activities of a particular foreign country or its citizens at least as favourably as it treats the activities of any other country.⁴²⁵ It is a legal obligation to accord equal treatment to all nations accorded the benefit.⁴²⁶

For example, if country X has granted MFN treatment to country Y, and then it grants a low tariff to country Z on imports from Z to X, country X is obliged to accord the same low-tariff treatment also to country Y and its citizens.

⁴²¹ Jackson H.J., *The World Trading System, Law and Policy of International Economic Relations*, 2nd edition, (1997) at 157. In this chapter the wording MFN principle and MFN clause are used interchangeably to illustrate the application of the MFN principle.

⁴²² Matsushita M, Schoenbaum J.T, and Mavroidis C.P., *The World Trade Organisation: Law, Practise and Policy*, 1st edition (2003) at 144

⁴²³ Trebilcock J.M, *Regulation of International Trade*, 3rd edition, (2005) at 49

⁴²⁴ (n 245 above) at 49

⁴²⁵ (n 421 above) at 157

⁴²⁶ (n 422 above) at 143

MFN clauses can be conditional or unconditional, under conditional MFN, when a country A grants a privilege to country C while owing MFN to country B, then country A must grant the equivalent privilege to B but only after B has given A some reciprocal privilege to 'pay for it'.⁴²⁷ Under unconditional MFN, in the case above, A must grant the equivalent privilege to country B without receiving anything in return from B.⁴²⁸

The phrase MFN appeared for the first time in the eighteenth century, and the clause began to develop into its modern form during this period. At this stage, the MFN clause was unconditional, which meant that the generalisation of concessions was not contingent upon the receipt of concessions equal to those exchanged by the original parties to a commercial treaty.⁴²⁹

In the 1800s and 1900s, the MFN clause, either conditional or unconditional, was included frequently in a variety of treaties, particularly in the friendship, commerce, and navigation treaties.⁴³⁰ The conditional MFN policy was virtually abandoned as the wave of liberal economic sentiment carried the unconditional MFN clause to the height of effectiveness.⁴³¹

After the Second World War, the MFN clause resumed its importance and contributed to the beginning of a new era of trade liberalisation. It was widely agreed that the pre-war economic nationalism and protectionist policies which led to uneconomic diversions of world trade had strongly contributed to the outbreak of the war. The Allied Nations sought to establish institutions that would liberalise trade and limit restrictive practises.⁴³²

The GATT secretariat was established in order to proscribe the discriminatory trade treatment which had caused international trade to develop into economic blocs. The GATT secretariat, therefore, emphasized the principle of

⁴²⁷ (n 421 above) at 161

⁴²⁸ (n 421 above) at 161

⁴²⁹ (n 245 above) at 50. By the eighteenth and nineteenth centuries, MFN provisions were in general use among European and American trading nations.

⁴³⁰ (n 421 above) at 158

⁴³¹ (n 245 above) at 50

⁴³² (n 245 above) at 51

non-discrimination in trade.⁴³³ The MFN principle went through several stages of development until its introduction in the General Agreement on Tariffs and Trade 1947.⁴³⁴ This principle was further divided into two parts that is external non-discrimination prescribed in Article I and internal non-discrimination prescribed in Article III of the GATT.⁴³⁵

On the other hand, as the GATT superseded a series of reciprocal bilateral trade agreements, it was inevitably based on the principle of reciprocity. Even though most such trade agreements, especially those concluded between European states, contained a conditional MFN clause, these clauses were not incorporated into the GATT agreement.⁴³⁶

The MFN principle, in its current usage (Article 1 of the GATT),⁴³⁷ is unchanged from its articulation in the GATT 1947 and states that:

‘...any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties’.

The MFN obligation under the GATT is unconditional and quite broad. It includes not only tariffs and associated customs measures, but also, through the incorporation of Article III:2 and Article III:4 of the GATT, internal taxes,

⁴³³ Yanai A., ‘The function of the MFN clause in the Global Trading System’, (2002)01/02(3) *APEC Study Centre Economics Cooperation Studies Department Institute of Developing Economies JETRO* at 14 <http://www.ide.go.jp/English/Publish/Download/Apec/1863ra0000006alg-att.pdf> [accessed on 11 March 2009]

⁴³⁴ (n 245 above) at 49

⁴³⁵ Article III of the GATT deals with the regulation of foreign products, indicating that, once they are imported and tariffs are paid, they should be treated on equal terms with domestic products in respect to taxes and other requirements. In other words, Article III enforces the National Treatment rule.

⁴³⁶ (n 433 above) at 15

⁴³⁷ Article I:1 of the GATT covers duties and charges levied on goods or on international transfer of payments related to those goods; the methods of levying such duties and charges; all rules and formalities related to importation and exportation; internal taxation; and internal regulations of the type covered by Article

charges and regulations affecting the sale, distribution, and use of products.⁴³⁸

In conclusion a historical examination of MFN clauses suggests that their birth was the product of necessity – the need to avoid troublesome and repetitive procedures by applying the same conditions to all trade partners. Early MFN clauses functioned as instruments to generalize concessions, while present-day clauses work as means to actualize non-discrimination.⁴³⁹

4.2. Interpretation and Application of the MFN Principle

Davey and Pauwelyn also identify several interpretive issues with respect to Article 1 of the GATT. These include: the scope of coverage of Article 1:1, the meaning of ‘any advantage, favour, privilege or immunity’, the meaning of ‘accorded...unconditionally’ and the interpretation of like products.⁴⁴⁰

4.2.2 Like Products

It is not always easy to determine the way the MFN obligation applies. First, in the GATT and many other agreements, the language of the obligation speaks of MFN treatment for ‘like products’. Therefore the question often arises as to what ‘like products’ are.⁴⁴¹

The issue of ‘like products’ relates frequently to classification of goods for tariff purposes. One of the main problems with the concept of ‘like product’ is to establish rules on the basis of which products may be differentiated. When determining whether products are like, WTO dispute settlement panels have taken into account factors such as tariff classification, physical characteristics, end-uses, consumers’ tastes and habits.⁴⁴²

⁴³⁸ (n 422 above) at 147

⁴³⁹ (n 433 above) at 20

⁴⁴⁰ Davey J.W and Pauwelyn J., ‘MFN unconditionality: A legal analysis of the concept in view of its Evolution in the GATT/WTO Jurisprudence with particular reference to the issue of ‘Like Product’, in Cottier T. and Mavroidis C.P., (eds) *Regulatory Barriers and the Principle of Non-discrimination in World Trade Law*(2000) Ann Arbor: University of Michigan Press at 17

⁴⁴¹ (n 421 above) at 162

⁴⁴² (n 245 above) at 65

For example if country A, wishes to differentiate its treatment of countries B and C, regarding tariffs on radios, one way to do this is to analyse the imports from country B and C so as to discern any distinguishing characteristics. If it is discovered that B ships FM radios while C ships AM radios, then A will be tempted to charge a higher tariff on FM radios, if it intends to favour C or disfavour B.⁴⁴³

In *EC – Bananas*, the Appellate Body stated that ‘the essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas irrespective of whether and how a member categorizes or subdivides these imports for administrative or other reasons’.⁴⁴⁴

In *Canada – Autos* the Appellate Body (AB) asserted that the object and purpose of Article 1 of the GATT is to prohibit discrimination among ‘like products’ originating in or destined for different countries. According to the AB, the prohibition of discrimination in Article 1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other members on an MFN basis.⁴⁴⁵

In conclusion the MFN principle bans discrimination between countries in respect to ‘like products’. Therefore ‘unlike’ products may be treated differently by countries.

