

**The Legal Implications of Economic
Partnership Agreements on Regional
Integration in East and Southern African**

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**SUPERVISED BY
Professor Evance Kalula**



Dissertation presented for the approval of Senate in part fulfilment of the requirements for the degree of Master of Laws in Commercial Law at the University of Cape Town.

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**THE LEGAL IMPLICATIONS OF ECONOMIC
PARTNERSHIP AGREEMENTS ON REGIONAL
INTEGRATION IN EAST AND SOUTHERN AFRICAN**

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I hereby declare that I have read and understood the regulations governing submission of the Master of Laws dissertations including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

RONALD MUSONI

DEDICATION

To Baby Elijah on life, this journey is never short of travellers. Welcome aboard.
To my country, Mzee Apollo will truly be happy.

I also dedicate this to the two men that have inspired me the most in my life thus far; Mzee
Apollo and Uncle Gus

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My utmost gratitude goes to the almighty God, who through his son the Lord Jesus Christ has ceaselessly blessed me in my endeavours.

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ABBREVIATIONS

ACP	African Caribbean Pacific
BLNS	Botswana Lesotho Namibia Swaziland
COMESA	Common Market for East and Southern Africa
DoP	Definition of Parties
EAC	East African Community
EBA	Everything But Arms
EC	European Community
EPA	Economic Partnership Agreements
ESAPEA	East and Southern African Economic Partnership Agreement
EU	European Union
FTA	Free Trade Agreement
GATT	General Agreement on Trade Tariffs
GDP	Gross Domestic Product
GNP	Gross National Product
LDC	Least Developed Country
MAT	Mozambique Angola Tanzania
MFN	Most Favoured Nation Clause
PTA	Preferential Trade Agreement
REC	Regional Economic Community
SACU	South Africa Customs Union
SADC	Southern African Development Community
SADCC	South African Development Coordination Conference
SDT	Special and Differential Treatment
TDCA	Trade and Development Cooperation Agreement
WTO	World Trade Organisation

LIST OF INSTRUMENTS

Cotonou Agreement June 23, 2000, 2000 O.J. (L 317) 3

Convention of Lomé I: February. 28, 1975, 1976 O.J. (L.25) 2), reprinted in 14 I.L.M 595 (1975).

Convention of Lomé II: October. 31, 1979, 1980 O.J. (L347) 2.

Convention of Lomé III, December. 8, 1984, 24 I.L.M. 571 (1985).

Convention of Lomé IV, December. 15, 1989, reprinted in The Courier, No. 120, Mar.-Apr. 1990, 29 I.L.M. 783 (1990)).

Treaty on the European Union and Final Act 1992, 31 I.L.M 247

Treaty of Rome 1957, 298 U.N.T.S. 11.

SADC Protocol on Trade Maseru, August 1996, entered into force 25 January 2000.

Treaty establishing the East African Community 30 November 1999, 2144 U. N. T. S. I-37437 (EAC Treaty)

WTO Agreement 1867 U.N.T.S. 3, 33 I.L.M. 9 (1994) (December 1993 text)

ABSTRACT

The European Union is currently negotiating new trade agreements in the form of -Economic Partnership Agreements (EPAs) with members of its former colonies- the African, Caribbean and Pacific (ACP) Countries. According to the European Commission's directorate general for trade, such agreements contain provisions aimed at progressively removing trade barriers, enhancing cooperation in trade related areas and fostering regional development. However juxtaposed against the endeavors of the regional integration efforts already established, especially in East and Southern Africa, the question one can't help but ask, is whether these EPAs will support the existing efforts at regional integration?

This study therefore examined the legal implications of these EPAs on the regional integrations efforts already established in the East and Southern African regional economic communities (RECs). This necessitated critical discussion on controversial clauses of the EPAs and issues raised during the negotiations of the EPAs, such as the reconfiguration of the membership of the various members of the RECs, the definition of parties to the agreement, and the inclusion of non-trade issues in the EPA agreements.

The study established that EPAs, in their current form, have the potential to hamper regional integration in the RECs. Such agreements demands for the reconfiguration of membership in the various RECs are not geared at promoting the integration process of these communities into the world economy that is based on their initiatives (RECs'). It would seem, rather, that the EPAs are tailored to serve only the interests of the EU.

