

Contentious issues in the interim EPAs

Potential flexibility in the negotiations

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www.ecdpm.org/dp89

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Abbreviations

AA	Agreement on Agriculture
ACP	African, Caribbean and Pacific
ASCM	Agreement on Subsidies and Countervailing Measures
AU	African Union
BITS	Bilateral Investment Treaties
CARIFORUM	Caribbean Forum
CEMAC	Communauté Économique et Monétaire de l'Afrique Centrale
CET	common external tariff
CPA	Cotonou Partnership Agreement
CTA	Technical Centre for Agricultural and Rural Cooperation ACP-EU
DDE	Department for Sustainable Economic Development
DGIS	Directorate General for International Co-operation
EAC	East African Community
EBA	Everything but Arms
EC	European Community
ECDPM	European Centre for Development Policy Management
EPA	Economic Partnership Agreement
ESA	Eastern and Southern Africa
EU	European Union
FAO	Food and Agriculture Organization
FTA	free-trade agreement
G8	Group of Eight
GAERC	General Affairs and External Relations Council
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
LDC	least developed country
MFN	most favoured nation
NAMA	Non-Agricultural Market Access
OECD	Organisation for Economic Co-operation and Development
PACP	Pacific ACP
REC	regional economic community
RoO	rules of origin
SACU	Southern African Customs Union
SADC	Southern Africa Development Community
SDT	special and differential treatment
TDCA	(EU–South Africa) Trade, Development and Co-operation Agreement
TRIPS	Trade Related Aspects of Intellectual Property Rights
UN	United Nations
UNECA	United Nations Economic Commission for Africa
WTO	World Trade Organization

1 Introduction

1.1 Background

Since 2002 the African, Caribbean and Pacific (ACP) States, initially in six regional groups, have been involved in negotiating new trade agreements with the European Union (EU). The new Economic Partnership Agreements (EPAs) were necessary to make the trade regime fully compatible with World Trade Organization (WTO) rules, especially in light of the expiry of a waiver for the existing preferential trading arrangements. In addition, it was envisaged that the agreements would be 'tools for development' which would foster the economic growth and integration of ACP countries, particularly at regional level.

Negotiations were agreed to be completed by the end of 2007, when the EU non-reciprocal trade preferences to the ACP, covered by the Cotonou Agreement, would expire. Yet as that deadline neared it became obvious that a lack of progress on the content of EPAs would make it impossible for most ACP regions to conclude. Many ACP regions remained insufficiently prepared (due to lack of capacity, political attention and organisation) while some EU positions, including on some of the most important issues – most notably the question of how much tariff liberalisation would be required by ACP countries under the agreements – became clear only as late as September 2007. With respective positions often diverging on technical issues as well as issues of principle, reaching agreement by the deadline became very difficult. The manner of the negotiations was also heavily criticised at that point: the EC in particular found itself accused of adopting a too aggressive stance, trying to divide ACP regions and presenting EPAs as a *fait accompli*.

In the end, only the Caribbean countries concluded a full or 'comprehensive' EPA, covering trade in goods and services and a host of other trade-related areas such as competition policy and intellectual property rights. In African regions and the Pacific, negotiations only resulted in interim or 'stepping stone' agreements: many of those that initialled were the relatively better-off developing countries that would have suffered significant economic harm from a reduction in preferential access for their key exports to the EU. The poorer group of Least Developed Countries (LDCs) also had access to the alternative scheme 'Everything-But-Arms' for their exports to the EU and therefore faced less pressure to initial agreements – although some, such as Mozambique, Lesotho and later Zambia, did so voluntarily. The pattern nonetheless indicates that the motives for signing the agreements were in general perhaps less related to reasons of supporting either trade development or regional integration, than preserving market access for established export industries that relied on preferences. Annex 1 provides an overview of which countries have concluded an EPA or Interim Agreement.

Exports from non-LDCs that did not sign an EPA or an interim EPA were treated like those from any other developing country, receiving some preferential treatment under the EU's Generalised System of Preferences (GSP)¹. In the run up to the conclusion of the negotiations, the EU would not consider the inclusion of ACP States in its 'GSP+' scheme, which provides better access to the EU market than the basic GSP scheme, although neither the GSP nor the GSP+ schemes would provide exports from ACP States with the same level of preferential access to the EU market as was formerly available under the Cotonou Agreement or an EPA². The many conditions that countries need to satisfy in order to participate would, in any event, have effectively excluded most ACP States from participating in the GSP+ scheme. The WTO

¹ The EU's Generalised System of Preferences is a trade arrangement through which the EU provides preferential access to the EU market to 176 developing countries and territories, in the form of reduced tariffs for their goods when entering the EU market. There is no expectation or requirement that this access be reciprocated. It is implemented by a Council Regulation applicable for a period of three years at a time. GSP covers three separate preference regimes: the standard GSP, the special incentive arrangement for sustainable development (GSP+) and the Everything-but-Arms scheme for LDCs.

² For a quantitative analysis, see Overseas Development Institute (2007) 'The Costs to the ACP of Exporting to the EU under the GSP', report prepared for the Netherlands Ministry of Foreign Affairs;

compatibility of the conditions imposed by the EU on access to the GSP+ scheme has also been questioned.³ A number of commentators have claimed that the EU GSP and GSP+ arrangements also do not appear to meet the objectives of Article 37:4 of the Cotonou Agreement, which committed the EU in 2004 to “assess the situation of the non-LDC which, after consultations with the Community decide that they are not in a position to enter into economic partnership agreements and will examine all alternative possibilities, in order to provide these countries with a new framework for trade which is equivalent to their existing situation and in conformity with WTO rules.”⁴

Some ACP countries, even when initialling or signing up to the agreements, continued to openly call for assurances that certain contentious issues in the agreements be revisited in future negotiations. For example in the case of Namibia, a statement to that effect was annexed to the agreement:

‘The Republic of Namibia has initialled the Interim Economic Partnership Agreement on the understanding that concerns which Namibia had identified throughout the negotiations of the Interim Economic Partnership Agreement would be addressed through the negotiations towards a comprehensive Economic Partnership Agreement’⁵

1.2 Contentious Issues from an ACP Perspective

Though often appearing to be technical in nature, the various issues considered by ACP negotiators as ‘contentious’ are viewed as having significant economic and political consequences for their development. The importance of the issues lies in the fact that unless some way is found of overcoming disagreements (and depending on the priorities in each region) there is a very real risk that negotiations on comprehensive EPAs will not be concluded. This would leave the process of regional integration – one of the original motivations for EPA negotiations in the first place – in several ACP regions in a difficult position, given that some countries within a region would dismantle tariff barriers for EU imports while neighbouring ones would continue to impose them. It would also represent a lost opportunity to foster development in the ACP through increasing the coherence of EU trade and development policies, facilitating the integration of the ACP States into the global economy and the promotion of regional integration within the ACP regions.

While the list of contentious issues naturally varies from one ACP region to another, a number have attracted particular attention among negotiators and politicians, as well as wider EPA stakeholders. Meeting in Addis Ababa in April 2008, the Ministers of Trade and Finance of the African Union identified a list of 9 issues⁶ considered critical to development-oriented EPAs in the interim agreements initialled by the 18 African countries at the time:

- the definition of ‘substantially all trade’, setting out the level of tariff liberalisation required by ACP countries (covered in section 2.1 below)
- transitional periods for tariff liberalisation (also in section 2.1)
- export taxes (2.3)
- national treatment (2.4)
- free circulation of goods (within ACP regions, 2.5)
- bilateral safeguards (2.6)
- infant industries (2.6)
- the most favoured nation, or MFN, clause (2.7)

³ Bartels, L. “The WTO Legality of the EU’s GSP+ Arrangement” *Journal of International Economic Law* 869, 2007.

⁴ For a discussion, see Bilal, S. and F. Rampa (2006). Alternative (to) EPAs: Possible scenarios for future ACP trade relations with the EU. (ECDPM Policy Management Report 11)

⁵ Annex 3 to the SADC Interim EPA Text.

⁶ ‘Addis Ababa Declaration on EPA Negotiations’, AU Conference of Ministers of Trade and of Finance, 3 April 2008, www.acp-eu-trade.org/library/files/AU-Ministers-of-Trade-and-Finance_EN_030408_AU_Addis-Ababa-Declaration-on-EPA-Negotiations.pdf

- the ‘non-execution’ clause (which provides for the possibility of trade sanctions in the event of violations of democratic or human rights principles) (2.8)

The Ministerial Declaration made a call to review these issues during negotiations towards full EPAs, to ensure that the trade agreements would safeguard development and regional integration. Bearing in mind its aspirations for continent-wide integration on trade, AU Ministers also called for the different interim EPA texts to be rationalised, and tasked the African Union Commission, in collaboration with the United Nations Economic Commission for Africa (UNECA) and the Regional Economic Communities (RECs) with drafting an EPA template that could be used as a common basis for African regions to negotiate.

In addition to the AU list, negotiators in Africa and elsewhere have also separately highlighted two more issues of importance in the texts: rules of origin reform (section 2.9) and the ‘standstill’ clause in goods (2.2), which prohibits any increase in tariffs once agreements enter into force. At the all-ACP level the issue of contentious clauses in the EPAs was formally included in the ACP Council’s June 2008 Declaration and the ACP Heads of State summit in Accra in October 2008, where the mandate was given for a high-level tripartite delegation to undertake a visit to EU member states and the EC. Among the country responses, Angola, Namibia and South Africa sent a letter to the EU member states outlining their concerns about the text of the SADC interim EPA.⁷

Beyond issues related solely to trade in goods, there have also been some long-standing concerns about making new commitments in the EPAs in services and investment, and in trade-related areas such as intellectual property. Finally, the important but complex issue of development support and accompanying measures for EPAs is closely related to the negotiations. While this issue is not covered as a ‘contentious’ issue in this paper, reference is made to the wider debate on development support and links to the EPA negotiations, as well as in the context of measures that might be taken to move forward in negotiations.

It is important to point out that – despite of a degree of convergence, in Africa in particular – not all of these issues are contentious in every ACP region or to every ACP country. Although discussions on controversial clauses still continue, the CARIFORUM countries (with the exception of Haiti) have all signed a comprehensive EPA and the focus has now shifted to implementation. Opinions on the problems with, the relative importance of, and the arguments for and against certain provisions, also differ. Neither are the issues covered here exhaustive: a further section (2.10) briefly highlights some additional issues, but no attempt has been made here to provide a comprehensive account of every concern.

1.3 EU Responses to Contentious Issues

Since the initialling of interim EPAs in late 2007, and in response to the strong views expressed by ACP countries, the EC has on numerous occasions signalled its willingness to revisit some of the contentious issues during the negotiation of comprehensive EPAs. One of the earliest such expressions was an apparent undertaking made by EC president José Manuel Barroso at the joint EU-Africa meeting in Lisbon to African Heads of State in December 2007 that all areas would be open to negotiation in the following year (though this has since been denied by the EC).

A formal acknowledgement of the need for flexibility on contentious issues was provided by the EU’s General Affairs and External Relations Council (GAERC) in May 2008:

“Acknowledging concerns expressed by ACP partners and the existence of, in some cases, problematic issues still outstanding in the negotiations, the Council underlines the need for a flexible approach while ensuring adequate progress, and calls on the

⁷ Available at www.acp-eu-trade.org/library/files/ANSA%20_EN_070109_Demarche-to-EU-MS.pdf

Commission to use all WTO-compatible flexibility and asymmetry, in order to take account of different needs and levels of development of the ACP countries and regions. The Council emphasizes that ACP countries and regions who so wish could draw, if appropriate, on provisions agreed by others in their EPA negotiations.”⁸

Separately, a number of EU governments have also expressed their position (see Box 1).

For her part, Baroness Ashton, the EU Trade Commissioner has also made it clear that contentious issues can be renegotiated in the context of moving towards full EPAs. In a recent interview she stated that:

“All issues tabled during negotiations, contentious or otherwise, are open for discussion. That's why EU and ACP negotiators are regularly re-examining provisions in the interim agreements as well as exploring new areas, such as services, that were not included in the 2007 deals.”⁹

It is important to note that the EC view is that contentious issues should be addressed during negotiations towards comprehensive EPAs, rather than in the context of making changes to existing interim EPAs. This is different from the view of some ACP negotiators, who would like to see the issues addressed in advance of interim agreements being ratified, or in the context of a review of them.¹⁰

Box 1. Position of some EU member states

In a letter to the new EU Trade Commissioner, Baroness Ashton, dated 7 November 2008, the development ministers of Denmark, Ireland and the Netherlands stated:

‘...we have much to do to ensure that EPAs genuinely live up to the goals formulated in the Cotonou Partnership Agreement. We therefore need to ensure that EPAs will actively support regional integration and contribute to a regulatory framework that will stimulate economic development.

If we are to succeed in this, we must be prepared to show more flexibility towards the countries and regions concerned in the next rounds of negotiations. In May of this year, the European Council already underlined how important it is to take a flexible approach to the transition from interim agreements to regional Economic Partnership Agreements and called on the Commission to make full use of the flexibility and asymmetry permissible under current WTO law so as to reflect the different development levels and development needs of the ACP countries and regions. Judging by the vast majority of reactions received from the ACP over recent weeks and months, it is clear that as yet no sufficient degree of consensus has been achieved on the disputed negotiating issues as to allow negotiations to be brought to a successful conclusion. We would therefore like to urgently appeal to the Commission to make full use of all the flexibility available to us under current WTO law and to actively display that flexibility in current negotiations.’

Source: Letter from Denmark, Ireland and the Netherlands to Baroness Ashton on EPAs, 7 November 2008 (quoted on TRALAC website: www.tralac.org).

⁸ Conclusions of the Council and Representatives of the Governments of the Member States meeting within the Council on Economic Partnership Agreements (EPAs), Council of the European Union, 27 May 2008.

⁹ Interview with *Trade Negotiations Insights*, February 2009, Volume 7, No.11, www.acp-eu-trade.org/tni

¹⁰ For further resources, see the bibliography provided at the end of this paper.

1.4 Scope, Rationale and Methodology

Numerous stakeholders across a wide spectrum of backgrounds have already provided a rich commentary on contentious EPA provisions. Part 2 of this paper seeks to provide a synthesis of different arguments made on a selected number of them, as well as a balanced summary of justifications provided both for and against the provisions. In order to spotlight attention mainly on a selection of issues already identified by negotiators as the most contentious, the main focus will be on issues affecting trade in goods, rather than trade-related issues or services – although these may be equally controversial. Where the paper makes suggestions for moving forward in the negotiations, these are made in the hope that will inform constructive debate at an important point in the negotiations, taking account wherever possible of the desire expressed on both sides for flexibility to arrive at mutually acceptable solutions. It is not intended to be prescriptive in any way to negotiators, who need to balance a number of interests and whose judgment will, as ever, be crucial to a successful outcome.

2 Contentious issues

2.1 ‘Substantially all Trade’ and Transition Periods for Tariff Liberalisation

One of the key concerns in the negotiation of both interim and final EPAs was to replace the previous system of unilateral trade preferences provided by the EU under the Cotonou agreement with one that was compatible with WTO rules. The deadline of December 2007 for the completion of EPA negotiations was driven largely by the expiry of a waiver for the Cotonou preferences secured from other WTO members in November 2001.

In order for the new EPAs to be compatible with WTO rules, the key requirement was a need to comply with Article XXIV of the General Agreement on Tariffs and Trade (GATT), which stipulates that regional trade agreements must eliminate duties on ‘substantially all the trade’ within a ‘reasonable length of time’. One obvious difference between the Cotonou and EPA regimes is that for the first time liberalisation obligations are reciprocal (i.e. requiring removal of tariffs on both sides).