4.2.3 Advantage, Favour, Privilege or Immunity

Article 1:1 of the GATT covers any advantage, favour, privilege or immunity granted to both members and non-members of the WTO. The interpretation of ‘advantage’ has been briefly discussed in several cases.⁴⁴⁶ A key application

⁴⁴³ (n 421 above) at 162

⁴⁴⁴ Paragraph 191 Appellate Body Report, *European Communities – Regime for the importation, sale and distribution of Bananas (EC – Bananas)*, WT/DS 27/AB/R/ DSR 1997: II; 589 adopted on 25 September 1997

⁴⁴⁵ Paragraph 84 Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry (Canada – Autos)*, WT/DS 139/AB/R, WT/DS 142/R, adopted 19 June 2000: VI, 2995.

⁴⁴⁶ (n 245 above) at 56

of the MFN rule is the interpretation given to the term 'advantage' in GATT Article I:1. First, the term 'advantage' applies to cases of explicit discrimination between products on the basis of their country of origin. Thus, different tariff rates, quotas, and taxation rates for 'like products' from different countries would be prohibited because the difference would afford some an 'advantage'.⁴⁴⁷

Second, an 'advantage' can also take the form of a procedural requirement or practise. For example, in *United States – Denial of Most Favoured Nation Treatment as to Non-Rubber Footwear from Brazil*, the GATT panel held that countervailing duty order was accorded by the United States to certain countries, while other countries were required to request an injury review for such back-dating.⁴⁴⁸ It made no difference whether the products covered by the (antidumping or) countervailing duty were 'like'.

Third, the term 'advantage' also covers indirect discrimination where the distinction is not expressly on the basis of countries but is drawn on the basis of conditions that obtain within countries. The leading case is the *Belgian Family Allowances case*,⁴⁴⁹ In this case different levies were made with respect to products purchased by public bodies, based upon whether the products originated in countries with family allowance taxation systems similar to Belgium's. The panel held this to be a violation of Article I:1.⁴⁵⁰

4.2.4 Unconditionally

Article I:1 of the GATT also provides for an unconditional MFN obligation, that is any concession accorded to one country must be unconditionally and

⁴⁴⁷ (n 422 above) at 149

⁴⁴⁸ Paragraph 3 *Belgian Family Allowances (Allocations Familiales)*, 7 November 1952, GATT B.I.S.D. (1st supp.) 1953 at 59. Denmark and Norway submitted a complaint regarding the application of a Belgian law imposing a charge on foreign goods purchased by public bodies when those goods originated in a country whose system of family allowances did not meet specific requirements.

⁴⁴⁹ (n 448 above) at 59

⁴⁵⁰ (n 422 above) at 149. The panel held that 'the Belgian legislation would have to be amended insofar as it introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption dependant on certain conditions

without payment be extended to all WTO members.⁴⁵¹ 'Unconditionality' was one of the main issues in Belgium – Family Allowances, the panel ruled that Article I:1 of the GATT prohibits the imposition of discriminatory internal taxes. This ruling could be interpreted to mean that that pursuant to Article I, members can not impose a condition on the granting of an advantage that results in discrimination between countries.⁴⁵²

4.3 Exceptions to the MFN principle

Despite the policies and legal obligations that support MFN, it is widely recognised that substantial departures from MFN in international trade practise are evident. Indeed, it has been estimated that 25 percent of all world trade moves under some form of discriminatory regime that is a departure from MFN principles.⁴⁵³

Some of these departures were anticipated by the original drafters of the MFN clauses, such as in GATT.⁴⁵⁴ For example, it has been recognised for centuries that although a tariff may be established on an MFN basis, classifications of tariff items can to some extent operate effectively to discriminate among goods of various countries.⁴⁵⁵

As an illustration within the EAC customs union there are at least three levels of tariffs that may apply to goods imported into any one of the partner states, the GATT bound-tariff level for GATT parties that are not in the customs union; tariff-free treatment for customs union goods, and tariffs on goods from other countries that are not GATT parties.

Further, at the time of coming into effect of the GATT historical preferences in force at the time were '*grandfathered*' under paragraph 2 and 4 of Article 1 of the GATT. This was subject to the requirement that the margin of preference can not be subsequently be altered in such a way as to exceed the difference

⁴⁵¹ (n 245 above) at 59

⁴⁵² (n 245 above) at 60

⁴⁵³ (n 421 above) at 163

⁴⁵⁴ (n 421 above) at 163

⁴⁵⁵ (n 421 above) at 163

between the MFN rate and preferential rates existing as of 10 April 1947. These provisions complete that the absolute, not proportional, difference between MFN and preferential rates must be maintained when MFN rates are reduced or raised.⁴⁵⁶

For example, if the MFN rate is 20% and the preferential rate 10% on imported widgets, and the MFN rate is subsequently reduced to 15% (a 25% reduction), the preferential rate can be reduced to 5% and not 7.5% (which would be a 25% reduction). This exception has become less important over time as MFN rates have been negotiated down and differences between the preferential rates and MFN rates progressively reduced. In addition, many of the preferences referred to in paragraph 2 have been subsequently changed or terminated.⁴⁵⁷

One of the most prominent and difficult problems engendering exceptions to MFN and GATT is found in GATT Article XXIV, which provides exceptions for customs unions, FTAs and interim agreements leading to either. Article XXIV of the GATT has furnished an extremely large loophole for a wide variety of preferential agreements.⁴⁵⁸

Provided that two basic conditions are met, that is trade restrictions are eliminated with respect to 'substantially all trade' between the constituent territories, and customs duties shall not be higher thereafter than the duties prevailing on average throughout the constituent territories prior to the formation of a customs union or FTA.⁴⁵⁹ Subject to these two conditions, constituent territories are permitted to establish more favourable duty and

⁴⁵⁶ (n 245 above) at 54

⁴⁵⁷ (n 245 above) at 54. GATT Article XXIV is based partly on the historical precedent of special regimes of frontier traffic between adjacent countries, and partly on the policy that total world welfare can be enhanced by regimes of trade that totally eliminate restrictions to trade among several countries.

⁴⁵⁸ (n 421 above) at 165. In a customs union, customs duties between the parties are eliminated and a common tariff with regard to third countries is adopted by all parties to the union. In a FTA, the parties eliminate tariffs as between themselves but do not adopt a Common External Tariff. FTAs are therefore prone to a type of trade diversion where goods from third countries enter the FTA at the point of the lowest tariff and then move to their ultimate destination within the FTA duty free. This is dealt with by differential and stricter RoO.

⁴⁵⁹ (n 245 above) at 55

other arrangements among themselves than pertain to trade with non-member countries.⁴⁶⁰

The customs laws of many nations require identification of the country of origin for imported goods. If true MFN were followed for all goods and all origins, then presumably no need would exist for such rules. In fact, however, there is considerable differentiation of treatment of imports, depending on their origin.⁴⁶¹

Furthermore, waivers can sometimes authorise departures from MFN. The Generalised System of Preference program to favour trade of LDCs operated under the benefit of a waiver from GATT MFN from 1971 to 1981.⁴⁶² Later it was presumed to be authorised by the Tokyo Round Understanding, called the enabling clause, but officially entitled the understanding on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries.⁴⁶³

In my view the foundation of the multilateral trading system is built on the MFN principle that has evolved overtime however the exceptions discussed above highlight some of the challenges faced in the enforcement of the principle. However depending on how the parties to an agreement draft the MFN clause it has numerous implications. In case of the EAC EC EPA, the implications are discussed in detail below.