The study therefore concluded by offering solutions that would alleviate the potentially detrimental effects of EPAs on the regional integration processes in East and Southern Africa which are geared towards integration into regional economic blocs.

CHAPTER I: THE LEGAL IMPLICATIONS OF AN ECONOMIC PARTNERSHIP AGREEMENT ON REGIONAL INTEGRATION EFFORTS IN EAST AND SOUTHERN AFRICA

1. Introduction

In 2000, trade relations between the European Union (EU) and the African, Caribbean and Pacific Group of States (ACP), began with a paradigm shift when they adopted the Cotonou Agreement. This instrument provides a framework for trade, aid and political cooperation. It replaced its predecessor– the Lomé Convention which had provided for a general set of non-reciprocal and privileged relations between the EU and the ACP countries in matters of market access, technical assistance and other issues. It was replaced because its provisions were at odds with the World Trade Organisation (WTO) rules of reciprocity.¹

Under the Cotonou Agreement, parties agreed to negotiate a separate set of individual bilateral treaties between the EU and the participating ACP countries. Such instruments were later called the Economic Partnership Agreements (EPAs). These bilateral treaties were supposed to provide specific reciprocal rights and obligations tailored to the six arbitrarily defined clusters of countries (West Africa, Eastern and Southern Africa, Central Africa, the Caribbean and the Pacific).²

In September 2002, the negotiations of these EPAs began and were supposed to be completed by 31 December 2007 when the WTO waiver on the non-compatibility of the EU's preferential trade relations with ACP countries would expire. The date of completion of the negotiations came and was missed because of a whole host of reasons which will be discussed in this study.³

During the negotiations of the EPAs, civil societies, labour unions and business groups in the various ACP countries studied the implications of the treaties to establish the validity of their alleged promise to foster regional integration in these various RECs while promoting reciprocal trade. One after the other, the groups decided that the EPAs were in fact more of a danger to the regional integration efforts in the ACPs than had been asserted by

¹ http://www.bilaterals.org/rubrique.php3?id_rubrique=170 [accessed on 22 January 2010].

² *Ibid.*

³ *Ibid.*

proponents of these instruments. They therefore vigorously campaigned against the signing of these agreements.

The notion that EPAs would foster regional integration has had ‘persuasive resonance’ at the on-going negotiations among the ACP States (given the habit of discursively linking ‘EPAs’ to ‘regional integration’).⁴ The above notion has also been supported by the Cotonou Agreement’s stipulation that economic and trade cooperation (which is the *raison d’être* of the EPAs) should build on regional integration initiatives of ACP States, bearing in mind that regional integration is a key instrument for the integration of ACP countries into the world economy.⁵

However, ever since the EPA negotiations started in 2002 at the all-ACP level,⁶ the claim that they would foster regional integration has prompted research into how EPAs foster regional integration in the regions; the extent to which they would do that; it has also prompted discussions questioning what links there are between EPAs and their ability to build on regional integration efforts already in place.⁷ This study therefore seeks to examine the legal implications of these EPA’s particularly in light of existing self-determined efforts by ACP States to establish their own regional integration communities.

Since EPAs are negotiated under regional groupings, they are automatically applied in several ACP countries, including those that have not signed them. This, however, inevitably has tended to have a detrimental effect on regional economic integration, particularly in East and Southern Africa.⁸ A case in point, that will be extensively discussed, is the Southern African Customs Union (SACU). It is the oldest customs union in the world, but is currently divided, with three countries having initialled an interim agreement with the European Commission (EC), in fact one of the countries refusing to sign the interim agreement with EC amongst the SACU members is Namibia, and the other, South Africa, is applying a separate

⁴ S Powell, *Economic Partnership Agreements: building or shattering African regional Integration?* (2007) at 8. Available on http://www.acp-eu-trade.org/library/library_detail.php?library_detail_id=3695&doc_language=Both (Accessed on 15 February 2010).

⁵ Article 35 (2) of the Cotonou Partnership Agreement (CPA). See also Powell (note 4) at 9.