Crucially, the term ‘substantially all trade’ has never been defined by the WTO. The Understanding on the Interpretation of Article XXIV of GATT 1994 provides that a ‘reasonable length of time’ should exceed 10 years only in ‘exceptional cases’, but the term ‘exceptional cases’ is undefined. Negotiations in the EPAs on the issue therefore centred on differing interpretations of the what was required to comply with Article XXIV.

The Cotonou Partnership Agreement (CPA) contains a number of provisions giving guidance on the WTO compatibility of EPAs. Article 37.7 states that EPA negotiations would be ‘as flexible as possible in establishing the duration of a sufficient transitional period, the final product coverage, taking into account sensitive sectors, and the degree of asymmetry in the timetable for dismantling tariffs’. Furthermore, in article 37.8 both sides committed to working together in the WTO to defend the arrangements reached, in particular with regard to the degree of flexibility available, whilst later agreeing in article 39.3 on the importance of flexibility in WTO rules to take into account the ACP’s level of development.

Pros

The EU has consistently emphasised the jointly-held ACP-EU position that EPAs are to be WTO-compatible, pointing out that any legal challenges to the agreements would threaten the preferential market access that ACP exports enjoy in EU markets. One of the key advantages

of EPAs would be that they provided long-term security for such access, free from the threat of any legal challenge at the WTO.

In a proposal on the issue at the WTO, the EC interprets the ‘substantially all trade’ requirement for free trade agreements to mean that liberalisation should cover a minimum of 90 per cent of total trade between the parties. In the context of the EPAs it is argued that the 90 per cent threshold could be met with a simple average of the EU liberalising 100 per cent of trade (with transition periods for sugar and rice) and the ACP only 80 per cent – measured in terms of both tariff lines and by value of the imported goods.¹¹ With regard to the transition period in the EPAs and the ‘reasonable length of time’ in which liberalisation should occur, the EC position has been that while tariffs on ‘the bulk’ of liberalised goods should fall to zero within 10 years, the ‘exceptional cases’ warranted some flexibility in EPAs – especially the LDCs among them – in liberalising a limited number of sensitive goods over a timeframe of 15 years. As in some other areas of the EPAs, the EC pointed to the asymmetry in the obligations as evidence that it had taken account of the development concerns of ACP countries.¹²

The above position was tabled by the EC in September 2007 as an indication of the maximum ‘flexibility’ that it would be prepared to defend at the WTO, while ACP countries were required to present ‘WTO-defensible’ trade liberalisation offers in order to become a party to an EPA and benefit from continued preferential market access. Indeed, it is this position that has been adopted in practice by ACP countries in the EPA and various interim EPAs, with some ACP even liberalising considerably more or over shorter periods of time.

Apart from the technical discussion on WTO-compatibility, the EU has also emphasised the development impact that liberalisation of inputs, certain consumer goods or medicines would have in terms of increased welfare of the population and competitiveness. ACP regions were encouraged to identify where liberalisation would bring quick benefits or where more time was needed or which should be excluded from liberalisation altogether in view of fiscal considerations or the need to protect vulnerable industries.

Cons

Notwithstanding the intensive negotiations of October and November 2007, which saw many countries table offers that met the EC’s preferred position, a number of ACP countries and regions had throughout the EPA discussions pressed for flexibility on the issue of tariff liberalisation and the interpretation of WTO rules in these areas. Indeed, the extent of tariff liberalisation demanded in the EPAs was the single most important reason why the majority of African and Pacific countries – particularly LDCs – decided not to sign an agreement, jeopardising *inter alia* their ongoing respective regional integration processes.

The emphasis on flexibility in the EPAs is justified by ACP States on the grounds that a reciprocal trade agreement between the ACP States and the EU is likely to impose greater adjustment costs on the part of ACP States, for two principle reasons. Firstly, tariff dismantling will result in revenue loss, and governments will have to establish alternative sources of fiscal

¹¹ The European Commission initially suggested that the 90 per cent threshold should reflect a weighted average taking into account the share of trade of each party in the total bilateral trade; hence, ACP countries with a trade balance surplus should liberalise less than 80 percent. This reference to trade balance was later in 2007 dropped by the European Commission; see Maerten, C. 2004. Economic partnership agreements: A new approach to ACP-EU economic and trade cooperation. Presentation at the TRALAC Annual International Trade Law Conference, Stellenbosch, South Africa, 11 November 2004. Unit TRADE C 2. European Commission www.acp-eu-trade.org/library/files/Maerten_EN_1104_TRALAC_EPAs-new-Approach-to-ACP-EU-Economic-and-Trade-Cooperation.pdf

¹² See *Statement by Commissioner Peter Mandelson following the General Affairs and External Relations Council (GAERC)*, Brussels, 10 December 2007, www.acp-eu-trade.org/library/files/Mandelson_EN_101207_EC_Statement.pdf

revenue.¹³ Secondly, uncompetitive industries will either have to adapt to improve their competitiveness relative to European products and industries, or policies will have to be put in place to develop new industries.¹⁴

Though negotiators and commentators on both sides have tried to point to precedents in other free trade agreements the EPA negotiations are, by any definition, accepted as 'exceptional cases' and unprecedented because of the number of countries involved, a very large proportion of which are LDCs, landlocked, small island states, or otherwise marginalised. It is indeed hard to conceive of a bigger difference in the size and level of development between the parties to the negotiations. Many ACP stakeholders argue that regional integration among the ACP States could also be undermined by requiring a pace and level of liberalisation that only some ACP States within a region could attain.

In addition, requiring the same minimum level of tariff liberalisation from all ACP States for the purpose of WTO-defensibility does not, in the eyes of many ACP stakeholders, take into account the greater need for flexibility for some ACP States because of the higher existing tariff levels, the structure of the economy, dependence on tariff revenue, etc. In this sense, the 'exceptional cases' are not receiving exceptional treatment that might be justified under the WTO. The significance of any required level of tariff liberalisation for WTO-defensibility will also depend on the other rules in a trade agreement, including the rules governing the use of safeguards and infant industry protection, and any standstill commitments.

In their own submission to the WTO on the interpretation of Article XXIV,¹⁵ the ACP countries have argued for a lower threshold of liberalisation.

Potential Flexibility

The final conclusions of the European General Affairs and External Relations Council (GAERC) meeting in Brussels on 14-15 May 2007 stated that Council recognises that 'flexibility in favour of ACP states (exclusions of products, long transition periods and safeguard clauses) must be compatible with WTO rules'.¹⁶ Shortly afterwards, Peter Mandelson stated that "in many areas, we are ready to give serious consideration to transition periods and in some cases very long transition periods – up to 25 years – together with substantial financial aid to help these countries implement their commitments so that EPAs genuinely act as a catalyst for policy reforms in ACP countries."¹⁷ Yet, to conclude EPAs, the EC required from all the ACP regions and countries a minimum of 80% liberalisation over a maximum of 15 years. The 2005 UK Commission for Africa set up under Tony Blair's government suggested that up to 20 years should be given to liberalise selected products if necessary.¹⁸ The letter from the governments

¹³ For a discussion and further references, see Bilal, S. and V. Roza. 2007. *Addressing the fiscal effects of an EPA*. Study conducted with the support of Irish Aid, Department of Foreign Affairs. Maastricht: European Centre for Development Policy Management. www.ecdpm.org and Babula, R.A. and K. Baltzer *Overview of Quantitative Analyses of Economic Partnership Agreements: Market and Revenue Effects of Liberalization of ACP Barriers and Enhanced EU Market Access*, Institute of Food and Resource Economics, December 2007, www.foi.life.ku.dk

¹⁴ Onguglo, B. and T. Ito, 'Special and Differential Treatment in WTO Rules in the Context of the ACP/EU Economic Partnership Agreements', *Trade Negotiations Insights*, Volume 1 No. 2, June 2002. and Onguglo, B. and T. Ito "How to make EPAs WTO compatible?: Reforming the rules on regional trade agreements, ECDPM Discussion Paper No. 40, July 2003. www.ecdpm.org/dp40

¹⁵ See Onguglo, B. and T. Ito *In Defence of the ACP Submission on Special and Differential Treatment in GATT Article XXIV. (ECDPM Discussion Paper 67)*. Maastricht: ECDPM, 2005, www.ecdpm.org/dp67 For a comprehensive analysis of GATT article XXIV see also Scollay, R. "Substantially all Trade: Which definitions are fulfilled in practice? An empirical investigation" A report for the Commonwealth Secretariat, APEC Study Centre, University of Auckland, New Zealand, 15 August 2005, www.acp-eu-trade.org.

¹⁶ Press release, European General Affairs and External Relations Council (GAERC), 14-15 May 2007.

¹⁷ Remarks by Peter Mandelson, European Parliament Debate on EPAs, 22 May 2007, Strasbourg.

¹⁸ The Commission for Africa Report, Chapter 8 "More Trade, Fairer Trade", March 2005.

of Denmark, Ireland and the Netherlands to European Trade Commissioner Baroness Ashton called for the EC to make full use of the flexibility and asymmetry permissible under current WTO laws, so as to reflect the different development levels and development needs of the ACP countries and regions.¹⁹ Commissioner Ashton has been promising increased flexibility in the negotiations since her appointment in November 2008: at a meeting with Brussels-based ACP Ambassadors on 4 December 2008, Commissioner Ashton said she would be going away with the message that she needed to reconcile her style with the substance of the negotiations.²⁰

Box 2: Regional and National Approaches to ACP Tariff Liberalisation

One overarching consideration for all EPA stakeholders is the impact that EPAs will have on the process of regional integration in the ACP. It is worth emphasising here the crucial role of coordinated, regional market access offers (i.e. tariff liberalisation schedules), as opposed to individual national ones. The issues are fundamental and clear cut: a common regional liberalisation schedule will strengthen integration by harmonising important elements of trade policy (such as a protected and sensitive industries) as well as enabling deeper integration in any number of initiatives (such as fostering the establishment revenue-sharing mechanisms between countries, and by making steps towards simplifying or abolishing border controls easier). By contrast the creation of differing regimes, through individual country lists of exempted sensitive products, will make such progress difficult, if not downright impossible.

One additional advantage of a regional offer would be that it could, to some extent, enable larger trading countries to 'shield' smaller ones because the mix of imported goods is likely to differ within the region. Hence while the region as a whole might liberalise 80 per cent of trade by value and tariff lines, individual countries may find that their individual incidence of liberalised goods is lower. This in itself may provide important flexibility for smaller countries; initial analysis by the CARIFORUM suggests that indeed some countries in the region may only liberalise just over 60 per cent of imports by value as a result of their regionally coordinated offer. A recent report by the World Bank²¹ highlights the regional offer by the East African Community (EAC) as the exception among the interim EPAs which otherwise 'do little to advance regional trade integration in Africa'. In contrast to the EAC, in SADC the situation in which four members of the SACU customs union presented a coordinated offer without the major trading country, South Africa – which already has its own trade agreement with the EU – has created considerable tension and raised the possibility of the break up of the union (though it is understood that solutions to this problem are now being sought).

In general, however, there are important issues with presenting such regional offers under WTO rules: late in the negotiations the EC outlined its interpretation on this point: that in order to submit a regional offer, the region would need to have, or at least to have firm plans to establish – a customs union with a common external tariff. Despite numerous declarations to this effect over previous decades (not to mention the added more recent pressure of the EPAs) this was something that not all ACP regions by 2007 had succeeded in putting into practice.

Substantially, all trade is not a contentious issue across all the regions, as additional flexibility is not required by all ACP states. One fifth of countries in the Caribbean and almost three quarters of SADC countries have unilaterally reduced their tariffs and have a marginal tariff of 5

¹⁹ Letter to Commissioner Ashton by EU Member States Denmark, Ireland and the Netherlands, dated 7 November 2007, published on the Tralac website www.tralac.org

²⁰ Julian, M. "EU Member States and new EC Trade Commissioner committed to flexibility in EPA negotiations", EPA update (longer version), Trade Negotiations Insight, Dec 2008/Jan 2009.

²¹ World Bank (2008) "Economic Partnership Agreements between Africa and the European Union: *What to do Now?*" Poverty Reduction and Economic Management (PREM) Africa Region, Summary Report, October 2008, http://siteresources.worldbank.org/INTRANETTRADE/Resources/EPA_bt看_Africa_EU_final_report.pdf

per cent or lower.²² Such countries can exclude the most sensitive products from liberalisation altogether while still meeting the EC's requirement of liberalising substantially all trade – although there may be issues over forfeiting the flexibility, or 'policy space', to raise tariffs on liberalised goods in future. The issue of the liberalisation threshold is most contentious in Central and West Africa, where over half the countries apply average marginal tariffs of 20 per cent or more. Nevertheless efforts have been made in both regions to bring an agreed regional offer to the table – CEMAC has tabled an offer that is understood to represent around 71 per cent of trade²³, which (following the EC's approach) would give a simple average above 85 per cent of trade liberalised by the parties in total: arguably this is not far removed from the EC's 90 per cent threshold²⁴. One further point about the scheduling process is that not all goods currently subject to high tariffs are actually developmentally sensitive (in the sense that imports damage pro-poor growth prospects) and by contrast, not all genuinely sensitive areas of domestic production are currently protected by high tariffs.²⁵

As noted above, the most common arguments for more flexibility on tariff liberalisation are that countries need to exclude products beyond the 20 per cent level either because tariff revenue on a larger range of products is a significant source of income for the government, or because more sectors need to be shielded from the negative consequences of increased competition from EC products. The EC argues that each case where more than 20 per cent may be needed should be judged on its own merits and, in accordance with the principles of the Cotonou Agreement, from a development and regional integration angle.

Some ACP regions have argued that tariffs specifically earmarked for regional integration activities – such as the running of regional secretariats or as part of a regional tax pool – should be given a further exclusion from liberalisation. WTO rules make no distinction between normal taxes and those earmarked for regional integration; the use of taxes for such objectives may however help regions make a case for additional flexibility, given the overall objectives of the EPAs.

As far as the protective needs of those sensitive sectors are concerned that are not excluded from liberalisation, the EC refers to safeguards in all agreements that may be used in the event that a surge in imports causes or threatens to cause injury to domestic industry or 'disturbances' in a sector. However, relying solely on safeguard measures restricts the policy space a country has, especially if in such situations tariffs can only be raised up to the applied rate for a limited amount of time; moreover, safeguards may be difficult for ACP countries to apply in practice (see Section 2.6).

The CARIFORUM EPA potentially offers further flexibility in this regard. Article 17 states that "in the light of the special development needs" of certain CARIFORUM countries, "Parties may decide in the CARIFORUM-EC Trade and Development Committee to modify the level of customs duties stipulated" provided that the EPA remains compatible with the requirements of Article XXIV. Similarly, the Euro-med agreements allow revisions of liberalisation commitments subject to the general incidence of liberalisation being the same. This clause, however, would require the agreement of both the exporting and the importing countries, in effect giving the EC a veto power on any proposal under the article from the ACP region concerned. The importing

²² ODI calculation based on 2006 trade data from Eurostat, UNCTAD TRAINS Database and regional sources in Stevens, C. and J. Kennan, "ACP Tariff Policy Space in EPAs: The possibilities for ACP countries to exempt products from liberalization commitments under asymmetric EPAs." ODI, July 2007.

²³ This is over a period of 20 years though (and not 15 years), up from an initial offer of only 60 per cent; see PANEC, "Why EPA Negotiations have slowed: The Central African Perspective", *Trade Negotiations Insights*, Vol.8, Issue 2, March 2009, www.acp-eu-trade.org/tni

²⁴ In contrast to the EC's approach, another idea put forward by some ACP negotiators was to use a threshold of 80 per cent but based on total amounts of two-way trade (rather than subjecting EU liberalisation and ACP liberalisation to separate, albeit different, thresholds). This approach would enable the parties to take account of imbalances in the trade relationship.