4.4 The Economic Implications of the MFN principle

The success of the MFN principle and its continued application are due to the perceived economic and political benefits of its use.⁴⁶⁴

Arguably, one of the main virtues of the MFN clause is its multiplier effect that is MFN treatment causes generalisation of liberalising trade policies, so that

⁴⁶⁰ (n 245 above) at 55

⁴⁶¹ (n 421 above) at 167

⁴⁶² (n 421 above) at 164

⁴⁶³ (n 421 above) at 164

⁴⁶⁴ (n 422 above) at 144

overall more trade liberalisation occurs. However, if, on one hand, the automatic extension of concessions caused by the MFN clause contributes to the generalisation of liberalising trade policies, on the other hand the opportunities for free-riding generated by the clause may result in less trade liberalisation.⁴⁶⁵

The disadvantage of MFN treatment is that *'free riders'* may be encouraged to take advantage of the system by claiming the benefits of liberalisation forged by states while keeping their own markets closed.⁴⁶⁶ In the past, the possibility of *'free riding'* has led some states to make MFN treatment conditional on other states granting concessions in return.⁴⁶⁷

Unconditional MFN treatment is especially useful in a multilateral system. This is because concessions which one country makes to another becomes generalised in favour of all countries to which the countries to which the country making the concession was obligated by treaty to extend MFN treatment.⁴⁶⁸

Unconditional MFN treatment reduces the transaction costs of entering and maintaining the multilateral trading system. It avoids the enormous difficulty involved in negotiating a multitude of interlocking bilateral agreements.⁴⁶⁹ Unconditional MFN treatment has been found to be the simplest system to administer and the most effective way of extending trade. Therefore, while details of the multilateral trading system are not reciprocal, the system as a whole is maintained and operated under broad principles of reciprocity and conditionality.⁴⁷⁰

⁴⁶⁵ (n 245 above) at 52

⁴⁶⁶ (n 422 above) at 144

⁴⁶⁷ Although conditional MFN treatment has now been largely abandoned, it still reappears from time to time. There two main reasons that conditional MFN treatment has largely been abandoned. First, it proved unworkable as ascertaining of what constituted equivalent compensation in application of the conditional MFN principle was found to be difficult or impracticable. Second, conditional MFN treatment was counterproductive because instead of securing concessions, it merely provided the opportunity to bargain for equity of treatment.

⁴⁶⁸ (n 422 above) at 145

⁴⁶⁹ It also counteracts the 'prisoners' dilemma namely the temptation to cheat the system because the putative cheater knows that the fruits of his bargain would immediately be claimed by all states.

⁴⁷⁰ (n 422 above) at 145

The MFN obligation also impacts on the bargaining game by protecting the value of concessions against future erosion, and eliminating the threat of discriminatory arrangements. Schwartz and Sykes note that:

‘...a trading regime without a MFN obligation creates an opportunity for a subset of trading nations to threaten to create a discriminatory arrangement even one that was not genuinely in their joint interests unless other nations make concessions to stop it...With the MFN obligation in place, by contrast, nations are disabled from making threats to discriminate.’⁴⁷¹

In addition, the presence of the MFN clause in a treaty for example between countries A, B and C protects the value of concessions by preventing country B from making a concession to the same goods to country C without extending this concession to A.

Implementing an MFN clause in an FTA, in an unconditional form, would oblige any party to the FTA, should they provide more favourable concessions to a third party, to provide those same concessions to the original members of the FTA. Concessions therefore do not remain internal to the FTA but can seep into the multilateral system.⁴⁷²

For example if country A receives a concession from country B and is not entitled to MFN treatment from B, then the value of the concession can be undermined if country B later makes an even better concession to country C on the same goods (or close substitutes). Faced with this uncertainty, country

⁴⁷¹ (n 245 above) at 52. See also Schwartz F.W, and Sykes O.A., ‘The Economics of the Most Favoured Nation Clause’, in Bandari S.J, and Sykes O.A., (eds) *Economic Dimensions in International Law: Comparative and Empirical Perspectives*, (1997), Cambridge: Cambridge University Press)

⁴⁷² Haynes - Prempeh M., ‘The MFN clause in the EPA supporting Multilateralism of Making Foes of Nations?’ (2008) *A Paper presented at the 6th Garnet PhD School: Global Governance & Regionalism: The Institutional Dimension* at 5
http://www.garneteu.org/fileadmin/documents/phd_school/6th_phd_school/Students_papers/Haynes_Prempeh.pdf [accessed on 18 October 2008]

A would offer less for the concession in the first place (as would country B for the reciprocal concession), and fewer valuable deals would be struck.⁴⁷³

The MFN clause also finds support in the classical theory of international trade. According to this theory, discrimination between foreign suppliers distorts the working of the price mechanism. When governments apply trade restrictions uniformly without regard for the origin of goods, the market system of goods allocation and production will have maximum effect. On the other hand, when governments discriminate between exporters, they cause a misallocation of resources by inducing a shift of resources toward those relatively less efficient producers who are favoured and away from those more efficient producers who are disfavoured.⁴⁷⁴

The MFN principle ensures the removal of distortions that otherwise would hinder the operation of comparative advantage.⁴⁷⁵ For example, if country K does not produce product X, and if country U can supply product X at a lower price than country T, country K can increase its economic efficiency by importing it from country U. If, however, country K applies higher tariff rates to product Xs from country U than to product Xs from country T, country K may end up importing product Xs from country T, even though country T is not as efficient a supplier.

In light of the example above, this distorts trade and, as a result, reduces the welfare of country K and the economic efficiency of the entire world. If, however, the MFN principle is applied between the three countries, then country K will apply its tariffs equally to all exporting countries and will therefore necessarily import product X from country U because it is cheaper to do so. Therefore the most efficient result is attained.

⁴⁷³ Schwartz W.F. and Sykes A.O., 'The economics of the most favoured nation clause', In Bhandani J.S. and Sykes A.O., (eds.), *Economic Dimensions in International Law: Comparative and Empirical Perspectives*.(1997) Cambridge University Press, pp. 43–79 at 62

⁴⁷⁴ (n 245 above) at 51

⁴⁷⁵ (n 422 above) at 144

The MFN helps to minimise transaction costs, because customs officials at the border may not need to ascertain the '*origin of goods*' to carry out their tasks with respect to goods controlled by MFN.⁴⁷⁶ In my opinion since all countries are treated equally, this will lead to enhanced economic efficiency because countries will not incur monitoring and negotiation costs.

According to the classical theory of international trade, discrimination between foreign suppliers distorts the working of the price mechanism. Therefore the political rationale for the MFN principle is based on the belief that the MFN promotes better international relations since it avoids the bitterness and tensions that may result from discriminatory policies.⁴⁷⁷

When governments apply trade restrictions uniformly without regard for the origin of goods, the market system of goods allocation and production will have maximum effect. On the other hand, when governments discriminate between exporters, they cause a misallocation of resources by inducing a shift of resources towards those relatively less efficient producers who are favoured and away from those more efficient producers who are disfavoured.⁴⁷⁸

In conclusion the widespread and continued use of the MFN clause in bilateral and multilateral trade agreements is clearly due to the advantages associated with the clause. By applying an MFN clause in an agreement any concessions and accrued benefits resulting from trade negotiations are more likely to be applied equally to all other WTO members, even though they may be excluded from the negotiations.

4.5 Implications of the MFN principle in the EAC EC EPA.

The MFN clause is the cornerstone of the principle of non-discrimination that underlies the entire international trading system (this is clear in light of the discussion above): it is also accepted by WTO members that the MFN clause

⁴⁷⁶ (n 421 above) at 159

⁴⁷⁷ (n 440 above) at 15

⁴⁷⁸ (n 245 above) at 51

makes sense within the WTO context. However, the MFN clause has stirred up controversy in the EPAs, this is probably because the MFN clause has no place as part of EPAs.⁴⁷⁹

The twenty five years of the EC's trade relationship with ACP countries was marked by the signing of the Cotonou Partnership Agreement (CPA) in 2000.⁴⁸⁰ The Lomé Convention, buttressed with generous non-reciprocal preferential market access into the European market for ACP exports but having failed to achieve these goals, have now been replaced with new reciprocal regional FTAs.⁴⁸¹

These FTAs were deliberately called EPAs since they go beyond liberalisation of markets known of standard FTAs to include some of the development dimensions that characterised the Lomé agreements, albeit now, within the rubric of trade liberalisation. For that reason, EPAs have been understood to be development oriented, and not classical hard nosed, FTAs.⁴⁸²

There key economic reasons why the Lomé Convention were overhauled; however, political and legal challenges were the main reasons. The non-reciprocal trade preferences granted to ACP countries under the Lomé Convention and, in the interim period, under the CPA, had been accused of contravening a fundamental principle of the WTO 'enabling clause'⁴⁸³

After the establishment of the WTO in 1995, the EC managed to secure a waiver allowing it to continue contravening the WTO stipulations. The waiver was extended for 7 years during the WTO's Doha Round in 2001 to allow both

⁴⁷⁹ Dièye C.T and Hanson V., 'MFN provisions in EPAs: a threat to South – South trade?' (2008)7(2) *Trade Negotiations Insights* at 3 www.acp-eu-trade.org [accessed on 30 December 2008]

⁴⁸⁰ The CPA, though replete with several objectives and principles, has the contribution to sustainable development, poverty eradication and gradual integration of ACP countries into the global economy (Article 1:2 of the CPA) as its salient end goals.