⁶ S Bilal, ‘*Economic Partnership Agreements: To be or not to be?*’ Available at www.gmfus.org/doc/GMF7257_Final_Ebook.pdf [accessed on 15 February 2010].

⁷ Powell (note 4) at 9.

⁸ Oxfam ‘*International concerns with initialled “interim EPA”*’ Available on www.stopepa.de/img/Oxfam_International_Evaluation_Of_InterimEPAs.pdf [Accessed on 22 December 2009].

trade agreement with the EU called the Trade and Development Cooperation Agreement (TDCA).⁹

Another example of regional integration to be discussed in greater detail is the Southern African Development Community (SADC), where a detailed plan for a common market had been established (but is now severely divided). As noted by the various anti-EPA activists, the negotiations and signing of these instruments contradicts the most prominent objectives of EPAs, especially that relating to the building upon and reinforcement of regional integration efforts.¹⁰

2. Aims and Objectives

It is important to note that since 2002, when six EPA groups started negotiating the EPAs with the EU, a body of literature quickly developed which was very critical of these agreements. Some of it suggested that EPAs would weaken regionalism,¹¹ and stated that they are contriving their own definition of ACP regions, hence creating new configurations that cut across existing ones.¹²

Other critics have also expressed scepticism over the EPAs, indicating that Europe's relationship with Africa has always been a mix of exploitation and philanthropy, that there was a high risk that an increased EU focus on the ACP-EPAs in their present state would further weaken rather than strengthen African States.¹³

⁹ Ibid.

¹⁰ Ibid.

¹¹ C Steven, 'The EU, Africa and Economic Partnership Agreements: unintended consequences of policy leverage' (2006) 44:3 *Journal of Modern African Studies* 441-458. This article suggests that EPAs will weaken regionalism because they are an external power attempting to use leverage to press trade policy change.

¹² D Keet, *Economic Partnership Agreements (EPAs): Responses to the EU offensive against the ACP development regions* (2007) at 6.

¹³ Magnus Killander States in his historical assessment of the relationship between Europe and Africa (which is a backdrop against which the EPAs currently being negotiated) that 'European traders on the coast used African intermediaries to trade with the interior. In the late 1800s, the tales of explorers such as Livingstone led to calls for opening up the interior for the three Cs: Commerce, Christianity and Civilization. The result was the scramble for Africa. The European powers concluded treaties with local chiefs to expand their empires. When the treaty route did not work [the Europeans] used force to get what they wanted, adding a fourth C 'Conquest'. The aim of the scramble was not philanthropic: 'Europe is in Africa for the mutual benefit of her own industrial classes, and of the native races in their progress to a higher plane.' Today Africa is governed by 3Gs: globalization and good governance. Globalization is the new word for commerce and the language of good governance is similar to the discourse of civilization of the past. M Killander 'Europe and the return to 'proper statehood' in Africa – A reply to strydom' (2007) 7 *African Human Rights Law Journal* 578.

Some critics have even referred to the on-going negotiation of the EPAs as a dangerous political trickery by the EU because it contrives to invert the underlying aims and the very logic of regional integration between smaller and/or lesser-developed countries of the ACPs.¹⁴ Proponents of the EPAs on the contrary insist that while the critics of the EPAs have seen them as an attempt by the EU to force open developing country markets with mercantilist interests in mind, they (the critics) ignore the fact that a change from the *status quo* to one compatible with WTO rules is no longer an option for the EU-ACP relations.¹⁵

However, what is most worrying about the EPAs is not what they intend to do, but rather their consequences for regional integration in the ACPs. The results of the ongoing implementation of the interim EPA are that some ACP countries have submitted separate and un-harmonised tariff liberalisation schedules to the EU, not agreed to as a region. This will commit them to liberalising to the EU, before they decide on what to liberalise to each other (as will be discussed in the COMESA group).¹⁶

Countries not signed up for these EPAs in the ACP regions are now likely to impose stricter border controls to guard against EU goods entering their markets through neighbouring countries. This has led to defensiveness between regional neighbours and greater barriers to regional trade.¹⁷

The objective of the study is thus to engage with current debate in literature on these bilateral agreements. In so doing, seeks to analyse the impact of the EPAs on the already established efforts and impediments to regional integration in the areas of focus herein.