²⁵ *Op. cit.* ref 22. It is also worth noting there may have been insufficient work also on defining potential trade strategies and, for example, analysis of industries in terms of the effective rate of protection (which more accurately captures the real value added of the protective tariff to the economy).

countries may doubt whether an exporting country would agree to the re-imposition of tariffs if its exports were causing harm to small local firms in the importing country. A clause like Article 17 of the CARIFORUM EPA could include a clear statement of the conditions under which modification of schedules would be permitted that corresponds to the key concerns of the ACP States while addressing EU concerns about secure long-term market access.

One option to mitigate the potential negative effects of liberalisation would be to defer or backload market opening for sensitive products. Despite the comments by the EC Trade Commissioner in mid-2007 that flexibility might be available on the issue of transition periods of up to 25 years for liberalisation, by the end of 2007 the EC was strictly enforcing its 80% over 15 years interpretation of compliance with GATT Article XXIV.²⁶ The EC has indicated though its willingness to consider liberalisation for products beyond 15 years or below the 80% threshold, but only for specific products on a 'case-by-case' basis where ACP regions could justify special treatment. Flexibility could indeed be further considered regarding the unilateral, and somewhat arbitrary, interpretation of GATT Article XXIV by the EC, though common understanding on indicative thresholds might be useful. What ultimately matters is that the liberalisation commitments by the parties respects the WTO condition of covering 'substantially all trade' (which remains unspecified) over a reasonable period of time, and that these commitments are politically and technically defensible at the WTO to prevent possible challenges from third party WTO members.²⁷ When needed, the negotiating parties to an EPA could thus engage in constructive flexibility. To be credible, however, requests for flexibility must be based on detailed analyses and arguments based on the specificities of the regional and national economies of the countries concerned.

2.2 Standstill

The standstill clauses in the EPAs stipulate that no new tariffs can be introduced and, once eliminated, tariffs may not be re-imposed or increased. Under the EPA, tariffs would therefore be bound at the applied rate, which is different from the WTO where applied tariff rates are often much lower than the rate at which they are bound in the WTO. A standstill obligation is included in all EPAs, but the clauses are not identical. In the CARIFORUM, SADC and Pacific EPA texts the obligation only applies to products subject to liberalisation, whereas in the remaining regions the standstill clause still applies even if a product is excluded from liberalisation.²⁸

Pros

One argument for 'standstill' provisions might be that they were required to establish a baseline rate for tariffs, from which liberalisation would follow according to the timelines laid down in ACP countries' respective schedules.

Perhaps the main argument put forward by the EC for a standstill clause was that the whole purpose of EPAs was to liberalise trade, and any flexibility that allowed tariffs to rise after the agreements were signed would be antithetical to that vision. From the point of view of EU

²⁶ It is true that the EAC has liberalised 82.6% of its imports from the EU over 25 years, but the liberalisation schedule shows that 80% of this trade was liberalised within 15 years.

²⁷ The question of what is defensible at the WTO is an important one. It is, arguably, unlikely that any third party would challenge the level of liberalisation in an EPA, since no free trade agreement has ever been challenged at the WTO; besides, the most probable successful outcome of such a challenge would be for more liberalisation (and therefore greater discrimination against the complainant). It can be argued that should any ACP region liberalise only 70 to 75 per cent of its trade, this will raise few concerns at the WTO, and possibly not more than an 80 per cent threshold which is itself not immune to a potential challenge. It is also worth noting that even to comply with the EU's own standard of 90 per cent liberalisation of the value of *total* trade between the parties, ACP parties with a trade surplus may need to liberalise less than 80 per cent of their imports from the EU.

²⁸ Articles 14 of ESA-EU, 13 of EAC-EU, 23 of SADC-EU, 15 of Ghana-EU, 14 of Pacific-EU interim EPAs, and Article 16 and Annex III of the CARIFORUM-EU EPA.

exporters, the effect of a standstill would also be to provide valuable security that tariff rates would not rise during the transition period or thereafter, including for goods that had been excluded from liberalisation (where these are not explicitly exempted from the clause).

Cons

Several ACP negotiators have argued that standstill provisions are not needed as a baseline for tariff liberalisation. This can instead be achieved through establishing start rates within the tariff schedules themselves (for example, choosing baseline rates or reference dates), and these need not necessarily be the rates applied when the agreement enters into force. Indeed, throughout their negotiations the CARIFORUM countries argued that they should be allowed to liberalise from WTO bound rates, which are usually – and sometimes significantly – higher than applied rates. Such an approach may indeed have been possible, if slightly unorthodox compared with other trade agreements.

Recently some commentators have also highlighted how this provision could have some unforeseen consequences: a number of governments, in response to very high food prices, reduced import duties and in some instances even set them at zero.²⁹ At this moment in time therefore, the strict application of this provision which fixes applied duties at the levels in force upon entry into force of the agreement, could result in freezing exceptionally low import duties.³⁰

There may be a need therefore to review standstill commitments where they exist and even to adopt the approach favoured in the Caribbean EPA and the Israeli-EU preliminary agreement, which establishes in annexes, line by line, the basis on which tariff reduction commitments will be made. In the case of the Israeli-EU agreement this establishes the base line for tariff reductions somewhere between the applied and bound tariff levels.

There is also a need to allow future modifications to tariff offers to take account of the future need to harmonise tariffs as the regional integration programme evolves. Implementation of a regional common external tariff (CET) in particular will require States to progressively adjust and align their tariffs. The standstill clause should provide for such flexibility in order to avoid conflict or incoherence between the EPA and the customs union programme.

A further consideration in the amendment of the standstill clause is to ensure that the trade defence provisions are effective. Bilateral safeguard duty rates, for example, should be able to go beyond the rate that tariffs are bound at under the EPA.³¹

Potential Flexibility

Although the European Commission initially refused to renegotiate EPA clauses, those with Côte d'Ivoire and Ghana have been amended (to allow changes to accommodate a regional tariff) and the Ghana IEPA now includes a new Annex (II) allowing the country to introduce an additional levy on imports of 0.5% of the cost, insurance and freight (c.i.f.) value until the end of 2017. This fee has 'the objective of generating funds to stimulate the export sector and support trade in general'. In addition the ESA has informed the EC that the region is working on draft amendments to the standstill clause. More recently the EC has stated it is 'open to discussion' on the EAC's standstill clause in the process of working towards a full EPA. Both sides have therefore agreed to formulate new standstill articles in the comprehensive EPA.

²⁹ For specific examples see CTA (2008) "Contentious issues in IEPA negotiations: implications and questions in the agricultural sector" Special Report, Agritrade, October 2008, <http://agritrade.cta.int/en/content/view/full/4272>

³⁰ Remarks by Paul Goodison at the ACP-EU Joint Parliamentary Assembly, Committee on Economic Development, Finance and Trade Meeting, Brussels, 10 September 2008.

³¹ ActionAid, Christian Aid, and Oxfam, "Market access for goods", Briefing 3: The EU Free Trade Agreements Manual, March 2008. www.oxfam.org.uk/resources/policy/trade/euftamanuals.html

Box 3. Standstill in Trade in Services

The standstill clause in the Services chapter might prohibit the introduction “of new or more discriminatory measures for all services sectors.” This would imply that no EPA signatory could introduce any new policies inconsistent with article XVI and XVII of the GATS that will further restrict service suppliers’ of other parties in terms of access to their markets, or that discriminate more in favour of national services suppliers over foreign service suppliers.

It has been argued by some that this provision could undermine the flexibility that ACP countries require to manage the growth of their services sectors. Many developing countries have not formulated policies in all their service sectors. When a policy exists, it may not be written down, and where it is written down, in many cases the legislation is outdated. This is a serious consideration for countries wanting to develop their service sectors, or establish new sectors.

CARIFORUM and the SADC are the only regions which for the time being have adopted or are considering a standstill clause vis-à-vis the EU. The CARIFORUM region has an offensive interest in the services negotiations, as many economies are service based, and regards services as the key to diversifying exports. SADC EPA signatory States have adopted a more cautious approach, and have agreed to undertake to liberalise one service sector further to the continued negotiations, and to liberalise other sectors within three years “following the conclusion of the full EPA” to comply with the requirement of GATS article V for substantial sector coverage. A standstill obligation is not required to comply with GATS article V.

The issue of a standstill in services is closely linked to the issue of regulation. The EU has recognized the lack of regulatory capacity in the SADC EPA and has agreed to “support capacity building aimed at strengthening the regulatory framework of the participating SADC EPA States.” Furthermore the EC has argued that the standstill covers only market access commitments, while domestic regulation is effectively excluded. The SADC region has yet to define the specific cooperation objectives, principles and procedures that will accompany liberalisation. A general standstill obligation, applying to all sectors, may obstruct the development and implementation of effective regulatory regimes. It is also inconsistent with the idea of a positive list approach to the sectors to be liberalised.

It is important to note that there is no obligation to negotiate trade in services as part of the EPA. In the CPA article 41.4, only the *objective* of “extending partnership under the EPAs to encompass the liberalisation of services in accordance with GATS provisions, particularly those relating to the participation of developing countries in liberalisation agreements,” was agreed.

In SADC, Angola has requested that an asymmetrical tariff arrangement be agreed on in which the concerns of the LDCs are fully taken into consideration. Angola has therefore requested that the standstill clause not apply to Angola to reflect the principle of Special and Differentiated Treatment (SDT) that the LDCs are entitled to, an argument refuted by the EC.

WTO-compatibility does not require the inclusion of a standstill clause in the EPA.³² The flexibility permitted in some regions indicates that the EU has room to manoeuvre on this issue and the same flexibility could be extended to other regions. The limited flexibility shown in the CARIFORUM, SADC and Pacific interim EPAs standstill clauses – to products not subject to tariff liberalisation commitments – is not easily explained in objective terms, with distinctions between ACP regions raising questions about the consistency and coherence of EU policy. The standstill clauses could be re-drafted to exclude food and other products where tariffs have

³² Bartels, L. ‘The legal status of the initialled EPAs and legal constraints on renegotiation’, April 2008. www.thecommonwealth.org/files/177361/FileName/EPAsin2008.pdf

been temporarily reduced. The interim EPAs and the CARIFORUM EPA contain a number of provisions intended to promote regional integration, including exemptions from certain general obligations. The relationship between the standstill clause and the provisions on regional integration could also be clarified by the addition of a rule, drawing on Article XXIV:5 of the GATT, to exempt implementation of a CET among ACP States provided that the CET is “not on the whole higher ... than the general incidence of the duties.”

2.3 Export Taxes

Duties and restrictions on exports – though far less common than ordinary import duties and charges – are applied by some ACP countries on a limited number of goods, for a variety of reasons. Export taxes and restrictions are most commonly applied to ‘agricultural products, fishery products, mineral and metal products, and leather, hides and skin products’.³³

Although used by ACP countries, export duties are more commonly associated with larger, middle-income developing countries with natural resource wealth and more developed trade policies. While most attention is focused on export duties, restrictions can also include export licenses and quotas. The WTO does not prohibit the use of export taxes, although Article XI:1 of the GATT contains a general ban on the use of other forms of export restriction or prohibition.³⁴

Pros: Arguments for discipline on export taxes

The EC argues that export taxes restrict the supply of raw materials to its industries. In recent months the EC has made a proposal for an EU Strategy on Raw Materials³⁵. In brief there are three parts to the strategy:

- (i) Using Free Trade Agreements (FTAs) to enforce commitments on reduction of export restrictions;
- (ii) Using WTO accession agreements for same; and
- (iii) Raising awareness and cooperation on these issues in all relevant international arenas such as the G8 and OECD as well as in ‘strengthened strategic dialogues’ with the US and Japan.

When announcing the proposed strategy, the then Commissioner of Trade, Peter Mandelson said: ‘I will raise the question of raw materials in every meeting I have with every trade minister from every country that restricts European imports.’³⁶

In the context of EPAs the EC has argued that elimination of export taxes and restrictions is necessary to meet the GATT Article XXIV requirement for eliminating barriers on ‘substantially all trade’, which covers export as well as import measures. It has also been argued that export

³³ Recent data on the use of export taxes is fairly difficult to find, although a study by Piermartini (2004) for the WTO notes that the following ACP countries made use of them during the period 1995-2002: Benin (diamonds, precious stones and metals, cocoa beans and crude oil), Botswana, Namibia, Lesotho (rough, unpolished diamonds), Ethiopia, Kenya (fish and timber), Uganda (coffee), Guinea, Côte d’Ivoire (rough timber, plywood, coffee, raw cocoa, cola nuts and uranium ores and concentrates), Mali (gold, fish), Mozambique (cashews), Gabon (manganese, un-squared tropical woods), Cameroon (logs, transformed forestry products), Ghana (cocoa, gold, bauxite, manganese, certain processed timber and jet aviation fuel), Madagascar (raw logs and processed wood products), Solomon Islands (logs, fish), Papua New Guinea and Fiji (gold and sugar), Dominican Rep, St Kitts and Nevis, Antigua and Barbuda.

³⁴ The general rule in GATT Article XI:1 is subject to a number of exceptions to the prohibition in Article XI:1, such as Articles XI:2(a) (shortages of foodstuffs and other essential products) and XX (general exceptions). The CARIFORUM EPA and the interim EPAs have provisions that are equivalent to GATT Article XI:1, but not exceptions in Article XI:2 nor the full range of general exceptions that are contained in Article XX.

³⁵ ‘European Commission proposes new strategy to address EU critical needs for raw materials’, press release, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1628>

³⁶ Mandelson, Peter, “The challenge of raw materials”, Speech at the Trade and Raw Materials Conference, Brussels, 29 September 2008.

taxes are counter-productive, pointing out that ACP countries should do everything possible to increase their exports. Indeed, economic theory would suggest that export taxes are no less distortionary than import taxes. As with import taxes there is always the potential risk that governments may use export taxes in damaging excess, perhaps under the banner of policies aimed at national or regional autarchy. This is not to rule out the possibility that 'self-sufficiency' might be a valid policy goal in certain sectors, such as food or energy security, however there is arguably no reason why export taxes should be viewed as privileged instruments of policy – over and above import taxes or restrictions, for example – as the arguments for and against their use are, in many ways, similar. The recent use of export taxes and restrictions during the aforementioned food crisis were widely criticised by developed countries and many developing countries, as well as by many international agencies, including the UN Food and Agriculture Agency and the World Food Programme.

In light of their association with resources, export taxes also raise important issues in the area of governance. Even where governments do not venture so far as to pursue policies that cause widespread damage to the economy, it is undeniable that – like other policy tools – export taxes and licensing regimes have in the past been associated with encouraging rent-seeking behaviour in a number of developing countries.

The EC's position to limit the use of export taxes is not specific to EPAs. In 2006, the EC also made a proposal at the WTO³⁷ for new rules on export taxes in the context of the negotiations on Market Access for Non-Agricultural Goods (NAMA), arguing that the Doha Round mandate unquestionably calls for this issue to be covered in any new trade deal. The EC paper, revised in 2008 following objections from some developing countries, proposes new restraints that would have WTO members list their export taxes and bind them below specified levels.

Notwithstanding its general disapproval of export restrictions, the EC has recognised that developing countries may need flexibility in this area. In the EPAs specifically it has made several concessions in allowing different ACP regions either transition periods for phasing out the taxes (CARIFORUM), 'grandfather clauses' which stipulate that existing export taxes may remain, and scope for new export taxes where the ACP party can demonstrate that they are necessary for the fiscal solvency of the State (PACP), currency stability (EAC), or the development of infant industries or protection of the environment (most texts). In most cases ACP countries must show that the export taxes are justified in terms of achieving the goal in question, and in some cases are subject to EC approval and joint monitoring. However, the terms of many of the exceptions to the general rule prohibiting export taxes may make the exceptions difficult to apply in practice, particularly where clauses give an effective veto to the EC party.