⁴⁸¹ (n 49 above) at 6

⁴⁸² (n 49above) at 6

⁴⁸³ The 'enabling clause' allows industrial countries to give unilateral non-reciprocal preferential treatment to either all WTO least developed countries (LDCs), or, all developing country members but not to the two categories of countries in the same region. Therefore, since ACP countries cover both categories, the non-reciprocal Lomé preferences granted to the ACP countries contravened the current WTO rules.

parties ample time to find a way out of the WTO's rule. The EPAs which come into force beginning January 2008 have been claimed to provide the solution.⁴⁸⁴

It is provided under the EAC EC EPA that the EC party shall accord to the EAC party any more favourable treatment applicable as a result of the EC party becoming party to an economic integration agreement with third parties after the signature of the agreement. In return, the EAC party shall accord to the EC party any more favourable treatment applicable as a result of EAC party becoming party to an economic integration agreement with any major trading country after the signature of the agreement.⁴⁸⁵

In situations of trade agreements between the EAC party with countries of the ACP group, or other African Countries and regions, the EAC party shall not be required to accord any resulting MFN treatment to the EC party.⁴⁸⁶ Furthermore, it is provided that the provisions above shall not be construed as to oblige the parties to extend reciprocally any preferential treatment applicable as a result of the one of them being party to an economic integration agreement with third parties on the date of signature of the EPA.⁴⁸⁷

Therefore, under MFN treatment, first if EC gives better treatment to a third country, they have to give it to the EAC partner states as well; secondly, if EAC partner states gives better treatment to a developed country or any country accounting for more than 1% of world merchandise trade, EAC partner states have to extend the same treatment to EC; and lastly, Members

⁴⁸⁴ (n 49 above) at 7. Interestingly, under the EPAs ACP-EC trade relationship is governed under article XXIV of the GATT rather than the 'enabling clause'.

⁴⁸⁵ Article 16(6) of the EPA defines a major trading economy to mean any developed country, or any country accounting for a share of world merchandise exports above 1% in the year before the entry into force of the economic integration agreement that is the EPA, 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% in the year before the entry into force of the EPA. According to WTO data, Brazil accounted for 1.5% in 2006, compared to 16.4% for the EU and 11.5% for the US. Other developing countries affected would include China; accounting for 10.7% of world exports that year, as well as Mexico, Malaysia, India and Indonesia (which cross the threshold with between 2.8% and 1.1%). It should be noted the 'MFN' clause is included in all the EPAs between the ACP countries and the EC however there are slight differences in the circumstances under which the clause may be triggered into application by the different ACP regions/countries.

⁴⁸⁶ Article 16(4) of the EPA

⁴⁸⁷ Article 16(3) of the EPA

of the ACP group and other African countries are not covered by the MFN provision with respect to the EAC EC EPA.

A few southern countries meet this criterion of major trading economies. They should be concerned by this only if they were to grant ACP countries better conditions than the EC in future trade negotiations. If that happened, then ACP countries (in this case EAC partner states) would be in a position to grant such countries better treatment than we gave the EC. The EC, in turn, would then be in a position to request implementation of the MFN clause in its favour.⁴⁸⁸

However, the MFN clause has stirred up controversy in EPAs, it has no place as part of them according to Dièye C. Tidiane and Hanson Victoria.⁴⁸⁹ The EC was within its rights to demand trading preferences from ACP countries on the same basis as those it grants to them (reciprocal trade preferences). But the EC goes too far when it asks that the ACP countries give in return all that they might 'one day' grant other countries, regardless of what those others might give them. This is certainly a 'pre-emptive' injustice for ACP countries and Brazil was justified to point it out.⁴⁹⁰

Therefore it is not surprising that MFN clauses in EPAs were denounced by a number of WTO members who saw it as putting in place a European strategy aimed at maintaining and increasing its share of a regional and continent-wide market that it had not yet been able to tap. Even before Brazil's sensational intervention at a WTO session where it warned of the dangers of including the MFN clause in EPAs not only for the ACP countries but for all developing countries⁴⁹¹

This is mainly because the MFN clause in an EPA 'multilateralises' any new FTA concessions that a country may receive to all other partners with which it

⁴⁸⁸ Camilo F.A.C., 'MFN in the Cariforum EPA is no treat to South-South trade', (2008)7(4), *Trade Negotiation Insight*, at 10 <http://www.ictsd.org/tni> [accessed on 15 August 2008]

⁴⁸⁹ (n 479 above) at 3

⁴⁹⁰ (n 479 above) at 3

⁴⁹¹ (n 479 above) at 2

shares an FTA. Though *'Multilateralising'* the obligations in regional agreements is one avenue through which harmony can be achieved between the regional and multilateral trading system.⁴⁹²

In light of the above, the inclusion of the MFN clause in the EAC EC EPA will have two major effects. First, the EAC partner states will be permanently opened to all goods, service-providers and investors from the EC through the provisions on free entry, national treatment, non-discrimination and permanency of this opening would be locked-in by treaty.

Secondly, by liberalising the EAC market the EC will have succeeded in ensuring a competitive environment is created for all its goods, service providers and services. Therefore given a minimal regulatory framework in place within the EAC market, constraints will be eased creating a likelihood of increased private investments from the EC. However there is need for the EAC partner states to put in place some measures to promote local production capacity.

Brazil has raised serious concerns that the MFN clause in the EPAs between the EC and ACP countries could pose a serious threat to improving trade between developing nations. The Latin American country, which voiced its fears during the WTO General Council in Geneva on 5 February 2008, pointed to the negative effects of the so-called MFN clause included in both the Caribbean and interim EPAs.⁴⁹³

According to Brazil by including MFN clauses in EPAs, the EC would be turning the *'Enabling Clause'* upside down.⁴⁹⁴ When the *'Enabling Clause'* was negotiated in the 1970s, one of its main objectives was to increase trade among developing countries, on a preferential basis. This possibility is clearly

⁴⁹² (n 472 above) at 12

⁴⁹³ (n 479 above) at 1; In this instance an interim EPA also includes the EAC EC EPA.