¹⁴ Keet (note 12) 19.

¹⁵ Curran L *et al.*, 'The Economic Partnership Agreements: rationale, misperceptions and the non-trade aspects' (2008) 26:5 *Development Policy Review* 531.

¹⁶ Oxfam (note 8).

¹⁷ *Ibid.*

3. General Research Questions

Much of the literature on EPAs between the EU-ACPs deals mainly with the question of how the EPAs are going to benefit the signatories. It does so by extrapolating from the potential benefits of the EPAs. The literature however pays little attention to the legal implications of signing the EPAs and the already existing efforts to foster regional integration in these regions.¹⁸

As already noted above, the shift in the EU-ACP relations from the old Lomé Convention to the Cotonou agreement and subsequent EPAs, was premised on the need to comply with WTO requisites of the reciprocity in trade. Indeed as a cornerstone of EPAs, the principle of reciprocity has compelled the signatories of these EPAs to liberalise to a certain amount their trade in a host of goods. Moreover in terms of the Cotonou Agreement, EPAs were to be established on the foundations of the pre-existing regional integration blocs. However (as evident in the definition of the parties to these agreements), the pre-existing regional groups have been reconfigured for purposes best suited for the conclusion of these agreements.

Central to this study, are a series of questions that bring to light the legal implications of these EPAs on the existing regional integration efforts. Important questions raised here are: How are these new regional groupings impacting on the already existing mandates and obligations that various ACP countries have amongst their various pre-existing regional groups in regards to promoting regional integration?

Considering that reciprocity and trade liberalisation between the EU and ACP countries are the cornerstone of the EPAs, what are the implications of signing the EPAs as a regional group, on regional integration efforts in these various regional groups given that different countries have different or un-harmonized tariff liberalization schedules ? By tackling the above questions and discussing various legal issues that EPAs have prompted in the ongoing negotiations, this study hopes to establish how the EPAs obligations affect the already existing mandates and obligations the various ACPs have between themselves under their various treaties in light of regional integration.

¹⁸ A Keck & R Piermartini, 'The Impact of Economic Partnership Agreements in the countries of the Southern African Development Community' (2008) 17:1 *Journal African Economies* at 85.

4. Scope and Structure

While the bulk of the debate on the benefits of signing the EPAs has mainly been one focused on market accessibility, at the cost of regional integration efforts, A case study of East and Southern African regional groups will be used for this legal analysis. However special emphasis will be laid on SADC, SACU, EAC and COMESA regional economic blocs in the Eastern and Southern African region.

The choice of case study herein stems mainly from the knowledge that the East and Southern African-EPA (ESA-EPA) group presents a good example of established efforts to integrate into a self-determined regional economic community, but now with the advent of EPAs these efforts are at risk of being stifled or put asunder.¹⁹

4.1. Chapter Synopsis

To examine the legal implications of the EPAs on regional integration efforts in ACPs, this study has been structured around five chapters. The first chapter gives a general introduction and overview of the study. Through its aims and objectives, its research question and scope, this chapter reiterates what the study intends to do, which is to examine the legal implications of these partnership agreements that were ostensibly intended to be 'development agreements' that would promote regional integration, but have now been deemed to rather be a risk to the very efforts they were intended to support.²⁰

The second chapter lays the foundation of the research by giving a brief historical background of the development of EPAs and the Cotonou Agreement and outline the workings of the WTO rules with a special emphasis on the reciprocity rule. It will therefore also analyse the various concepts that will be dealt with throughout the study particularly 'regional integration' and highlight the achievements made so far.

¹⁹ Powell (note 4) at 19.