Cons: Arguments for the use of export taxes³⁸

Several ACP countries are opposed to provisions limiting the use of export taxes as a matter of principle, and for the sake of preserving their policy space. Traditionally, one use of export taxes has been as a means of *revenue support*. While the use of export taxes has declined in the last two decades, there are a number of ACP countries – such as Burundi and Guinea – which still rely on export taxes for a significant part of their government revenues. In dealing particularly with the natural resource sector, export taxes may be easier to administer by border authorities than other forms of taxation. While many countries have in the past suffered from an

³⁷ EC Communication on Export taxes in the NAMA negotiations at the WTO, April 2006, revised 17 January 2008.

³⁸ For a fuller summary of the arguments for and against the use of export taxes generally in developing countries, see Piermartini (2004) "The Role of Export Taxes in the Field of Primary Commodities", WTO, 2004, www.wto.org/english/res_e/booksp_e/discussion_papers4_e.pdf and South Centre (2006) *Some reasons not to negotiate export taxes and restrictions in the WTO NAMA Negotiations*, Analytical Note, May 2006, www.southcentre.org/index.php?option=com_content&task=view&id=255&Itemid=67

inadequate framework for managing wealth from minerals, forestry or other resources, it has been argued that export taxes may be more *transparent* than alternatives – such as the granting of concessions or royalty payments. The existence of export taxes, by providing legal powers and incentives for authorities to control exports, may also assist in the *management* of those resources, for example for purposes of stabilising government revenues or *protecting the environment*: export taxes are not, however, the sole way of achieving this goal.

A more controversial use for export taxes has been to apply them as either an *industrial or export diversification policy*. Export taxes are arguably an important policy tool for countries with primary industries that are looking to add value to their raw commodities and thereby move up the commodity value chain. By taxing exports of unprocessed goods – in combination with other policies – governments can encourage producers to add value to them. By restricting opportunities to sell the unprocessed goods, the policy also has the effect of *increasing local supply of inputs* for processing and thereby *lowering prices* for them on domestic markets. In this sense export taxes can have a similar effect to subsidies, which would be allowed under an EPA, but are not always affordable in poor countries. Export taxes have furthermore been seen as a countervailing measure to tariff escalation applied in the tariff regimes of developed countries, which have the opposite effect of making imports of raw commodities more expensive in comparison with finished products. For the developing countries, revenues from export taxes may also be ‘ring-fenced’ and used for further development of the industry. CTA (2008) cites the success of the Namibian meat processing industry.

In a similar way, export taxes can be used for the opposite purpose of *export diversification* into other sectors altogether.³⁹ By using export taxes or restrictions effectively to discriminate against traditional exports, governments can try to induce producers to expand into other industries, perhaps again in combination with other policies (for example, export credit guarantees).

Export taxes have also been used at various times by countries to pursue the goal of *macroeconomic stability* by influencing variables such as the exchange rate and rate of inflation, or similarly to stabilise *export earnings*. Indeed, one of the main motivations for using export taxes has been to counter the effects of ‘*Dutch disease*’, whereby an increase in the value of exports in a dominant sector of the economy leads to currency appreciation, with adverse effects both for exporters in other sectors and the population at large. Finally, export taxes have also been used to lower prices of essential goods, particularly food items, by restricting their export. The use of export taxes has become increasingly common as a result of the recent global ‘food crisis’ (see Box 4).

In general, export taxes are rarely the ‘first-best’ policy option, but have been used as a policy instrument where alternatives are expensive, unavailable or difficult to implement.

From a strategic perspective, with export taxes as well as other areas, there is a perception among some ACP countries that the EC has been using the EPA negotiations as a ‘back-door’ to WTO negotiations, establishing principles that might later set precedents for multilateral rules. Arguably, the use of EPA negotiations to advance broader strategic goals is at odds with the stated development-oriented goals of the EPAs and increases the risk that the negotiations will not be successfully concluded.⁴⁰

³⁹ Economists also use the terms ‘horizontal’ diversification to describe shifts between sectors. Industrial diversification is also referred to as both ‘vertical’ or ‘downstream’ diversification.

⁴⁰ The arguable element here is that to some extent all WTO Members – including the EC and ACP members – use FTAs as a way of establishing precedents that can then be ‘imported’ into the multilateral trading system or other FTAs. Some have argued that this trend, though seemingly unavoidable, undermines the multilateral negotiating system itself, and that specifically, the context of the EPAs as ‘development instruments’ rather than ‘classical’ FTAs implies that not everything that the EC is pursuing in other trade negotiations should be included in EPAs.

Box 4: Export Restrictions and Food Security

The issue of export taxes and bans attracted attention over the first half of 2008 as a result of rapid increases in food prices, which sparked serious and fatal rioting in a number of ACP countries including Burkina Faso, Senegal and Haiti.

Some developing countries responded by imposing export restrictions on certain food products, to lower the domestic price of food and help prevent shortages. The most notable restrictions were on rice in Vietnam and India. However the measures were not universally popular, even in the countries that applied them. A proposed increase in export taxes on grain and soybeans in Argentina was abandoned further to popular protest.

Food prices decreased in the second half of 2008 as a consequence of the global slowdown in economic growth, leading to some of the restrictions being removed. However the FAO predicts that prices will continue to be high in the medium-to-long term, while some developing countries have announced new goals for self-sufficiency in agriculture. This suggests that the use of export taxes and restrictions is likely to remain controversial.

Potential Flexibility

Regardless of the EC proposal at the WTO, at the present time there is no consensus at the multilateral level on the issue of export taxes and they are not (or not yet) regulated within its rules, other than to ensure that the taxes do not discriminate between destination countries. Leaving aside the arguments for and against their existence, there are some questions as to whether provisions on export taxes are necessary for completion of a WTO-compatible free trade agreement. Focusing specifically on the policy implications, a good case for restraints in the EPA can be made from a development perspective, though ACP negotiators argue that the use of export taxes that facilitate economic development should not be prohibited and the flexibilities contained in the EPA agreements do not go far enough in providing the policy space that they seek.

A limited degree of flexibility has been introduced on export taxes during 2008. The ESA IEPA was amended to include a completed annex listing exceptions from the general prohibition on export duties and quantitative restrictions (QRs) in the main text. However, only two countries (Seychelles and Zambia) appear to have registered exceptions. Unless this is an example of where the texts on the Council website are incomplete it raises the question whether or not the other countries apply such policies or whether they have failed (accidentally or by design) to list them. Evidence from the 2008 WTO *Trade Policy Reviews* for Mauritius and Madagascar suggests that both countries apply additional import/export charges and quantitative restrictions. Côte d'Ivoire also appears to have abstained from its right to develop a list of products for which export taxes are allowed as foreseen in the IEPA initialled at the end of 2007. The final version does not make any reference to such an Annex.

As with other provisions, some ACP regions may feel that something may be gained by 'importing' features from other EPA texts (as outlined in Table 1), as offered under the GAERC conclusions of May 2008 (though, as noted above, only in the context of negotiations towards full EPAs). This would imply that export taxes on products might be permitted in an EPA where the export of a product was subject to an export tax at the time the EPA enters into force, or the export tax is intended to generate or improve the collection of government revenue, protect the environment, or diversify production or develop greater value-added production within a country. Flexibility might be given for existing export taxes to be increased. A general ban on export taxes may also lead to an ACP State being in breach of its obligations under another

international agreement, in particular an international commodity agreement. The risk of a conflict is greater where an EPA does not contain the same general exceptions for goods as are contained in the GATT, in particular GATT Article XX(h).⁴¹

Table 1: Summary of different EPA text provisions on export taxes

Agreement	Notable Features and Exceptions	Process
SADC	Carve out for existing export taxes although these may not be increased. In exceptional circumstances where SADC states can justify specific revenue needs, protection of infant industries or protection of the environment, SADC states may introduce temporary export taxes on a limited number of products. Nothing is said about whether existing export taxes may be increased for the same reasons. Article is subject to review after three years to take into account impact of export taxes on development and diversification.	Consultation with the EC party, requires EC agreement
CARI-FORUM	No exceptions. Transition period of three years.	
Cameroon	Carve out for existing export taxes although these may not be increased. Exceptions for serious public finance problem or the need for greater environmental protection.	EPA Committee to regularly evaluate the impact and relevance of export duties
Pacific	Unlike other agreements the ban also covers 'any internal taxes, fees and charges on goods exported to the other party that are in excess of those imposed on like products for domestic sale (a national treatment restriction). There is no carve out for existing export taxes. Exceptions for temporary export taxes extend to: (a) when the measures are necessary for fiscal solvency of the state or protection of the environment (b) in exceptional circumstances, where a Pacific State can justify specific protection to develop infant industries for a limited number of products.	For export taxes related to infant industry protection, Pacific Parties require mutual agreement with the EC
Ghana / Côte d'Ivoire	Carve out for existing export taxes although these may not be increased. In exceptional circumstances where states can justify specific revenue needs, protection of infant industries or protection of the environment, SADC States may introduce temporary export taxes on a limited number of products. Existing export taxes may be increased for the same reasons. Article is subject to review after three years to take into account impact of export taxes on development and diversification.	Consultation with the EC
EAC	Exceptions for export taxes under the following circumstances, on a limited number of products: (a) to foster development of a domestic industry (b) to maintain currency value stability, when the increase in the world price of a commodity creates the risk of a currency value surge.	EPA Council must authorise the export tax. Such taxes are reviewed after 24 months
ESA	A list of excluded goods is annexed to the agreement.	EPA committee may examine a request for a review of the goods on the excluded list

⁴¹ See section 2.10 below; for a general discussion, see also Lunenburg, P. "EPA General Exceptions Undermine WTO Negotiations on Commodities", *Trade Negotiations Insights*, Vol. 8, Issue 2, March 2009, www.acp-eu-trade.org/tni

As well as extending the scope of activities under which the use of export taxes is approved, the scope of exceptions could be made clearer, and made available without the prior approval of, or extensive review by, all parties. The definition of what constitutes an export tax itself could also be made clearer, as this can be difficult to define. Legal uncertainty and burdensome administrative processes would significantly reduce the value of any exceptions. The EPAs make provision for notification of measures and regular consultation and dialogue between the parties. A provision on export taxes therefore might be designed to require only the notification of new export taxes before such taxes are implemented.

Another potential solution might be to leave export taxes to be agreed in a multilateral setting at the WTO. The WTO is arguably the best place for disciplines on export taxes, since a partial or 'second best' solution – applied only in limited bilateral trade – could in practice and under certain conditions lead to further distortions in global supply chains through trade diversion.⁴²

2.4 National Treatment Principle in goods

National treatment is a central principle of WTO law and is found in the three main WTO agreements, namely GATT, GATS and TRIPS. The national treatment obligation found in the goods chapters of the EPAs is similar to that found in GATT Article III. The principle in both the WTO and the EPA texts requires parties to treat imported goods no less favourably than goods produced domestically. The purpose is to enable domestic and imported products to compete on equal terms after the imported goods have crossed the border. All ACP countries that are WTO members are already obliged to implement this principle, thus the issue should only be of concern to non-WTO members. The main concern in the EPAs, however, is that some of the exceptions to the principle that provide flexibility for developing countries in the WTO have not been incorporated into the EPAs.

The national treatment principle in the GATT does not apply to government procurement, which allows governments to enter into contracts for the purchase of domestic products on a preferential basis. GATT Article III:8(a) excludes government procurement from the scope of the national treatment obligation in Article III. The WTO Agreement on Government Procurement includes a national treatment provision, but this is a plurilateral agreement to which no ACP States are party and only one is an observer (Cameroon). Only WTO members that have signed up to the agreement have to implement this provision. The texts of CARIFORUM, ESA, EAC, CEMAC, Ghana and the Pacific, state "The provisions of this Article [on national treatment] shall not apply to laws, regulations, procedures or practices governing public procurement." The SADC EPA is the only EPA text not to include an exception for government procurement. The issue was considered at a high level technical meeting on EPAs organised by the Commonwealth Secretariat in cooperation with the ACP secretariat in April 2008.⁴³ The discussion suggested that the EPAs should make reference to the national treatment provisions in the GATT to remove the uncertainty as to its scope.

More controversial is whether ACP EPA signatories can continue to subsidize industries or can introduce new subsidies. The WTO recognises that the subsidies may be a legitimate policy tool, but contains rules that limit their use in cases likely to lead to significant distortions in international trade. The rules applicable to trade in goods are primarily set out in the Agreement

⁴² For example if ACP countries removed export taxes on animal hides, while Brazil and Argentina retain theirs, the leather industries in Brazil and Argentina would benefit from an increased supply of cheaper inputs while the leather industry in the ACP States might see their supplies rise in price. Though trade diversion is also an issue for tariff reductions on imports, in this event it can be addressed (at least partially) by any government wishing to do so through a policy of unilateral tariff liberalisation. For export taxes it may be the case that trade diversion may only be avoided – the playing field can only be levelled – if it is agreed by all countries to lift their export tariffs at the same time, and such a solution can only be achieved at the WTO.

⁴³ Outcomes, High Level Technical Meeting on EPAs: The Way Forward for the ACP, Cape Town, Commonwealth and ACP Secretariat, 7-8 April 2008, www.thecommonwealth.org/shared_asp_files/GFSR.asp?NodeID=177516

on Subsidies and Countervailing Measures (ASCM) and the Agreement on Agriculture (AA). Therefore the GATT allows for the payment of subsidies to domestic producers provided that they do not violate the ASCM or the AA.

The national treatment provision in the text of the ESA and the Pacific interim EPAs, following GATT Article III:8(b), provide: "The provisions of this Article shall not prevent the payment of subsidies or the granting of tax incentives for the purpose of developing industries to national producers, including payments to national producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies implemented through governmental purchases of national products." Significantly, there is no definition of a subsidy.

Under the WTO, developing countries which need to support the establishment of an industry though subsidies can invoke the provisions of GATT Article XVIII:C to notify WTO members to initiate consultations. The developing country is then allowed to take measures which are inconsistent with GATT provisions further to consultations and subject to certain restrictions.

Box 5. National Treatment in Investment

The CARIFORUM EPA is the only EPA to include investment provisions and commitments (relating to establishment). In 2005 the African Union conference of Ministers of Trade clearly stated that: "We reaffirm the position of African countries that... investment, competition policy and transparency in government procurement should remain outside the ambit of the EPA." It should be noted that some of these issues are covered in the Cotonou Agreement, albeit in limited form.

National treatment is an investment protection provision typically found in International Investment Agreements such as Bilateral Investment Treaties (BITS) that guarantees that investors will not be discriminated against. The investor is protected through a guarantee of investor-state (and state-to-state) arbitration to resolve disputes if the national treatment commitment is not honoured by the government. Many developing countries do not have the capacity to comply with legal rulings. Therefore BITS serve more as a deterrent to developing country governments' adopting measures that may discriminate against foreign investors.

By including national treatment in the EPAs, the EU is seeking to improve the business environment for its investors in ACP countries by binding the commitments in the EPA, but without the potentially onerous investor-state dispute settlement provisions (because the EC does not yet have full competence over foreign investment - although it will if the Lisbon Treaty is ratified). ACP countries have the opportunity to conclude more development-oriented investment provisions in the context of an EPA than in the context of BITs which are concluded with European member states. For example, the CARIFORUM EPA provides countries with the scope to discriminate by allowing national treatment limitations to be included which is not an option in BITs. However, even after the conclusion of an EPA that covers investment, investors might still desire European Member States to negotiate BITs because of the additional rights (e.g. investor-state arbitration) they grant investors. The CARIFORUM EPA addresses Services and Investment in a single chapter, so that national treatment rules apply to both investment in goods sectors and service sectors at the pre and post-establishment stages of the investment cycle. Services chapters in EPAs that have been concluded independently allow countries to list limitations to national treatment in the schedule of commitments in services sectors, as per the GATS.