⁴⁹⁴ The *'Enabling Clause'* was adopted under the GATT IN 1979, allows developed members of the WTO to give preferential and more favourable treatment to developing members while not doing so to wealthy ones. In addition to North – South trade preference schemes, it also specifically refers to regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs.

mentioned in indent C of paragraph 2 of the *'Enabling Clause'*, which determines that the provisions of the clause apply to 'regional or global arrangements entered into amongst less-developed Contracting Parties for the mutual reduction or elimination of tariffs ...'⁴⁹⁵

According to Brazil, including the MFN clauses would discourage any developing country from entering into agreements aimed at securing mutual concessions with EPA countries, on the grounds that the existing access to markets granted to EC by the ACP would equal the maximum access possible to other developing countries because in effect anything above would automatically have to be offered back to EC.⁴⁹⁶

Brazil further argues that the inclusion of MFN clauses in the EPAs, if confirmed, will discourage or even prevent third countries from negotiating FTAs with EPA parties and this will create major constraints to South-South trade. This comes at a moment when we are witnessing a major expansion of that trade and the prospects for promoting further growth through initiatives like the extension by some developing countries of duty-free, quota-free market access to LDCs and the current round of global system of trade negotiations.⁴⁹⁷

The inclusion of MFN clauses in the EPAs has the potential to undermine these initiatives and to create constraints to the development of South-South trade. This will not help the integration of developing countries into the world trading system, one of the central objectives of the Doha round (also a key objective of the EPAs).⁴⁹⁸

According to Carmen Pont-Vierira Dos Santos, a former WTO official in charge of regional trade agreements 'Brazil would be reluctant to make concessions in exchange for concessions that will be extended to the EC,'

⁴⁹⁵ General Council meeting-Item 6 ACP-EU Economic Partnership Agreement statement by Brazil 5 February 2008 Paragraph 4 http://www.acp-eu-trade.org/library/files/Brazil_EN_050208_Statement-WTO-General-Council.pdf [accessed on 10 January 2009]

⁴⁹⁶ (n 479 above) at 2

⁴⁹⁷ (n 495 above) Paragraph 9

⁴⁹⁸ (n 495 above) Paragraph 9

India would also be wary of giving up anything in exchange for far reaching, prompt access to an ACP country's automobile market, if it knew it had to compete on identical terms with European cars, she said. The MFN clauses do introduce a '*real problem*' and a disincentive to South-South commerce.⁴⁹⁹

This suggests that the MFN clauses curtail negotiated rights for developing countries and in effect '*unable*' the '*Enabling Clause*' in some cases. Pont-Vieira Dos Santos said that if such clauses become a practice 'it could contribute to fewer South-South agreements, and maybe more North-South agreements.'⁵⁰⁰

According to Rob Davies, (South African Deputy Minister for Trade and Industry), the MFN clause suggests that tariffs on EC products cannot be higher than the levies imposed on goods from developing countries. EPAs thus prevent other developing countries from having an advantage in bringing their goods on the markets of developing nations.⁵⁰¹

'This would lock us (ACP countries) into a primary relationship with the EC for ever more. It would be an unacceptable limit on our sovereignty'.⁵⁰²

Brazil raised this issue because they thought the conditions that were presumably being asked from the ACP countries were unfair, especially within the context of the Doha Development Round. As a developing country that has seen its trade with other developing countries grow significantly in the past ten years to the point that South-South trade now represents 55% of Brazilian total trade, Brazil has not only systemic and legal concerns with the MFN clauses but also very concrete objections to those clauses.⁵⁰³

⁴⁹⁹ (n 59 above) at 2

⁵⁰⁰ (n 479 above) at 2

⁵⁰¹ (n 479 above) at 2

⁵⁰² (n 479 above) at 2; see also: *Africa: EPAs signed after EU's threats*, *Africa News*, 21 December 2007, www.africanews.com/site/list_messages/14101)

⁵⁰³ Brazil further contends that they would like to hear from the EC the rationale for devising these agreements in this format and, particularly, would seek confirmation of the existence of a MFN clause in these agreements, something that will affect third parties in their negotiations with the ACP

Brazil's reservations are widely shared, as the EC proposal seems to run counter to a strong and almost irreversible tendency towards increasing trade between developing countries particularly India, Brazil, China and the African nations. Even though EC is undeniably Africa's main trading partner, and will probably remain so for years to come, its share of trade with Africa continues to decline, whereas Africa's share with countries such as China is showing a stratospheric rise.⁵⁰⁴

Brazil, which was supported by several developing countries including South Africa, China, India, Paraguay and Argentina, said it was raising the issue partly out of systemic and legal concerns that would affect all WTO members, but also due to 'very concrete objections' arising from the implications for its own trade with other developing countries.⁵⁰⁵

In my view, much as the inclusion the MFN clause in the EPA is not contradictory to 'Enabling Clause' on the face of it, however the application of the MFN clause is likely to negatively affect South-South trade. This is because if developing countries classified as major trading economies in the EPA extend better concession to the EAC partner states then the same concessions will be extended EC. This places the EC in an advantageous and secure bargaining position for its goods and services as compared to countries classified as major trading economies.

The EC argues that in expressing concerns about the inclusion of the MFN clause within the EPAs, Brazil was also inaudibly pursuing its medium term economic interests. Indeed, some point out that the Latin American giant is not driven solely by systemic concerns but rather by an appreciation that its offensive interest could be thwarted by an EPA MFN clause as 55% of Brazil's total trade is with developing countries. Moreover, it is important to be aware that the EC is currently negotiating FTAs with Central America and the

countries and that will bring a series of challenges and difficulties to developing countries in particular and to the WTO Membership as a whole.

⁵⁰⁴ (n 479 above) at 2

⁵⁰⁵ (n 479 above) at 2

Andean Pact – Brazil’s natural market - with the strong likelihood that these will contain similar MFN provisions.⁵⁰⁶

The EC also defended the inclusion of the MFN clause in EPAs. The first line of defence is on legal grounds. One EC official told Trade Negotiation Insights that:

‘the MFN clause does not contradict the *Enabling Clause* in any legal aspect’.

The EC official further explained that ‘the *Enabling Clause* permits trade preferences among developing countries, but it contains nothing that prohibits the extension of such preferences to other WTO members’.⁵⁰⁷ The official concluded by stating that because the ‘*Enabling Clause*’ does not cover FTAs therefore there is no connection between the MFN clause, which applies only to FTAs and preferences granted under the *Enabling Clause*.⁵⁰⁸

Therefore it has no effect on regional integration between ACP countries or agreements between ACP and other small or poor developing economies, the official underlined. But the EC position is driven by more pragmatic considerations. The EC claimed that the MFN clauses, which was negotiated jointly by the EC and the ACP countries, is a question of basic fairness and covers the so-called ‘*competitive new players*’ Brazil, India, Russia and China.⁵⁰⁹

Louis Michel, EC Commissioner for Development, has recently stated that Europe’s generosity in terms of aid for development did not mean that it would

⁵⁰⁶ (n 479 above) at 2

⁵⁰⁷ (n 479 above) at 2

⁵⁰⁸ (n 479 above) at 2; The matter of the relationship between the EPA MFN Clause and the Enabling Clause remains on the agenda of the General Council and will no doubt be aired when the EPA is notified to the WTO and reviewed in the Committee on Regional Trade Agreements.

⁵⁰⁹ (n 479 above) at 3; for the moment, the ‘*legal limbo*’ surrounding the EPAs, none of which have been officially notified, would make it difficult to conduct a thorough examination of their provisions. If the EC chooses to maintain its position on MFN, it will find it very difficult to claim that its only goal in the EPA is to seek compatibility with the WTO and to encourage integration within ACP regions. Brazil is now expected to ask for the issue to be placed on the agenda for the next WTO General Council’s meeting. Concerns related to bilateral trade arrangements are then usually discussed at the WTO committee on Regional Trade Agreements. However, formal discussions can only happen once the EPAs have actually been notified to the WTO

allow its partner countries to grant more favourable treatment to its commercial rivals; *'we are generous, but not naïve'*, he said.⁵¹⁰

A number of actors in Africa believe that the EC's demand is intended merely to quash any desire to diversify among trading partners a process that the African countries have been engaged in for several years and that is beginning to bear fruit. Europe is therefore eyeing the increasing importance of trade between Africa and China and with good reason.⁵¹¹

The best-informed experts stress that the decline in trade between EC and Africa on traditional postcolonial terms is structural in nature.⁵¹² Lulled by the comfort of its existing trade positions, its monopoly situations and its almost total stranglehold on the means of production and distribution in most African countries, EC has had a brutal awakening and has realised that the world of trade has changed drastically, and in future it must pay a fair price for its consumption, and it must do this in competition with others.⁵¹³

Also, an attempt was made in creating a balance in North-South trade agreement which combines the need to promote and support the necessary development objectives of the South states, thereby addressing global security issues associated with underdevelopment, while at the same time adhering to the underlying principles of non-discrimination, that promote stability in the multilateral system, is arguably one of the most essential undertakings for parties in such arrangements.⁵¹⁴