The GATT therefore allows exceptions to the national treatment principle in order to promote domestic infant industries.⁴⁴ The text of the ESA interim EPA also provides that the EPA Committee may decide to authorise a Signatory ESA State to depart from the national treatment provisions to promote the establishment of domestic production and protect infant industries. The development needs of Signatory ESA States and, in particular, the special needs and concerns of ESA LDCs are explicitly to be taken into account. However, while useful, any derogation requires the agreement of all parties which may not be forthcoming when needed. ESA is the only region to have secured a list of provisional time-bound derogations attached as an Annex to its EPA text. This option should be extended to other EPA regions.

However, whilst subsidies may be given to domestic producers in all EPA texts, the exports from ACP States may still be subject to countervailing duties, i.e. if the subsidy has the effect of lowering the price of the good when it enters the EU market, and as a result causes or threatens to cause injury to EU industries producing like products, countervailing duties may be applied.⁴⁵

2.5 Free Circulation of Goods and Regional Preference

Provisions on the free circulation of goods and ‘regional preference’ are included in those EPA texts that refer to regions rather than individual countries (i.e. Côte d’Ivoire, Ghana). Although they have been linked by some negotiators because they both raise issues about regional integration, they are separate and distinct issues: the clauses on free circulation of goods stipulate that EU goods are only taxed once on entry to any ACP region, while the regional preference clauses stipulate that any advantage granted to the EU, in tariff reductions or in any other area covered, must also be granted to partners within the same region.

2.5.1 Free Circulation of Goods

The clauses in the EPA and interim EPA texts on the free movement or circulation of goods stipulate that EU goods are only taxed once, upon entry to any ACP region. The clauses are reciprocal – the same applies to ACP goods entering the EU – although (as with other clauses) it could be argued that this reciprocity is rather ‘unequal’, since the challenges of implementation and compliance fall entirely on the ACP, with the clause merely reflecting what already happens in the EU.

In the African and Pacific texts – with the exception of those that refer to individual countries rather than a regional group – this principle is clear:

‘Customs duties shall be levied only once for goods originating in the EC Party or in the SADC EPA States in the territory of the other Party.’⁴⁶

The qualification to this principle is that in all cases the texts allow the possibility of a ‘duty drawback’ procedure, whereby any duty already applied is repaid when the good leaves the first country, to be paid again (potentially at a higher rate) in the second country. Such procedures are commonplace under normal trading circumstances, though cumbersome for importers. However, where countries either (a) do not apply a common external tariff (or in the context of an EPA, a common schedule of tariff reductions) for a given good; (b) have not liberalised trade within themselves; or (c) where there is no compensatory mechanism within a region to distribute duty revenues, the procedures continue to be necessary to prevent

⁴⁴ Chapter 2 “National Treatment”, Report on the WTO Inconsistency of Trade Policies by Major Trade Partners, Ministry of Economy, Trade and Industry of Japan, 2006.

⁴⁵ The EPA: Fact vs. Fiction: Issue no. 3, Caribbean Regional Negotiating Machinery.

⁴⁶ SADC-EC Interim EPA, Article 27.

countries from losing out on duty revenues that should, in theory, be theirs because duties were paid in one country but the goods were consumed in another. In the case of (a) above, where different duty rates are applied by different countries, free intra-regional movement of goods would also lead to trade deflection.

Pros

Notwithstanding the points above on the necessity of duty drawback procedures in usual circumstances, the key argument in favour of such provisions is one of efficiency. In general, the potential efficiency gains for an importer of being able to avoid complicated duty drawback procedures are large in ACP countries, where crossing borders can add significant time and cost delays, and where corruption at borders is sometimes also a possibility. The interim EPAs already provide for the removal of import tariffs for 80 per cent of EU goods to ACP countries, and where tariff schedules within a region are similar that tariffs across all countries will fall to zero for a good by the end of the transition period. This would in itself imply that an EU-produced good could move freely around the region without incurring further tariffs. Any additional provisions in an EPA that allow EU exporters to avoid at least some of these procedures would add significant value (and provide greater advantages over importers from non-signatories) to other commitments in the text. Beyond such narrow considerations however, there are overwhelmingly strong development reasons why reducing both tariff and non-tariff barriers between ACP countries would be good for development. The clause should, in theory, lead ACP countries to increase their efforts to achieve the objective of free circulation of goods within their region, for both EU and regionally-produced goods; the EPA is arguably not the place however for commitments on such internal matters.

Cons

The case against the clause however is that, as already indicated, it may undermine choices in individual countries' liberalisation schedule, in terms of transitional periods and excluded goods – although the exceptions may make such objections redundant. Beyond this, the clause may be difficult to implement, especially during transition periods, and add an unnecessary complication to the ongoing process of regional integration. Sensitivities are particularly acute in the SADC region because of the SACU customs union, where SACU members receive the vast majority of imports via South Africa, which has not yet concluded an interim EPA.

Potential Flexibilities

In contrast to most of the interim EPA texts, the CARIFORUM provision differs significantly from that in other texts, turning mandatory language into a 'best endeavour' commitment:

'The Parties recognise the goal of having customs duties levied only once on originating goods imported into the EC Party or into the Signatory CARIFORUM States. Pending the establishment of the necessary arrangements for achieving this goal, the Signatory CARIFORUM States shall exercise their best endeavours in this regard. The EC Party shall provide the technical assistance necessary for the achievement of this goal.'⁴⁷

Furthermore, the text initialled by the ESA countries appears to have no similar provision on the free movement of goods. Therefore, based on the principle that any ACP region can 'import' more flexible provisions that they find in other texts, there would appear to be no reason why any ACP region would feel obliged to include one. Given the potentially beneficial effect of the clause in focusing regional integration efforts, there is also scope instead for designing provisions on a region-by-region basis, taking account of the state of integration in each region, on a voluntary basis.

⁴⁷ CARIFORUM-EU EPA Article 18.

2.5.2 Regional Preference

Clauses on 'regional preference' in EPA texts stipulate that any advantage granted by an ACP country to the EU under the agreement – in terms of tariff liberalisation but essentially also covering all other areas of the text – should be automatically passed on to other members of the ACP region itself. Article 238:2 of the CARIFORUM-EU EPA, for example, provides that "Any more favourable treatment and advantage that may be granted under this Agreement by any Signatory CARIFORUM State to the EC Party shall also be enjoyed by each Signatory CARIFORUM State." While there has been some suggestion that the scope of the clause is limited only to liberalisation schedules for goods and services, this is not mentioned in the text, which appears to be fairly unambiguous in its application to all parts of the agreement.

Pros

The EC argues that the clause ensures that the EPA does not undermine regional integration, which would be the case if a country granted the EU more favourable rights within a country compared to those of regional partners. It can also be argued that such clauses will foster greater efforts towards regional integration itself, ensuring that commitments which are not currently being honoured within respective regional integration agendas will now be taken more seriously (although it is again questionable whether an EPA is the place for this).

Cons

Some observers have pointed out that, while EU support for regional integration might be desirable, the regional preference clause does not so much support as direct the course that integration should take in each ACP region. The potential breadth of coverage of a comprehensive EPA could eliminate the ability of a region to innovate and develop an approach to regional integration that best meets its economic and political needs and responds to its capacity constraints. The EPA would govern and proscribe the content and form of the regional integration process of ACP regions, especially in areas such as SPS or trade facilitation (and, where applicable, services and investment, intellectual property and government procurement) where there may not yet be a binding agreement between members of a region. A third party (the EU) having direct control over regional integration has given rise to concerns about sovereignty and legitimacy. Outside of tariffs and quotas, it will often be difficult to determine whether one set of policy measures grants more favourable treatment than another. The effect of the clause may be to force ACP region integration to take place in accordance with a particular EU-inspired model, which may not always be the best approach to regional integration (for political and economic reasons) in the ACP.⁴⁸ A longer-term effect may be to undermine domestic and international political processes in the ACP, which are essential for effective regional cooperation: arguably, effective regional integration needs to grow organically, from the ground up.

Potential flexibility

In seeking areas of potential flexibility, it is interesting to note that the CARIFORUM EPA text includes transition periods of between three and five years for the clause to take effect specifically in terms of commitments between the 'more developed countries' and 'lesser developed countries', and those with the Dominican Republic and Haiti. Some commentators believe that the regional preference clause does, and should, only apply to scheduled commitments, rather than all rules in the EPA. Clarification of this understanding within the text

⁴⁸ The classic reference is Rodrik, D. *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (2007); for a discussion on the EU as a model of regional integration, see also Bilal, S. 2005. *Can the EU be a model of regional integration? Risks and challenges for developing countries*. Paper presented at the CODESRIA - Globalisation Studies Network (GSN) Second International Conference on 'Globalisation: Overcoming Exclusion, Strengthening Inclusion', Dakar, Senegal, 29-31 August 2005, www.ecdpm.org/bilal

could reduce concerns about the clause. As with the clause on free circulation of goods, a voluntary or a 'best endeavour' model, or a simple reaffirmation of existing regional agreements in the EPA, might help to solve the problem.

2.6 Safeguards and Infant Industry Provisions

In all of the interim and full EPA texts, the issues of safeguards and infant industry protection are treated together in the chapter on 'trade defence instruments'. This is despite, arguably, some major differences between traditional safeguards – which are usually associated with dealing with temporary import surges occurring as a result of liberalisation of some other area – and the principle of infant industry protection, which relates more to a policy choice by a government to protect a certain industry for a limited period of time to enable it to achieve a degree of competitiveness.

Safeguards

The EPA and interim EPAs contain provisions dealing with multilateral and bilateral safeguards. With regard to the former, the EPA and interim EPAs preserve the right for the EC and ACP States to apply multilateral safeguard measures (and antidumping and countervailing duties) in accordance with the requirements of the WTO. The EC has also stated that it *may* not apply multilateral safeguards to products originating in ACP States in some of the agreements – this commitment only applies during the first five years of the EPA.⁴⁹

By contrast bilateral safeguards (which also include the infant industry safeguards discussed below) set out a framework under which either party may suspend its tariff liberalisation obligations in certain circumstances, namely when goods enter into the other party:

'...in such increased quantities and under such conditions as to cause or threaten to cause:

- '(a) serious injury to the domestic industry producing like or directly competitive products in the territory of the importing Party, or;
- (b) disturbances in a sector of the economy, particularly where these disturbances produce major social problems, or difficulties which could bring about serious deterioration in the economic situation of the importing Party, or;
- (c) disturbances in the markets of agricultural like or directly competitive products or mechanisms regulating those markets.'⁵⁰

In all cases a procedure for approving and monitoring the safeguard is envisaged, and a maximum length of time for safeguards is also stipulated. Notwithstanding the joint processes, the application of safeguards can effectively be done unilaterally. Safeguards may be applied for longer by ACP states – generally twice as long as the EU – although the EU's 'outermost regions' are treated the same as the ACP countries. The exact periods vary between EPAs, with provisions for the Pacific being the longest.

Infant Industry Provisions

Questions of whether or how governments should protect infant industries are widely debated in trade theory. In the interim EPA texts several restrictions are imposed on provisions specifically dedicated to infant industries, making them in fact more akin to traditional safeguards:

⁴⁹ Many free trade agreements provide for the elimination of the use of safeguard measures on trade between the parties to the agreement, which has raised a number of questions about WTO compatibility of the use of multilateral safeguard measures, not all of which have yet been addressed by the WTO Appellate Body.

⁵⁰ For instance, see Article 21 of the ESA-EC Interim EPA Text.

- In all cases, tariffs may only be increased in response to a significant surge in the quantity of EU imports.
- Such a surge in EU imports must either cause – or threaten to cause – serious injury to an infant industry that has already been established.
- The safeguard may only be applied as long as disturbance persists, and is subject to regular monitoring.
- In any event, the total length of time for which this safeguard may be applied is limited initially to eight years in total (for all regions except the Pacific).

In addition, such infant industry clauses are also subject to a ‘sunset provision’, meaning that they are only available for use within 10 years (or in other cases up to 20 years) of the entry into force of the interim EPA (see Table 2).⁵¹ For industries which could emerge in the future after the end of that period – perhaps as a result of new technology or growing demand, just as the biofuel industry, for example, has only become viable in recent years – governments must fall back on more general provisions which are unlikely to provide them with effective instruments. In this sense it is clear that the clauses have been designed to act as limited safeguards to defend against import surges during liberalisation, rather than as a more flexible instrument of trade policy that might more readily be associated with text-book discussions of infant industry protection.

Table 2: Comparisons of Infant Industry Provisions

Agreement	Maximum length for infant industry protection	Availability of Infant Industry Provisions
SADC	8 years	Within first 12 years (15 for LDCs) with possibility of extension by joint decision
CARIFORUM	8 years	Within first 10 years
Cameroon	8 years	Within first 15 years
Pacific	10 years (15 for LDCs and small island states)	Within first 20 years
Ghana	8 years	Within 10 years (with option of extension, subject to mutual agreement)
Côte d’Ivoire	8 years	Within first 10 years (with option of extension, subject to mutual agreement)
EAC	8 years	Within first 10 years
ESA	8 years	Within first 10 years (15 for LDCs)

Pros

The EC acknowledges the need for safeguards for ACP States in the EPAs to prevent unforeseen negative outcomes that might occur as a result of liberalisation. During the course of negotiations it was argued that the provisions on bilateral and multilateral safeguards and elsewhere adequately cater for any such eventuality.

⁵¹ It is unclear from the clauses whether all infant industry protection must terminate at the specified date or whether it is sufficient that the period of protection commenced before the sunset date. If the former is the correct interpretation, it may only be possible to grant the infant industry protection in the first few years after some of the EPAs enter into force.

The main arguments of the EC in limiting the scope of flexibility in the area of safeguards and infant industry provisions focus on the need for WTO compatibility. They point out that the provisions on safeguards link with other clauses in the goods chapter to form a 'package' which must, overall, meet the requirement for liberalisation of 'substantially all trade'. Hence too much flexibility on safeguards and infant industries threatens the scope of flexibility elsewhere, particularly in the level of tariff liberalisation, where there is already scope for ACP countries to schedule sensitive goods in their exclusion baskets. The EC also makes the point that in many texts there are additional provisions akin to safeguards, for the modification of tariff schedules in the event of serious difficulties, though this may relate more to fiscal difficulties than difficulties in a sector or industry, and modification is subject to the agreement of all the parties. Beyond the need for flexibility there are strong arguments that infant industry policies – as with policies promoting import-substituting industrialisation – did not work during the post-independence period in ACP countries, although other developing countries may have had more success.

Cons

Some commentators have identified some limitations in the safeguard clauses. Firstly, many important terms are not defined, arguably, allowing for the use of safeguards with minimal justification. The concept of "serious injury" is undefined but is derived from the WTO and some ACP fear that its interpretation will be influenced by GATT Article XIX and the WTO Safeguards Agreement and their strict interpretation by the Appellate Body. More importantly, it appears that the EU imported the concept of a 'disturbance' to a market or a regulatory mechanism from the EC GSP Regulation, which uses the term 'serious disturbance'.⁵² In terms of the 'trigger' for the safeguards to be applied, the EPA contains the WTO concept of 'such increased quantities' that 'cause or threaten to cause' one or several types of effect, but there are no particular volume or price triggers.⁵³ Prices are arguably the more important factor in many agricultural goods, for example. Moreover, data on import volumes may be collected less rigorously in developing countries than data on import values and prices. Some ACP fear that the safeguard as it is currently designed may be difficult for most ACP countries to make effective use of, nullifying its existence without, *inter alia*, improvements in monitoring trade flows and new legislation.⁵⁴

One reflection on the EC position made by some ACP negotiators is that at the same time as accepting the need for flexibility for the ACP, the EC also sought flexibility for itself. The EC also strongly resisted any initiative that would affect its rights under the WTO to apply antidumping and countervailing duty measures against goods from ACP countries, and sought the right to take bilateral safeguards in particular where ACP imports caused or threatened to cause disturbances in the markets for agricultural products or mechanisms regulating those markets. Given the similarity between the provisions in the EPA and in the GSP regulation, it seems likely that there was a desire to be able to apply safeguard measures in similar circumstances as such measures could be applied under the current GSP Regulation.

With regard to multilateral safeguards, the ACP has argued that, in practice, preservation of the rights of the parties to apply them – as well as to take antidumping and countervailing

⁵² Council regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences [2005] OJ L 169/1, art 22.

⁵³ CTA (2008) *Contentious issues in IEPA negotiations: implications and questions in the agricultural sector*, Special Report, Agritrade, October 2008, <http://agritrade.cta.int/en/content/view/full/4272>

⁵⁴ For a discussion, see also Berthelot, J., Reflections on the safeguard measures that ECOWAS could adopt, Solidarité, February 2009, <http://solidarite.asso.fr/home/2008texte/Reflexions%20sur%20les%20mesures%20de%20sauvegarde%20adoptables%20dans%20la%20CEDEAO.doc>, Kwa, A. African Countries and the EPAs: Do Agriculture Safeguards Afford Adequate Protection?, South Centre, 7 November 2008, www.southcentre.org/index.php?option=com_docman&task=doc_download&gid=1135&Itemid=68, and Pitschas, C. Special Safeguard Mechanisms in Agriculture-Drawing Inspiration from the TDCA and the CARIFORUM EPA?, GTZ, November 2008, www.gtz.de/trade

measures – is only a right only for the EC and possibly a few ACP States. The complexity of the WTO rules and requirements for WTO-compatibility mean that the vast majority of ACP States will not have the legislation, or the financial or technical capacity to apply such measures. There is only a very remote possibility that exports from an ACP State could cause injury to an industry in the EC, while many industries in ACP States could be injured by exports from the EU. Despite the unequal risk of injury, the EC insisted that EC antidumping and countervailing measures had to apply to the ACP States in the same way as all other countries, such as China, India and the United States.

With regard to the infant industries provision, the ACP has argued that the conditions attached to the infant industries safeguard render the provision inappropriate for their purposes. For example, the fact that tariffs may only be increased in response to a significant surge in EU imports means that infant industry protection cannot be provided in situations where trade flows remain constant. Nor could an industry be protected where there was a surge in non-EC imports, while EC imports remained constant. As it stands, the clause may not allow for new industries to be established using protective tariffs, since an industry which did not yet exist could not be threatened with serious injury by an import surge. Finally, while the regular monitoring envisaged in the provision of infant industry protection is essential, the inability to provide certain protection for a specified period of time may mean the provision will not provide an adequate incentive for private investment.

In addition to points on general safeguards above, ACP negotiators have highlighted two particular problems in relation to the clause on infant industries. The first point of contention is that these clauses do not actually provide their countries with the ability to establish an actual infant industry from scratch. Tariffs may be increased only in response to an increase in the volume of imports, not because of any policy choice by an ACP government to pursue a comparative advantage in a particular new industry.

Equally worrying for the ACP is that the provisions on infant industry inexplicably expire after 15 or 20 years. In principle, there is no reason to assume that increases in demand for new products – one of the main reasons for setting up infant industries – will only occur in the next twenty years, after which innovation will cease. Therefore, according to this argument, policies to promote infant industries should be available at any point in time.

One additional point to make in connection with infant industry provision is that there is a linkage to the ongoing process of regional integration in the ACP. For smaller countries, it is unlikely that, on their own, they will have sufficient market size to be able to create efficient industries. However, the fact that in many (though not all) ACP regions the removal of trade barriers to create regional markets is itself in the early stages, it is arguable that there is potential for regionally-competitive industries to emerge (under protection from external competition) over time before becoming internationally competitive. Being able to shield such industries from competition outside the region for a while at this particular point in time may be an important part of the regional integration process itself – for example, by allowing ACP countries to emulate others by pursuing sequenced integration of their industries (for example, promoting the ‘clustering’ of linked industries) at the regional level. While infant industry clauses may have had shortcomings in the past, the failure of a policy to generate growth in particular circumstances, or due to the manner in which it was implemented or administered, does not establish that the policy could never work. Arguably, the reporting and monitoring provisions of an EPA could be adapted to reduce the risk of policy failure without eliminating policy options for the ACP States.

Potential Flexibility

As with other clauses, the provisions on infant industries are a clear test of the level of discipline required *versus* ‘policy space’ allowed in EPAs, and as such will be an important test of recent promises for increased flexibility for the ACP. One option would be to take a new

approach to such provisions in the text, perhaps creating a separate clause based on whether industries were deemed viable prospects – allowing for temporary protection, but subject to criteria to limit the promotion of inefficient industries. Both the SADC and PACP regions are understood to have made proposals for separate infant industry clauses in their respective negotiations.

More limited options would include amending the current EPA texts. One priority for ACP negotiators is likely to be a deletion of the expiry or 'sunset' clauses in the text to allow for infant industries to be established, albeit within the limited safeguard approach of existing texts. Another option for increasing flexibility within this framework would be to allow other regions to import the most flexible provisions, found in the PACP text (allowing for 15 years) into other EPA texts.

2.7 Most Favoured Nation

The basic principle for the MFN clause is simple: following the EPA, should any ACP country or grouping conclude a free trade agreement with any developed country or any other (i.e. non-EU) country or grouping which is a major trading economy⁵⁵, then any more favourable treatment provided to that developed country or major trading economy must also be passed on to the EU. The same applies in reverse: the MFN clause is a symmetrical restriction of policy space in the sense that both parties are obliged to extend to the other improvements in treatment. It may be argued that the EU is exempt from this obligation because it has already granted DFQF to the ACP EPA states. But the MFN principle does not only apply to tariffs: it applies to all measures covered by the chapter in which it is to be found. To quote the phraseology in the EC–ESA text, the clause applies to '... the subject matter covered by this Chapter ...' (Article 16). The chapter covers a range of subjects; Article 13, for example, covers RoO. It would appear, therefore, that were the EU to offer less constraining origin rules in a future agreement with a non-ACP state it would have to extend these to the ACP. The chapter also covers safeguards and standstill.

Concerns have been expressed that if, for example, if an ACP country only liberalises 80 per cent of tariff lines with the EU under its interim EPA, but then liberalises 90 per cent with another trading partner under another FTA, in principle, it would need to pass on the extra tariff liberalisation benefits to the EU as well. Even if the ACP State liberalised only 80 per cent of its tariff with the third country, if the tariff lines were different from those liberalised to the EU, the ACP State may be required to liberalise the additional tariff lines with the EC, i.e. over 80 per cent of tariff would then be liberalised with the EU. Besides, the matters covered by the MFN clauses vary between IEPAs. It is interesting to note also that in the CARIFORUM EPA, the obligation to provide MFN treatment extends to services and investment, but not the temporary movement of natural persons (i.e. GATS modes 1 to 3, but not GATS mode 4).⁵⁶ For the areas that it covers, the MFN clause therefore essentially ensures that the ACP countries cannot discriminate against the EU in future agreements, and vice versa.

Beyond the basic principle, there are various caveats which restrict the circumstances under which the clause applies. The first is that in most cases only FTAs (a term that is undefined – see below) with developed or 'major trading' countries are covered. Agreements with the objective of regional integration that involve the harmonisation of policies are also exempt. The mechanism for transferring benefits is not automatic in every case: in the case of the CARIFORUM text, for example, a decision must be taken jointly about whether to deny the EU any benefits to which it was entitled (although there are no criteria established for doing so, so

⁵⁵ 'Major trading economy' means any developed country, or any country accounting for a share of world merchandise exports above 1 percent, or any group of countries accounting collectively for a share of world merchandise exports above 1.5 percent in the year before the entry into force of the preferential trade agreement in question.

⁵⁶ CARIFORUM-EU EPA, articles 19, 70 and 79.

it remains to be seen how this would work in practice). The scope of what provisions are covered is also apparently different between the full and interim EPAs that have been negotiated. A summary of the differences in the provisions is provided in Table 3.

Table 3: Comparison of MFN Clauses in EPA Texts

Agreement	Exclusions of application	Preference extension process	Definition of 'free trade agreement'
SADC	More favourable treatment which is applied by a party as part of its respective regional integration process	The parties will consult and jointly decide how to extend preferences to EC – extension of advantage is automatic for all except SA	Not defined in the text
CARIFORUM		The parties shall enter into consultations. The parties may decide whether the CARIFORUM State may deny extension of preferences to EC	
Cameroon Pacific		The parties will consult and jointly decide on how to extend preferences to EC	An agreement substantially liberalising trade... , either when that agreement enters into force or on the basis of a reasonable time frame.
Ghana / Côte d'Ivoire	No exclusions		
EAC	Trade agreements between EAC States and ACP countries, or other African countries and regions	Automatic	
ESA	Trade agreements between ESA States with other African countries and regions	Automatic	

Source: Lundenborg (forthcoming).

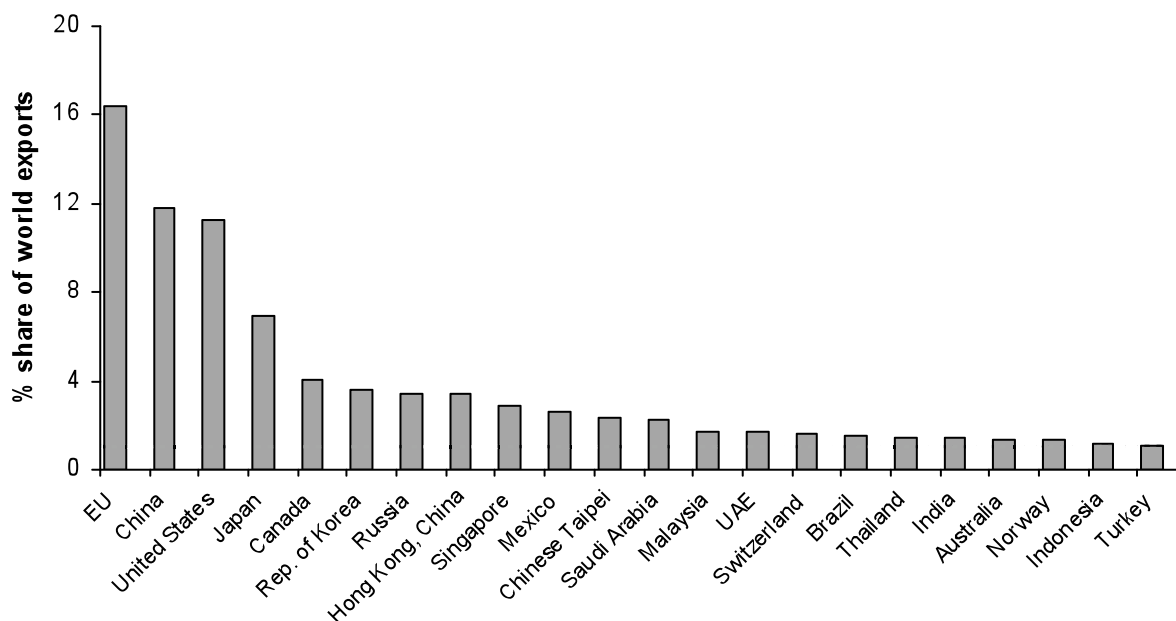
The term 'major trading economy' is defined in most texts as either countries having a percentage share of world trade greater than 1 per cent, or regions with a share of greater than 1.5 per cent.⁵⁷ As shown in Figure 1, such a distinction would include agreements with the three powerhouse developing economies of India, Brazil and China (though the absence of any definition of an FTA has led some to point out that that the MFN clause might not apply in the case of agreements with these countries, if they were notified to the WTO under the Enabling Clause).

When groups of countries are taken, the 1.5 per cent threshold here would cover the important negotiating blocs of MERCOSUR and ASEAN, meaning that any additional concessions made under any free trade agreements with those groups by the ACP party would also need to be passed on to the EU under the MFN obligation in the EPAs, and vice versa.

Pros

The EC has justified the inclusion of the clause in all the EPAs as being necessary to ensure that they are treated fairly, or rather to avoid the unacceptable position that they would be treated worse than their competitors, given that the EU is providing duty-free quota-free access to all ACP products. This argument, however, is not applicable to trade in services or investment. EU Development Commissioner Louis Michel apparently also linked the clause to the provision of development assistance:

⁵⁷ These figures exclude trade within the EU.

Figure 1: Leading exporters in world merchandise trade

Legend: --- = 1 per cent of world exports

Source: WTO

“The European Commission and our member states provide 56 percent of all development assistance in the world. It is difficult to say that Europe should let our partner countries treat our economic adversaries better than us. We are generous but not naive.”⁵⁸

The EC has also pointed out that the clause may constrain partners with whom ACP regions negotiate in future, in terms of limiting their requests, in the knowledge that any concessions that they gain will also have to be passed on the EU. Opinion is divided on this matter however: while some ACP negotiators emphasise this constraining effect within future FTA negotiations, others argue that this is wishful thinking.

Cons

Some ACP negotiators have pointed out that the MFN clause represents a departure from the development goals of the EPA – since the agreements were supposed to be centred on ACP rather than EU interests – and have therefore questioned the EC’s motives for its inclusion. The fact that the MFN clause in the CARIFORUM EPA covers treatment of goods, services and investment – but not temporary movement of labour – somewhat reinforces this perception.

The ACP has also argued that the MFN clause places an unacceptable constraint on their ability to pursue independent trade relations with third countries, and as such is an unacceptable curb on their sovereignty. In effect, the MFN clause ties their hands in negotiating with other countries and regions, since they are unable to offer them anything that could confer any trade advantage over the EU. The effect may be to discourage ACP States from taking steps to become more integrated into the global economy.

Another concern raised by some ACP negotiators is that the clause also undermines ‘South-South’ cooperation, specifically under the ‘Enabling Clause’ at the WTO (given the absence of

⁵⁸ Interview with Inter Press Service, 11/01/08. Available at: <http://ipsnews.net/news.asp?idnews=40762>

any definition of an FTA in the EPAs). The Enabling Clause was established to legitimise the principles under which unilateral preference schemes were granted by developed to developing countries, and to allow lower thresholds for liberalisation in agreements between developing countries. The question of whether or not agreements notified to the WTO under the Enabling Clause rather than under Article XXIV of GATT are 'FTAs' goes to the heart of the controversy over the extent to which the MFN clause will directly affect intra-developing country trade agreement.

Among the ACP regions themselves, one argument emphasised by the EC in favour of including MFN clauses is that they guarantee that all ACP regions will be treated equally, so that any region or country signing an agreement now will not be relatively worse off if another region manages later to negotiate extra concessions. However this also implies that it is now impossible for the EU to discriminate in favour of more economically disadvantaged ACP regions within the EPAs than more advanced ones (rather than, for example, under EBA). It could be argued that regions like ESA or ECOWAS which consist mainly of LDCs, should expect more flexibility in terms of market access than other more developed regions (like the Caribbean), and that as such the MFN clause goes against the development principles of the EPAs themselves.

Finally, with regard to the actual implementation of the clause, some ACP negotiators have highlighted an important ambiguity in the definition of what constitutes 'more favourable treatment', affecting the conditions under which tariff concessions made to third parties need to be passed on. Under one interpretation, a future FTA that liberalises the same overall amount of trade (or less) as the EPA cannot represent one that provides more favourable treatment, and so concessions need not be passed on. However at the level of individual product tariff lines, some goods may be liberalised under the second agreement that were excluded from liberalisation under the EPA – leading to a second interpretation that 'more favourable treatment' is in fact being provided at the level of specific products, even if the overall incidence of liberalisation is lower. Clearly, it is the interpretation that actually prevails in any dispute which will determine the extent to which the MFN clause could potentially have important implications for specific industries in the ACP States. Nonetheless, the uncertainty itself may cast a shadow over any negotiations that ACP countries enter into with third parties.