In my view after finding CPA trade provisions incompatible with WTO legal framework the EC pressured many ACP countries to sign EPAs including LDCs which have benefited from EBA initiative. A modified EBA initiative

⁵¹⁰ (n 479 above) at 3. See also Q&A *'We are generous but not naïve'*. Interview with Louis Michel, EU Development Commissioner, IPS, Bruxelles, 11 February 2008, www.ipsnews.net

⁵¹¹ (n 479 above) at 3

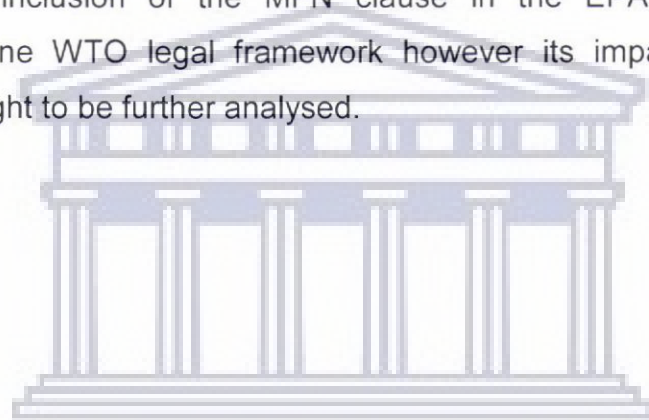
⁵¹² (n 479 above) at 3

⁵¹³ (n 479 above) at 3. China is now the third biggest trading partner on the African continent. Even though Africa remains a minor partner for China, representing only 3% of Chinese global exports and 3.7% of its imports, the Asian giant replaced Germany as the continent's biggest supplier in 2005.

⁵¹⁴ (n 472 above) at 5

would have easily fulfilled the requirements of the 'Enabling Clause' incorporated in WTO legal framework following the decision of 25 June 1971 (BISD 18S/24. By enacting an EPA with a MFN clause the relevancy of the 'Enabling Clause' is minimised.

In conclusion developed countries are increasingly applying the MFN principle in bilateral and multilateral trade agreements which suggests the importance attached to the principle in facilitating trade cooperation at the international level. A FTA as envisaged under Article XXIV of the GATT is no longer necessarily an exception to the non discrimination principle in the multi lateral trade system. The inclusion of the MFN clause in the EPA does not necessarily contravene WTO legal framework however its impact on the 'Enabling Clause' ought to be further analysed.



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CHAPTER FIVE

CONCLUSION AND POSSIBLE RECOMMENDATIONS

5.1 Conclusion

This paper sets out to examine whether development will be enhanced in the East African Community (EAC) partner states in light of the conflicting aspects within EAC - EC EPA and also how the inclusion of the MFN clause in the EPA will impact on the development prospects of the EAC partner states.

This paper found that;

1. Due to the unilateral trade preferences granted under the CPA to EAC partner states they were held to be incompatible to WTO rules as a result the EAC EC negotiated and enacted a reciprocal WTO compatible EPA. The EAC EU EPA is a legally binding agreement, locking in tariff elimination schedules for the EAC partner states with respect to EC goods.

The EAC EC EPA is compatible with the requirements Article XXIV of the GATT which regulates the formation of FTAs however the EAC partner states are required to reciprocate and also liberalise their economies under the new trade arrangement with the EC whereas this was not the case under the Lomé Conventions. As a result the EAC partner states policy space will be eroded on the account of constraints imposed by the new rules thereby limiting these countries from following the most effective development policies.

2. The majority of the population in the EAC partner states rely on agriculture for livelihood and sustenance. However there is a possibility that agricultural producers will be adversely affected by cheaper and heavily subsidised agricultural EC exports.

This possibility is justified despite the exclusion of many agricultural products from liberation in the EAC EC EPA. The major obstacles identified in this paper include supply side constraints faced by the EAC partner states and EC market entry requirements which indirectly

affect the EAC partner states capacity to export agricultural produce to the lucrative European markets.

Whereas the EAC EC EPA contains trade defence measures designed to address agricultural constraints. It would be imperative for the parties to ensure that the use of these measures does not arise in the first place. This is due to the difficulty of proving the prerequisite prior to imposing trade defence measures.

There is great need for the EAC partner states to be vigilant in preparations and during the negotiations for a comprehensive EPA so as to ensure that the agricultural sector is further protected given its importance to the partner states economies and people's livelihood.

- 3 The inclusion of MFN clauses within the EAC EC EPA is likely to undermine the development initiatives that were envisaged at the inception of the EPA negotiation process. Much as the MFN clause in the EAC EC EPA does not apply to ACP countries, it specifically targets emerging economies like Brazil whose trade volume with EAC partner states (as well as ACP countries) is on the increase.

The MFN clause is likely to have a negative impact on trade between the EAC partner states and the so called emerging economies because many of the southern countries classified as emerging economies will be hesitant to extend better trade concessions to EAC partner states since they will automatically extend to EC.

According to Harvard economist Dani Rodrik, there is no convincing evidence that trade liberalisation is always correlated with subsequent economic growth. If market opening occurs, it should not be dictated by arbitrarily devised timetables, but according to the developmental priorities of the country concerned. Liberalised markets can bring economic benefits, but as the experience of China and India shows, domestic policies that foster

economic growth are of overriding importance. Without these the benefits of liberalisation are debatable.⁵¹⁵

Like anything, the EAC EC EPA has its likely advantages and disadvantages, and it is the duty of EAC partner states to mitigate the bad and benefit from the good.⁵¹⁶ Therefore, it is the theory of this paper that the EAC EC EPA was not a bad agreement altogether because it was logical to strengthen the EAC CET. However there are a number of issues which remain of concern to the EAC partner states.

It is the notion of this paper that EAC partner states should have put in place measures to address supply side constraints and other related development challenges faced prior to the introduction and implementation of reciprocity in their trade relations with the EC.

With such measures in place to address the inherent domestic constraints in EAC partner states perhaps subsequently development would be enhanced in these countries hence the possibility of substantially benefiting from consequent multilateral trade engagements.

However in the absence of substantial progress in addressing the physical constraints on competitive production, the productive base of EAC partner states economies is likely to be undermined by moves towards WTO compatible EPA arrangements.⁵¹⁷ This in a way explains why EPAs have generated a lot of debate at national, regional and the international forum.

The EAC EC EPA was negotiated under Article XXIV of the GATT. However there is evident lack of SDT provisions in this WTO provision that regulates North-South RTAs. Further a historical analysis of the origins of Article XXIV

⁵¹⁵ (n 239 above) at 3

⁵¹⁶ Katende E., 'Economic Partnership Agreements and African Countries: A totally bad deal; what are the real issue?', (2008)2 *Uganda Trade Review* at 3

⁵¹⁷ 'Awaiting the grim REPA? 'A review of the outcome of the first phase of ACP-EU trade negotiations', (2003) at 54. A publication of the European Research Office & 11.11.11.-coalition of the Flemish north-south movement.

of the GATT and permissive past practices within the GATT/WTO does not suggest that it was designed for North-- South FTA⁵¹⁸

The ban on export taxes and duties under the EPA⁵¹⁹ is unacceptable for two reasons. First, the WTO allows countries to impose export taxes and duties; in addition export taxes are important to encourage diversification and value addition for African economies. Therefore this EPA provision goes beyond the requirements of Article XXIV of the GATT and could prevent EAC partner states from industrializing and increasing their domestic agricultural production.⁵²⁰

Secondly, the EAC partner states will have signed away their policy space yet the value of preferences granted to them by the EC will be nil in about 5 to 10 years. This is because the EC is already negotiating FTAs with Central America, Andean countries, ASEAN, India and others.⁵²¹

The EAC partner states are faced with a key challenge of inherent supply side constraints which inhibit private sector entities from competing in the lucrative international markets like the EC.⁵²² Yet much as the EC agrees to the development matrix it does not want a detailed one that identifies the costs and exact projects. Therefore this indicates a possibility that EAC partner states have a better understanding of their problems now.