Box 6: Examples of how the MFN provision might affect ACP countries

Two regions, in particular, have announced that they intend to negotiate free trade agreements with other developed countries: the Caribbean with Canada and the US, and the Pacific with Australia and New Zealand. An objective assessment of how the MFN clause could constrain trade negotiations between EPA signatories and third countries would be difficult, requiring a detailed empirical analysis of trade flows and other factors.

Nevertheless for the Pacific, it is possible to provide a simple illustration of how the MFN clause might constrain negotiators in practice. While some Pacific ACP countries (PACPs) rely on preferential exports to the EU for a small number of goods, Australia and New Zealand are more important as long-term trading partners for the group as a whole. The PACPs are also important markets for Australian and New Zealand goods. As such, the PACPs anticipate that negotiations will yield benefits beyond what the EU has offered in areas like temporary movement of labour and even in relation to goods if more favourable rules of origin can be negotiated. In return, it is possible that the PACPs may concede more in terms of tariff reductions. Under the MFN clause any such better treatment given to Australia and New Zealand must also be passed on to the EU – this is regardless of the fact the EU may not have provided the same level of benefits either in goods or areas beyond goods, like temporary movement of labour – the MFN clause as it currently exists takes no account of this.

Potential Flexibilities

From an initial position that an MFN clause is ‘inevitable’, it has been suggested that through taking the best elements of the various interim EPA clauses, a more favourable solution could be reached.

In addition, in order to dispel any confusion with regard to ‘South-South’ trade, the text could make clear that agreements notified to the WTO under the enabling clause would not be affected by the clause. It would also be relatively easy to agree language that cleared up the ambiguity over the definition of ‘more favourable treatment’ for tariff concessions, as mentioned above.

Another way in which the MFN clause could be modified to take account of some ACP concerns would be for the clause to assess ‘more favourable treatment’ based on a broader set of criteria than those it contains. As noted above, in its current form the scope of the MFN provision is limited to the chapter on trade in goods. If the total balance of an agreement could be considered, for example, this might go some way towards meeting the objections of the ACP, particularly the Pacific. There is some common sense in looking at trade agreements as a balanced ‘package’ of measures, rather than trying to assess only the costs and benefits of particular sections or focusing on the treatment of each individual tariff line in two trade agreements.

Finally, flexibility might be enhanced by amending the MFN clause so that it does not provide for the automatic granting of any more favourable treatment to the EU, but instead provided for consultations with a view to determining whether and how any more favourable treatment should be provided to the EU. This is already the practice in some trade agreements to which ACP states are party. For example, if the third country provided the ACP State with greater benefits under the trading arrangement than the EU, the EU may need to negotiate the terms on which that more favourable treatment should be provided to the EU.

2.8 Non-execution clause

The issue of the ‘non-execution clause’ relates to the preservation of the power of the parties, in practice, the EU, to take various actions under Articles 11b, 96 and 97 of the Cotonou Agreement, even if the actions are inconsistent with the trade or trade-related commitments made under the EPA. Within the framework of the original Cotonou Agreement, these clauses allowed the EU to suspend its commitments under the Cotonou Agreement where an ACP State failed to respect human rights, democratic principles and the rule of law.⁵⁹ This clause has been invoked following a *coup d’état* or flawed electoral processes, in Zimbabwe in 2001 and Fiji in 2007, for example. In these cases, aid but not trade preferences were suspended by the EC.⁶⁰ While economic sanctions are generally incompatible with the trade liberalisation provisions of the GATT, economic sanctions for gross human rights violations may be permitted in exceptional circumstances. The exception clauses in the EPAs preserve the rights of the

⁵⁹ For an extensive review and discussion, see ECDPM Discussion Paper series 64: Mackie, J. and J. Zinke. 2005. *When Agreement Breaks Down, What Next? The Cotonou Agreements Article 96 Consultation Procedure*. (ECDPM Discussion Paper 64A). Maastricht: ECDPM, www.ecdpm.org/dp64a, Hazelzet, H. 2005. *Suspension of Development Cooperation: An Instrument to Promote Human Rights and Democracy?* (ECDPM Discussion Paper 64B). Maastricht: ECDPM www.ecdpm.org/dp64b, Mbangi, L. 2005. *Recent Cases of Article 96 Consultations*. (ECDPM Discussion Paper 64C). Maastricht: ECDPM, www.ecdpm.org/dp64c, and Bradley, A. 2005. *An ACP Perspective and Overview of Article 96 Cases*. (ECDPM Discussion Paper 64D). Maastricht: ECDPM, www.ecdpm.org/dp64d

⁶⁰ See Bartels, L. “The application of human rights conditionality in the EU’s bilateral trade agreements and other trade arrangements with third countries”, Directorate-General for External Policies of the Union, European Parliament, November 2008.

parties to apply economic sanctions in at least as broad a range of circumstances as permitted under the WTO.

It should be emphasised that neither side in the negotiations denies the importance of the protection of human rights or good governance.

Pros

The EC argues that the inclusion of Articles 96 and 97 are necessary merely to maintain the *status quo* of what was agreed under the Cotonou Agreement, which covers trade issues as well as development assistance. It is worth noting that the Cotonou Agreement, and therefore any agreement of development financing and the right of the EU to suspend either the Cotonou Agreement or the EPA, will expire with the Cotonou Agreement in 2020.

Cons

The ACP is concerned that this provision could provide a basis for the EU to invoke unilateral trade sanctions for political violations. The ACP position since the inception of negotiations has been that the non-execution clause should not apply to EPAs and should be confined to political cooperation because of the adverse impact that sanctions on one country could have on regional trade and integration, particularly if the country concerned is a key trading partner or an outlet for landlocked neighbouring countries.

Box 7: The non-execution clause and definition of parties to the Agreement

The non-execution clause is also linked to the issue of the 'definition of the parties' to the full and interim EPAs. In previous versions of the texts at least, commitments were to be taken on a regional basis, raising the possibility of all ACP countries within a region being faced with a possible withdrawal of concessions and preferential access, based on transgressions by only one of member their party. Given that ACP countries lacked the necessary political governance structures to be able to take decisions jointly at the regional level, the provision was opposed by the ACP side – particularly in areas that were subject to the non-execution clause, such as human rights and elections. Late on in the negotiations a 'mixed' solution was adopted whereby ACP regions would assume obligations on a regional basis in some areas, and on an individual basis in others. The extent to which ACP concerns in relation to the definition of the parties (in relation to the non-execution and other clauses) were addressed will depend on a careful examination of the texts.

A meeting of the ACP Legal Experts on EPA Negotiations in October 2007⁶¹ concluded that because the principles for the negotiation of EPAs are based on Article 37 of the Cotonou Agreement, no reference should be made to Articles 11, 96 or 97. It was advised that to avoid any doubt, the ACP regions should include an exception clause in the final provisions which states that "For the avoidance of doubt, articles 11, 96 and 97 of the Cotonou Agreement will not apply to EPAs". The EC would however retain the ability to suspend development assistance under the Cotonou Agreement for failures to respect human rights and democratic principles, as well as the right (and obligation) to take action under the United Nations Charter.

The Caribbean called for the inclusion of a non-execution clause which would allow suspension of Caribbean commitments if EU support was not forthcoming and, therefore, ensure proper sequencing of capacity building, regional integration and trade liberalisation. The CARIFORUM EPA and the interim EPAs do recognise that incomplete or imperfect implementation of the

⁶¹ Final Report, Meeting of the ACP Legal Experts on EPA Negotiations, 9-11 October 2007. www.acp-eu-trade.org/library/files/ACP_EN_111007_ACP_ACP-legal-experts-on-EPA-negotiations-final-report.pdf

EPA may be the result of capacity constraints in the chapters on development cooperation and dispute settlement. These provisions, however, do not create any legally binding obligation on the EU either to provide resources or a defence further to failure to implement an EPA.

Potential Flexibilities

The ACP countries are still concerned about the inter-relationship between EPA provisions and the Cotonou Agreement, particularly concerning the treatment of EC development cooperation even though the EPAs do not provide any rights to development assistance. The Ghana interim EPA clause regarding temporary remedies in the event of non-compliance with an arbitration panel ruling, explicitly proscribes the ‘appropriate measures’ the complaining party may take, to prevent this from affecting the development assistance.⁶² It has been suggested that a general provision stating that the ACP’s use of the EPA dispute settlement mechanisms will not affect the development assistance given to them, would also be an important guarantee for the ACP States.⁶³

Arguably, the power of the parties to a free trade agreement to temporarily suspend trade preferences because one of the parties has allegedly failed to respect human rights, democratic principles or the rule of law is inconsistent with GATT Article XXIV. More specifically, the ability to suspend trade liberalisation would not satisfy the requirements to eliminate tariffs on substantially all trade in Article XXIV and therefore be incompatible with GATT Article I. If the EU suspended some or all of the trade preferences given to an ACP State under the non-execution clause, that State may be forced to suspend preferences given to the EU under the EPA to avoid breaching its WTO commitments. It is fundamental to the EPAs that they are WTO-consistent and that specific provisions address the relationship between the EPAs and the WTO. If the EPAs stated that the non-execution clause did not entitle a party to suspend commitments under the EPA, EU practice under the Cotonou Agreement of seeking aid, rather than trade, suspension measures would be confirmed, WTO incompatibility would be avoided, and a potential area of uncertainty in the EPA would be eliminated.

2.9 Rules of Origin

In any trade agreement, the rules of origin (RoO) define the ‘nationality’ of goods, thereby establishing which goods qualify for preferential treatment. While identifying the origin of goods is relatively simple in the case of raw materials and commodities – which are usually ‘wholly obtained’ from one country – it is more difficult in the case of goods that have been manufactured using inputs sourced from more than one country. Given that many high-value exports fall increasingly into the latter category, reform of the RoO was one way in which to promote the development of ACP industries, particularly in areas where they were seen as too restrictive.

A RoO regime however also needs to be balanced. On the one hand, where restrictive RoO prevent sourcing from outside the FTA partners – effectively limiting suppliers to the EU and ACP region – they can be used either to ‘lock-in’ existing supply chains or even to act as barriers that prevent otherwise potentially competitive industries from emerging. On the other hand, where RoO are too lax this will simply lead to trans-shipment, whereby almost-finished goods are imported into an ACP country, undergoing minimal value-adding before being exported duty-free to the EU. Finally, a RoO regime needs to be administratively simple, especially since the administrative burden of fulfilling the requirements of the regime are private sector operators. It has also been argued that in a number of cases the value of preferential

⁶² Article 56.2 “Under no circumstance will the appropriate measures referred to in the present paragraph affect development assistance to Ghana.”

⁶³ Karli, M. “Development friendliness of dispute settlement mechanisms in the EPAs”, *Trade Negotiations Insight* Vol.7 No.9, November 2008, www.acp-eu-trade.org/tni

access conferred by a trade agreement has been less than the cost complying with the RoO (a situation which gets worse as the preferences are eroded by other unilateral liberalisation or other agreements, for example, in the WTO).⁶⁴ Unless the rules are transparent and easy to comply with, and provide certainty for investors, the investments required to take advantage of them will not be forthcoming. Compliance costs are likely to be a greater issue for small producers in developing countries.

After a complicated set of negotiations on them, the rules of origin arrived at in the EPAs were essentially the same as those in the Cotonou Agreement, with some improvements in the agricultural and textiles sectors (although with some potential deteriorations due to the fact that the ACP was now divided into regions and because not all countries signed EPAs). Earlier on in the negotiations the ACP countries recognised the desirability of having common rules of origin across all the EPA agreements, so as to enable trade incremental value-adding – known as ‘cumulation’ – across different regions. As such it was envisaged that new rules would be agreed during the ‘first phase’ of negotiations at the all-ACP level from 2002-04. However this was not possible due to differences between ACP regions on the issue, combined with an apparent lack of willingness on the part of the EC to make commitments during the early stages of negotiations.

Pros

The EC tabled a draft position on RoO reform in March 2007 based on a new methodology that set a minimum percentage of local ‘value addition’ to imported raw materials. However the position was later withdrawn because of difficulties in getting EU-wide approval, and replaced with an approach based on the existing rules – known as ‘Cotonou-plus’ – in July 2007. Noting time pressures for concluding the agreements, the EC rightly pointed out that by defining which goods qualified for preferential access under the EPA when compared with normal applied rates, the reform of RoO only mattered for those goods where such preferences existed and remained significant. In the end reforms were limited to a selection of products in the textiles and agricultural sectors, although these were also areas where ACP preferences were greatest. In the textiles sector, the ‘double transformation’ rule – requiring for example that clothes were manufactured from yarn rather than fabric, thereby undergoing two separate transformations – was relaxed. For the Pacific, a new set of rules defining the origin of fish for processed goods – allowing fish to be sourced from anywhere in contrast to earlier, highly restrictive rules – was seen as a major concession on the part of the EU that was specifically limited to this region.

Cons

While some ACP countries (especially LDCs that initialled agreements) saw improved market access in the new RoO, others expressed disappointment at the scope of the changes, seeking to ensure that an early review of the rules took place after entry into force of the interim EPA or in the context of comprehensive EPA negotiations.

A major long-term objective of the ACP has been *simplification* of the RoO regime which, in the EPAs as in the Cotonou Agreement, run to some 170 pages of complex, product-specific rules. Such complexity they argue often increases the *compliance cost* of the meeting the rules, lessening the value of the preferential market access on offer, and thereby acting as a deterrent to private sector investors. Both the World Bank⁶⁵ and the Blair Commission report⁶⁶ have called for a simplification of the rules, for example a simple ‘change in tariff heading’ procedure or a threshold of 10 per cent ‘value addition’ in ACP countries (though one problem associated with

⁶⁴ Brenton, P. and Manchin, M. "Making EU Trade Agreements Work: The Role of Rules of Origin," *World Economy*, vol. 26(5), pp.755-769, 2003.

⁶⁵ Hoppe, M. "Economic Partnership Agreements: Does Preferential Access of Non-LDC African Countries Increase?", World Bank Trade Note 32, July 2007. See also work by Paul Brenton on this issue.

⁶⁶ Chapter 8 "More Trade, Fairer Trade", Report of the Commission for Africa, March 2005

the latter is that thresholds are subject to currency fluctuations, creating unpredictability for producers about whether goods will be accepted or not).

Another idea put forward by some ACP regions has been for asymmetric RoO – higher thresholds for EC goods than for ACP goods. In theory there is perhaps no reason why rules of origin regimes should be the same for the ACP and EU exports, although it is less clear what practical impact asymmetric RoO will have in preventing EU imports from qualifying for preferential access to ACP markets. Some commentators have argued that in most cases they are likely to meet the defining criteria, but whether or not this is true (given Europe's deep integration in global value chains) has not been tested empirically. Perhaps more relevant is the limited capacity of ACP customs authorities to challenge the originating status of EU goods, which would require them to have sophisticated knowledge of where and how each product was made.

A major issue is that of *cumulation* which has been made temporarily less extensive than it was before 2008. Under the Cotonou RoO, ACP countries could transform raw materials sourced from any other ACP country, which in effect counted as if they were from the exporting country itself. The division of the ACP into regions, and then into those that signed EPAs and those that did not, mean that – at least in terms of cumulation – ACP signatories are worse off than before, particularly those in Africa where there are greater opportunities for cumulation. Some commentators have pointed out that this breaks the promise, enshrined in Article 37.7 of the Cotonou Agreement, that EPAs would lead to an improvement in rules of origin. However, the extent to which cumulation between ACP regions was ever used, or (with the exception of South Africa) might potentially ever have been used, is also highly debatable.

Apart from the issue of cumulation between ACP regions, there are the rules dealing with cumulation with South Africa, and those allowing cumulation with other developing countries. In light of its position as a competitive producer of many goods, the Cotonou Agreement set out a long list of products for which cumulation with South Africa was not allowed. A crucial point here, relevant also for other provisions in the interim EPA RoO, is the difficulties encountered in meeting the necessary administrative arrangements for cumulation with South Africa to take place. In the interim EPAs, cumulation with non-parties requires coming to an agreement on administrative arrangements in customs areas, the exact nature of which is not defined in the text and which could prove fairly difficult to negotiate. Even if South Africa were to sign an IEPA there would remain the problem that its RoO are set out in the TDCA, and are different from those in the SADC EPA.

Finally, ACP negotiators have highlighted the issue of cumulation with 'neighbouring developing countries', as well as overseas territories of the EU. In the EPA RoO, there is a clause which allows ACP countries to treat materials sourced from other developing countries as 'their own', which could potentially be a major source of flexibility depending on the countries involved. The developing countries, however, are limited to neighbouring developing countries and those (such as Egypt) in pre-existing regional trade agreements with EPA states listed in an annex to the rules, and again the conditions needed in order to benefit may prove difficult to meet in practice.

Potential Flexibility

It is difficult to generalise about potential flexibilities for Rules of Origin because the best solutions often need to be specific to the export profile of particular ACP regions.

Nevertheless some general principles apply: the RoO should aim to simplify the currently complex procedures (perhaps with an 'across-the-board' solution as proposed by the World Bank), allowing for cumulation within the ACP and with other developing countries (including non-EPA signatories and other GSP beneficiaries), and relaxation of specific rules where requested by the ACP regions, for example, by lowering the share of domestic value-added

requirements so that the ACP may also source from other countries. Furthermore, any revision of the EPA RoO should be a genuinely cooperative effort between the ACP and the EU. The EU needs to actively engage with the ACP before deciding on an approach, and assist the ACP in identifying its interests and developing proposals that address EU concerns.

2.10 Other Contentious Issues

While this paper has focused on the issues that have been most contentious in many, if not all, the ACP regions, there remain a significant number of other issues where the EU and one or more ACP regions have expressed concerns, although some questions are arguably more 'technical' than others. Given that at the end of 2007 most of the negotiations were towards interim rather than final EPAs, it is likely that the parties to the negotiations may have focused less attention on the details of the institutional and general provisions than might otherwise have been the case. Problems in these areas may loom larger as the negotiations near conclusion. Individually, these issues are unlikely to prevent the conclusion of an EPA, but collectively they may present an obstacle.

Listed below are some provisions that may be uncertain or unusual in the CARIFORUM EPA or the interim EPAs or that are perceived to have inequitable effects by one or more of the ACP regions, and where there may be a tension between the provisions and the stated development objectives of the EPAs. As such, the issues should not be seen as simply contentious between the parties to the negotiations, but raise issues of coherence in EU policy making. While not all such issues are covered here, the objective of this section is to illustrate the different issues that have arisen and highlight the potential need for greater reflection.

- *Administrative Cooperation:* The CARIFORUM EPA and the interim EPAs permit the suspension of trade preferences, *inter alia*, in cases where one party has made a unilateral finding of 'irregularities' and 'failure to provide administrative cooperation'⁶⁷. These concepts are not well-defined, which creates uncertainty for governments and traders. The loose language and scope for unilateral termination of trade preferences also creates the impression that the trade ACP-EU relationship is not moving to a truly contractual basis, but will remain one where the EU grants significant trade preferences to ACP States but retains a high degree of unilateral control over those preferences.
- *General Exceptions:* The general exceptions contained in the CARIFORUM EPA and the interim EPAs are based on equivalent provisions in GATT Article XX and GATS Article XIV, but omit some of the WTO exceptions, in particular equivalents to GATT Article XX(h)-(j)⁶⁸. The eliminated exceptions (on international commodity agreements, essential materials, and products in short supply) may be of value to some ACP States. The change means that the EPA reduces the policy space of the ACP States, eliminating the flexibilities available under the WTO.
- *Security Exceptions:* By contrast, the security exceptions in the CARIFORUM EPA and the interim EPAs are broader than the security exceptions in the WTO⁶⁹. Even if a case can be made that the WTO exceptions are too narrow, whether in light of the subject matter of the EPA or changing international conditions, the current provisions provide almost no limit on the actions that may be justified on 'security related' grounds, which would otherwise be inconsistent with the EPA. The provision would permit a party to manufacture an exception in a broad range of circumstances which creates uncertainty for governments and traders.

⁶⁷ See, for example, CARIFORUM-EU EPA Article 20.

⁶⁸ See, for example, CARIFORUM-EU EPA Article 224.

⁶⁹ See, for example, CARIFORUM-EU EPA Article 225.

- *Tax Exceptions:* The tax exceptions in the CARIFORUM EPA and the interim EPAs⁷⁰ are broader than the equivalent exceptions in the WTO. Some of the provisions may have been inspired by bilateral investment treaties, others by a desire to deal with what the OECD refers to as ‘harmful tax practices’. However, it would be possible for a party to manufacture an exception for virtually any tax-related practice under this provision. The tax exception is also included in other provisions calling for cooperation and dialogue on tax practices⁷¹ and in some of the draft EPAs requiring acceptance of EU defined good tax practice. Harmful tax practices are dealt with in other fora. It is not clear why these issues should be also dealt with in an EPA, which is a trade agreement. Nor it is clear that the EPA should seek to reduce the policy space of ACP States on such an important matter as taxation systems, through a short (and rather opaque) article in a trade agreement, without full consideration of the consequences and public consultation in each of the ACP States.
- *Incorporation of International Instruments:* Similar concerns may also arise from the incorporation of international instruments (as opposed to EU documents) into the EPAs by reference. Regardless of how important the policy is, or how much all the parties wish to cooperate (for example, on the suppression of illegal financing activities), more thought needs to be given to whether a trade agreement with all that it entails is the appropriate instrument to pursue police and security interests, for example.
- *Dispute Settlement:* The introduction of binding dispute settlement procedures into the WTO was seen to be of value to smaller states. However, experience in the WTO has shown that, except in exceptional circumstances, small developing countries like the ACP States do not avail themselves of the opportunity. The lack of legal and financial resources to analyse a situation and submit a dispute prevents most developing countries from using the dispute settlement system. Small countries are also wary of bringing disputes because the usual remedy - the right to suspend trade concessions - is likely to cause economic harm to the complainant country and fail to motivate the defendant to comply with the agreement. The full and interim EPAs do not address these issues. The EPAs are complex agreements. The drafting is also, in parts, not as clear as it could be. There is a risk that only the EU will be able to enforce the EPAs.
- *Institutional Issues and Monitoring:* The CARIFORUM EPA gives the EPA Ministerial Council broad powers to make decisions to implement the EPA that are binding on the parties⁷². The draft EPAs contain similar provisions. While a broad decision-making power may be necessary, the provision may raise different concerns in the EU and the ACP region. Without the same level of institutional development as the EU an open-ended decision-making procedure may create concerns about the ‘democratic deficit’ and the accountability of trade ministers to their parliaments and people.
- *Compliance with Objectives:* The final illustrative example is article 233:5 of the CARIFORUM EPA, which states that “The Parties or the Signatory CARIFORUM States as the case may be shall adopt any general or specific measures required for them to fulfil their obligations under this Agreement and shall ensure that they comply with the objectives laid down in this Agreement.” The draft EPAs contain similar provisions. This provision, in particular the obligation on the parties to ensure that they comply with the objectives of the Agreement may have been inspired by Article 10 of the EC Treaty. However, the different institutional and legal context (intra-EU relations versus ACP-EU relations), as well as the breadth of the subject matter covered by the EPA, raise doubts about the appropriateness of this provision. It creates great uncertainty about the obligations that the parties have accepted, which is compounded by the tension between the multiple stated and implicit objectives of the EPA.

⁷⁰ See for example CARIFORUM-EU EPA Article 226

⁷¹ Cariforum EPA, Articles 22 and 236.

⁷² See, for example, CARIFORUM-EU EPA Article 229.

3 Conclusions

Despite a period of intense negotiations towards interim EPAs that led to the conclusion of several Interim Economic Partnership Agreements between the EU and a number of ACP States in late 2007, a number of ACP negotiators and politicians have voiced concerns over a number of provisions appearing within the agreements that they view as 'contentious'. This paper has attempted to review some of the issues that have been raised by various ACP negotiators in key documents and meetings, although it is important to point out that the list is neither exhaustive, nor are all the issues viewed in the same way by different ACP States. The discussion has also been limited to provisions related to trade in goods in the new agreements, not to services or trade-related issues that are being discussed within ongoing negotiations towards comprehensive EPAs, and where there are some equally contentious issues.

Importantly, both sides of the negotiations have acknowledged the existence of certain contentious issues within the agreements. Both EU member states and the new EU Commissioner for Trade have expressed a willingness to look at contentious areas and adopt a flexible approach to them in the context of future negotiations towards comprehensive EPAs. The importance of these apparently technical issues lies in the fact that unless some way is found of overcoming disagreements (and depending on the priorities in each region) there is a very real risk that negotiations on comprehensive EPAs will be derailed, and regional integration processes disrupted.

In terms of the issues themselves, it is difficult to categorise them into different types, since they all raise particular issues and because of the variety of opinion on what are the most important and which justifications are the most relevant. Nevertheless, it is perhaps possible to discern some common arguments for and against some of the provisions. For example, for many of the provisions EC justifications focus on the importance of achieving agreements that meet the two criteria of being WTO-compatible – which is essential for the long-term security of the trade regime – and promoting development. Provisions may not be considered in isolation, as liberalisation commitments – for example, on tariff liberalisation, safeguards, infant industry clauses and export taxes – that taken together – form a package of commitments which defines the level of trade barriers to be eliminated. Flexibility in one area must be compensated by greater discipline in another. Such 'discipline' is required not simply to comply with WTO obligations, but mainly to achieve development objectives through much-needed economic reforms which can be securely 'locked in' through commitments in the EPAs.

By contrast ACP justifications for flexibility focus on the idea of 'policy space', highlighting in many cases the role that flexible policy instruments can play in actively promoting development: for example, the continued use of tariffs in the context of the definition of 'substantially all trade', export taxes, and infant industry provisions. In other cases there are concerns about the practicability of some clauses (for example, safeguards, free circulation of goods), and for some provisions (such as MFN, the non-execution clause and some of the clauses covered as 'other contentious issues' above) there is debate over the precise linkage between economic and political sovereignty and purely trade concerns. In most cases, though, the call for flexibility may be based on a mix of justifications.

One observation is that while the burden of *compliance* with the clauses often applies to both the EU and the ACP (albeit with different transition periods or levels of commitment), the cost of *adjustment* falls overwhelmingly on the ACP side. This must be set against the fact that – apart from some notable improvements in the rules of origin for some products and quotas for sugar – there were few dynamic *improvements* in the situation of those ACP States that initialled the EPAs. Many ACP States initialled simply in order to preserve the duty-free market access that they had benefited from previously under the expiring Cotonou preferences. Others signed up because their regional integration process would otherwise be jeopardised.

In most cases, the potential benefits and challenges of the EPAs in the long run do not critically hinge on the way that concerns over these contentious issues will be addressed. The overall balance of the final EPAs to be concluded, the availability of appropriate accompanying measures (including the willingness of the EU to undertake and deliver Aid for Trade commitments) and the effective pursuit of necessary institutional, structural and economic domestic reforms will be much more prominent factors. But a constructive engagement by all parties to accommodate concerns on this set of contentious issues will be a test of their willingness and readiness to conclude EPAs that both comply with WTO rules and promote development in line with the strategic objectives and priorities of the respective ACP countries and regions.

This paper has shown that there is potential for some flexibility on at least some of the contentious issues. The final outcome will naturally depend on the continuing negotiations – negotiators need to balance a number of interests and their judgment will, as ever, be crucial to a successful outcome.

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Annex 1 Overview of ACP States having concluded a full or interim EPA

Table A1. Overview of States having concluded a full or interim EPA

	Members	States having concluded as of March 2009 ^a	Countries falling into EBA/ <u>standard GSP</u>	Proportion of signatory countries	Number of liberalisation schedules
ESA EPA	Comoros Djibouti Eritrea Ethiopia Madagascar Malawi Mauritius Seychelles Sudan Zambia Zimbabwe	<i>Comoros</i> <i>Madagascar</i> Mauritius Seychelles Zimbabwe <i>Zambia</i>	Djibouti Eritrea Ethiopia Malawi Sudan	55%	6
EAC EPA	Burundi Kenya Rwanda Tanzania Uganda	<i>Burundi</i> Kenya <i>Rwanda</i> <i>Tanzania</i> <i>Uganda</i>	—	100%	1
SADC EPA	Angola Botswana Lesotho Mozambique Namibia South Africa Swaziland	Botswana <i>Lesotho</i> <i>Mozambique</i> Namibia Swaziland	Angola	71%	2
CEMAC EPA	Cameroon Chad Cent. African Rep. Congo DR Congo Eq. Guinea Gabon S. Tomé/Principe	Cameroon	Chad Cent. African Rep. <u>Congo</u> DR Congo Eq. Guinea <u>Gabon</u> S. Tomé/Principe	12.5%	1
ECOWAS EPA	Benin Burkina Faso Cape Verde Côte d'Ivoire Gambia Ghana Guinea Bissau Liberia Mali Mauritania Niger Nigeria Senegal Sierra Leone Togo	Côte d'Ivoire Ghana	Benin Burkina Faso Cape Verde ^b Gambia Guinea Bissau Liberia Mali Mauritania Niger <u>Nigeria</u> Senegal Sierra Leone Togo	13%	2
PACP EPA	Cook Islands Fed. Micronesia Fiji Kiribati Marshall Islands Nauru Niue Palau Papua New Guinea Samoa Solomon Islands Tonga Tuvalu Vanuatu	Fiji Papua New Guinea	<u>Cook Islands</u> <u>Fed. Micronesia</u> Kiribati <u>Marshall Islands</u> <u>Nauru</u> <u>Niue</u> <u>Palau</u> Samoa Solomon Islands <u>Tonga</u> Tuvalu Vanuatu	14%	2

	Members	States having concluded as of March 2009 ^a	Countries falling into EBA/standard GSP	Proportion of signatory countries	Number of liberalisation schedules
CARIFORUM	Antigua/Barbuda Bahamas Barbados Belize Dominica Dominican Rep. Grenada Guyana Haiti Jamaica St Kitts/Nevis St Lucia St Vincent/Grenadines Suriname Trinidad/Tobago	Antigua/Barbuda Bahamas Barbados Belize Dominica Dominican Rep. Grenada Guyana <i>Haiti^c</i> Jamaica St Kitts/Nevis St Lucia St Vincent/Grenadines Suriname Trinidad/Tobago	—	100%	1

Notes:

- (a) Countries in bold have signed a full or interim EPA, others have only initialled one. Countries in italics are classified as LDCs. In the table compiled by the Commission (<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/15&format=HTML&aged=0&language=EN&guiLanguage=en>), Somalia and Timor Leste are listed as LDC non-signatories (in the ESA and PACP groupings respectively). Since neither has played any part in the negotiation of EPAs, they are omitted here.
- (b) Cape Verde has been classified as non-LDC since January 2008 but will be able to export to the EU under the EBA initiative for a transitional period of three years.
- (c) Haiti initialled the Cariforum-EU EPA at the end of 2007, but has not signed with the region in October 2008.

Source: Adapted from ODI-ECDPM (2008), *The New EPAs*, www.ecdpm.org/pmr14

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