In Uganda the agricultural sector engages almost 70 percent of the population (including fisheries and forestry) and is also important in terms of household incomes, export revenues, and food security.⁵²³ Therefore the EPA agricultural commitments are likely to have a major effect not only on the

⁵¹⁸ (n 39 above) at 372

⁵¹⁹ Under the EAC EC EPA a standstill clause was introduced that disallows new customs duties to be applied, or existing ones to be raised, even for sensitive products after the entry into force of the agreement and also a provision that freezes export taxes and duties

⁵²⁰ Kwa A., 'South Centre cautions African when approaching Economic Partnership Agreements' (2009) at 1 http://www.bilaterals.org/article.php3?id_article=14448 [accessed on 30 December 2008]

⁵²¹ (n 520 above) at 1

⁵²² The supply side constraints are cross cutting issues in all the EPA negotiation clusters but more so components of the development cluster.

⁵²³ Ensuring food security involves providing support for the agricultural sector, controlling the liberalisation of the market in agricultural products, ensuring proper management of the resources allocated to the agricultural sector and promoting consumption of local products.

economy of Uganda but also on the EAC partner states economies as a whole.⁵²⁴

5.2 Recommendations

For the EAC partner states to meaningfully take advantage of the EPA, they will have to advocate for the EC Common Agricultural Policy reforms to be taken expeditiously. With agricultural trade liberalisation in the EC, it may impact world prices thereby enhancing the ability of EAC partner states to benefit from a more open trading system.⁵²⁵

Further, the EC is also pushing hard for countries to liberalise services, intellectual property, investment, competition, and government procurement, these issues are more suited when EAC partner states' economies have grown and can negotiate from a stronger position, rather than from weakness, as it is at the moment. These issues are beyond the requirements of WTO compatibility for RTAs as enshrined in Article XXIV of the GATT.

In terms of regulation and sequencing, effective regulatory authorities should be in place before liberalisation of the sub-sectors is effected for example in Uganda there is neither competition legislation nor a regulatory body. In terms of pace, the liberalisation should be gradual and have appropriate safeguards so that adverse consequences can be addressed through adjustment and corrective measures.⁵²⁶

The inclusion of the MFN clause makes it mandatory for EAC partner states to offer the EC what they offer to another major economy after the entry into force of the EPA. This works against regional integration and the promotion of

⁵²⁴ (n 306 above) at 73

⁵²⁵ (n 10 above) at 73

⁵²⁶ (n 52 above) at 11. The identification of offensive interests should be based on past experiences with liberalisation, export performance and returns, credible positive impact and inflows, and the likelihood of promotion of regional development objectives. The privatisation experience has demonstrated the possibility of some serious adverse consequences for the public. In Tanzania, unscrupulous dealings were discovered in the provision of electricity and water by foreign companies that were either 'brief case' companies or that charged exorbitant and unjustified fees and fines from a developing country government.

south-south trade. It also goes beyond the requirements of the WTO's Article XXIV of the GATT on RTAs.⁵²⁷

In my view much as there development initiatives included in the EPA, a lot more has to be done by the EAC partner states in order to attain their envisaged development objectives in the medium and long-term. This is due the fact that well as Article XXIV of the GATT requires liberalisation in goods only, the EC has insisted on the inclusion of services and Singapore issues among others.

For example if the EAC partner states are to benefit from the EPA, they ought to streamline their domestic policies with both their international trade agenda.⁵²⁸ This essentially means EAC partner states need to effectively and comprehensively address all production and trade related bottlenecks (commonly referred to as '*supply-side constraints*') which are currently and persistently inhibiting economic growth, trade and development.⁵²⁹

In the negotiations leading to a comprehensive EPA the EAC partner states should advocate for the inclusion of development benchmarks pegged to their liberalisation schedules.⁵³⁰ This would assist to measure the implementation and contribution of the EPA from a development perspective.

The indicators could cover all the major areas of the EPA, including implementation of tariff reductions in sensitive sectors, implementation of the development chapter, resource disbursement, role of other donors, changes in social economic indicators, export performance, use of flexibilities, effectiveness of EPA and EAC institutions, and use of the dispute settlement system.⁵³¹

⁵²⁷ (n 520 above) at 1

⁵²⁸ Article 37 of the EPA provides a rendez-vous clause under which the parties agree to negotiations in a number of areas leading to a comprehensive EPA.

⁵²⁹ (n 306 above) at 250

⁵³⁰ SEATINI 'The EAC-EU EPA key improvements for promoting social economic development and regional integration' (2008) *SEATINI* at 5

⁵³¹ (n 530 above) at 5

For example, if after 20 years the EAC partner states have attained 70 percent the size of the EC (in per capita terms) and fulfilled the diversification and regional integration criteria, they would eliminate 70 percent of their tariff lines over 5 years. This will ensure that upon the EAC partner states having attained a certain level of development then would they undertake reforms of their trade regimes vis-à-vis the EC.

There is need for EAC partner states to devise ways of replacing lost revenue due to tariff liberalisation under the EAC EC EPA. The EAC partner states could be forced to reform their indirect tax systems so that revenues from the VAT and other non-discriminatory excise taxes are levied at equal rates on imports and domestic products replacing the forgone tariff revenues.⁵³²

The EAC partner states should advocate that WTO rules on RTAs must be reviewed so that future agreements do not insist on substantial reciprocity, avoiding the need for alternatives to be thrashed out each time. 'By demanding reciprocal liberalisation, EPAs contravene the long-fought-for concepts of SDT and non-reciprocity, which have been embedded at the WTO since the Punta del Este ministerial declaration'.⁵³³

To this effect a proposal was submitted by the ACP Group of states which aims at formally incorporating SDT in the application of conditions set out in the paragraphs 5-8 of GATT Article XXIV when they are applied to RTAs formed between developed and developing countries (that is North-South RTAs).⁵³⁴

In a bid to increase the EAC partner states net trade benefits from the EPA, it is also imperative to enhance domestic value addition through processing of

⁵³² Though in the recent years EAC partner states were directed to reform their tax systems by donor partners more efforts are needed in this area to ensure maximum efficiency and effectiveness in revenue administration.

⁵³³ (n 239 above) at 2. Article XXIV of the GATT provides the rules on Regional Trade Agreements, it should be amended to include development flexibility, and EPAs should then be compatible with such flexibility.

⁵³⁴ With the recognition that the 'less-than-full' reciprocity principle in tariff negotiations (thus a form of SDT) is being overridden by the reciprocity requirement of GATT Article XXIV, the ACP proposal calls for SDT in the application of GATT Article XXIV requirements, such as the 'substantially all the trade' requirements, when it applies to the North-South RTAs (also see: WTO document TN/RL/W/155, 28 April 2004)

agricultural produce to benefit from the resultant market price of processed goods as opposed to exportation of agricultural raw materials.

In this regard EAC partner states should seek a commitment on the part of the EC to increase joint venture investments in value addition for agricultural products. Well as on their part, EAC partner states should pursue vigorously policies to modernise agriculture, boost agricultural production and productivity and increased agro-processing.

Also to ease the movement of agricultural produce and manufactured goods within the EAC region and to the more lucrative European market there is a need to finance infrastructure projects in the EAC partner states. For example the development of water transport on lake Victoria, rail and roads upgrading starting with a major highway (rather than a two-lane, broken-down road) linking the port of Mombasa in Kenya with Nairobi, Uganda, Rwanda, Burundi, eastern Democratic Republic of Congo and southern Sudan would go a long in enormously expanding trade within the region as well as the rest of the world.

The EAC partner states should also utilise their ongoing negotiations towards a comprehensive EPA with the EC to enlist further support for their SPS capacity building efforts. The EAC partner states, private sector and civil society need to work together in a coordinated manner to respond to the challenges posed by SPS compliance.⁵³⁵

In this regard the EAC partner states should detail and quantify their technical assistance needs so that they can more successfully lobby for support. On the other hand the EC needs to show greater will to operationalise the SDT measures within the SPS Agreement and to provide the resources to support EAC partner states reforms. The EC also needs to provide greater oversight

⁵³⁵ (n 307 above) at 7. On their part EAC partner states need to carry out effective assessments of their SPS compliance capacity and to draw up detailed proposals for capacity building support that relate to all aspects of the compliance process. This will enable them to make their case to donors in a more effective and coordinated fashion

to the setting of governmental and private SPS standards so as to make sure they uphold the principles of the SPS Agreement.⁵³⁶

The inclusion of agricultural safeguards in the EAC EC EPA is a justified review provision as a protective measure to remedy any unforeseen consequences arising out of the EPA. The vulnerability of the agricultural sector in the EAC partner states, lack of resilience in the rural population where small farmers' livelihoods depend on production and the significant financial support given to EC farmers make it a necessary tool for the EAC partner states.⁵³⁷

The EAC partner states should advocate for an agricultural safeguard mechanism that is easy to implement and responds to individual country circumstances. Such a safeguard should include automatic triggers for price and volume fluctuations to respond to import surges on a timely basis, before any damage is done to the local markets or farmers' incomes deteriorate.⁵³⁸

The safeguard should be asymmetrical in that it is only available to EAC partner states, consider quantitative restrictions as possible trade remedies, include transparency provisions that take into account the administrative and institutional capabilities of the EAC importing country, allow individual countries within the regional scheme to trigger the safeguard measures and impose trade remedies on imports from the EC and also be available throughout the implementation period of EPA and beyond.⁵³⁹

However it should be noted that having an agricultural safeguard is not enough to reap the benefits from EPA market liberalisation. In order to reduce poverty and boost development, it is necessary to contemplate the inclusion

⁵³⁶ The EC have an important role to play in mobilising the resources to build capacity through encouraging private sector investment in standards compliant infrastructure and developing the institutions required to coordinate standards compliance.

⁵³⁷ (n 348 above) at 7. Modeling the safeguard on the G33 group of developing countries' proposal for an SSM would make it WTO compliant and could minimise some of the potentially damaging effects of liberalisation).

⁵³⁸ (n 348 above) at 7

⁵³⁹ (n 348 above) at 7

of support measures geared towards increasing investment, improving infrastructure and productivity, adopting measures to address safety and quality standards and promoting integration of regional markets in the EPAs.⁵⁴⁰

Historically, the demanding Rules of Origin (RoO) under Generalised System of Preferences (GSP) and to a lesser extent, the Cotonou Partnership Agreement (CPA), have hindered more dynamic export growth in ACP countries. There is need for EAC partner states to negotiate a more favourable RoO framework for their exports into the EC under the EPA. Allowing global cumulation from all other developing countries, including between countries from different ACP EPA Groupings, could also provide greater export opportunities.⁵⁴¹

The internal problems of the EC fisheries have important consequences for the development of fisheries in the EAC partner states. This is particularly true in the areas of resource management, food security and the development of value-added activities. The most important aspects in this regard are the need for sustainable development and exploitation of the fisheries resources as well as issues related to market access in general.⁵⁴²

In this regard the EAC EC EPA is likely to address some of the shortcomings that EAC partner states face in accessing the EC fish market. The standards and accreditation issues involving technical barriers to trade and SPS measures are of significance.⁵⁴³ Therefore the EPA promises to address the shortcomings that EAC partner states face in developing their fish export capacity.⁵⁴⁴

⁵⁴⁰ (n 348 above) at 7

⁵⁴¹ South Centre, 'The value of EU preferences for the ACP and EPA contribution to market access' (2007), SC/AN/TDP/EPA/2, at 16, <http://www.southcentre.org> [accessed on 6 October 2008]. However, whatever the alternative if EAC partner states are allowed to source their inputs to goods from anywhere in the world their duty-free exporter status should not be affected.

⁵⁴² (n 259 above) at 37

⁵⁴³ (n 259 above) at 37

⁵⁴⁴ It is important to note that small-scale value-adding activities do help in increasing the shelf life of fish products, making them more transportable and therefore accessible. Improving the returns from

The EC should not aggressively push EAC ACP countries to open their services sector, and all flexibility sectors, and all flexibility in Article 5 of the WTO Agreement on Trade in Services (GATS) should be maintained; on the other hand, on the basis of asymmetry, the EC should satisfactorily liberalise its services sectors in favour of EAC ACP countries.⁵⁴⁵

In any case, if EAC partner states want to include negotiations of trade in services in their EPA, this may potentially provide 'new preferences' to EAC countries in the services sector. In particular, the temporary migration of people (Mode 4) could be an important part of EPA service negotiations since the EAC region should have a comparative advantage in its supply as it is by definition labour intensive as a region. It has been estimated that Africa would gain around US\$14 billion from increased developed country quotas for both skilled and unskilled temporary workers.⁵⁴⁶

Further liberalisation and commitments under the GATS should contribute to attracting investment in services, in general, and should improve the efficiency of other economic activities and the competitiveness of EAC's exports, especially by reducing costs related to inter alia telecommunications, transport and energy.⁵⁴⁷

Further, the EAC partner states should advocate importation of EC assistance in building physical and social infrastructure, increasing development financing, promoting health, eradicating poverty, and addressing key constraints to achieving their development goals. These infrastructural

value-adding, fish processing will require understanding of the markets and how they operate at both regional and international levels.

⁵⁴⁵ (n 530 above) at 15. ACP governments should not be pressed to make commitments on trade in services in the context of negotiating a comprehensive EPA which they are not willing to make as commitments in a WTO context.

⁵⁴⁶ (n 541 above) at 17. Although the potential gains are large, it is unclear how Mode 4 could be incorporated into the EAC EC EPA framework, and whether it would require the reciprocal liberalisation of services in ACP countries.

⁵⁴⁷ (n 52 above) at 10

services would assist in social economic development to ensure social justice and sustainable development.⁵⁴⁸

The MFN clause should not have been included in the EPA and if possible it should be eliminated due its conceptual difficulties. The MFN clause is of limited importance to the EAC partner states better still its inclusion should be on the basis that the EC should match any better treatment that the third country give to the EAC; or (as a fall back position) introduction of an exception to the MFN clause that where the EAC gives a third country better treatment than it gives the EC under the EPA, there may be consultations in the Development Council whether to extend this to the EC.⁵⁴⁹

The EAC partner states will continue to negotiate a comprehensive EPA in 2009, the inclusion of the MFN clause in the EAC EC EPA remains highly sensitive. Ultimately, it is up to the EAC partner states to convince their EC partner that it is inappropriate to include this clause in the EPA.⁵⁵⁰

This must be done through a vast campaign at the WTO and in other forums to rally remaining countries to this cause. But the experience of the Caribbean and other ACP regions, where the MFN clause was strongly resisted yet imposed by the EC, is not encouraging.⁵⁵¹

As a result of the issues discussed above the EAC partner states face an uphill task if they are to benefit from EPA. One of the primary reasons for this is the requirement of reciprocal market opening between the unequal EPA parties. This in a way is likely to affect the faith of EAC partner states in using their multilateral trade commitments as an instrument of development.

In conclusion a better deal for the EAC partner states would have enabled them to make giant strides in achieving their envisioned development prospects as a result of their interaction with the global economy. However, since EC trading capacity is not comparable to the EAC partner states the

⁵⁴⁸ (n 52 above) at 11

⁵⁴⁹ (n 530 above) at 6

⁵⁵⁰ (n 479 above) at 3

⁵⁵¹ (n 479 above) at 3

application of reciprocity in the EAC EC EPA does not help matters. At the moment the exact impact of the EPA on development can not be ascertained since the agreement was only signed in November 2008 and a comprehensive EAC EC EPA is due to be finalised later in 2009.



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