²⁰ E A. Traidcraft, *Economic Partnership Agreements: What MEPs need to know* (2009) available at [http://docs.google.com/viewer?a=v&q=cache:bxosdVTNX54J:www.aprodev.net/main/Files/Plans_and_reports/EPA%2520MEP%2520briefing%2520Aug%25202009%2520web.pdf+EA+Traidcraft+Economic+Partnership+Agreements:+What+MEPs+need+to+know+\(2009\).&hl=en&gl=za&pid=bl&srcid=ADGEEsGfEqGfEv9lhMTdPyni0AVarPdGFVbUNdDAAg7QtSYst7re19QKMX6QB_bnTrmMN5VxosUFTuib45YKmbzDWrJq9x2hF7B8xuf1kl_cl2a5fLoe_ITpqQF-7XG_zqu4uCnVhHQ&sig=AHIEtbSOgJpdIWD0cJ6sdnIBMIQ4NJZZuw](http://docs.google.com/viewer?a=v&q=cache:bxosdVTNX54J:www.aprodev.net/main/Files/Plans_and_reports/EPA%2520MEP%2520briefing%2520Aug%25202009%2520web.pdf+EA+Traidcraft+Economic+Partnership+Agreements:+What+MEPs+need+to+know+(2009).&hl=en&gl=za&pid=bl&srcid=ADGEEsGfEqGfEv9lhMTdPyni0AVarPdGFVbUNdDAAg7QtSYst7re19QKMX6QB_bnTrmMN5VxosUFTuib45YKmbzDWrJq9x2hF7B8xuf1kl_cl2a5fLoe_ITpqQF-7XG_zqu4uCnVhHQ&sig=AHIEtbSOgJpdIWD0cJ6sdnIBMIQ4NJZZuw) [accessed on 12 December 2009].

Chapter III engages with the body of literature on the various legal ‘contentious issues’ that research has deemed an impediment to regional integration in the on-going EPA negotiations such as *inter alia*: those relating to the definition of ‘parties’; the reconfiguration of the regional blocs especially in light of the EPAs Definition of Parties (DoP) clause; the reciprocity in liberalization of trade issue, and the ‘Most Favoured Nation’ (MFN) clause. This chapter engages with these issues to establish to what extent they impact on the mandate of the signatories, to their pre-existing obligations and how that affects regional integration efforts in the region.

Bearing in mind that the EPAs were an initiative to remedy WTO rules of reciprocal trade between the EU and ACPs, Chapter IV examines some of the issues that have since been added to the EPAs that were not necessarily required by the WTO rules of trade, but have since been imposed on the ACPs in the ongoing negotiations. The chapter will demonstrate how with the inclusion of these non-WTO requirements and the general approaches to the negotiations with ACPs, the EU is breaking the letter and spirit of the Cotonou Agreements²¹ (the very framework within which the EPAs were supposed to be negotiated). It will also demonstrate that consequently, entering into an EPA with the EU under the aforementioned conditions will only impose obligations that help the EU and not ACPs regional integration efforts.

Chapter V conclude the study by attempting to establish whether EPAs in their existing state can foster regional integration in the ACPs. It will propose solutions for the signatories of the EPAs that might best harness the trade liberalisation of various ACP countries on the basis of established regional integration endeavours.

²¹ ‘Partnership under pressure; an assessment of the European Commission’s conduct in the EPA negotiations’ available at <http://tilz.tearfund.org/Research/Trade+policy+and+research/> [accessed on 10 December 2009].

CHAPTER II : REGIONAL INTEGRATION AND TRADE WITH EU: UNDERSTANDING THE CONCEPT

1. Introduction

The Cotonou Agreement, the basis on which the EPAs are currently being negotiated, States that the primary objectives of the EPAs are to gradually integrate the ACP into the world economy by fostering regional integration in their various configurations. This assertion stems from what the Cotonou Agreement provides, that,²²

Economic and trade cooperation shall build on regional integration initiatives of ACP States, bearing in mind that regional integration is a key instrument for the integration of ACP countries into the world economy.

This study illustrates that the implementation of the EPAs may not attain the objectives enunciated in the above provision. The reason is that the implementation carries with it some legal implications, which may be detrimental to the pre-existing regional integration efforts. The above provision pre-supposes an EPA designed along a pre-existing regional integration framework. However, the reality is that EPAs' design, requirements and implementation processes have taken on an approach totally different from what was envisaged by the drafters of the Cotonou Agreement. It therefore comes as no surprise that during the negotiations, the EU was accused of 'fundamentally breaking the letter and spirit of the Cotonou Agreement'.²³

To elaborate on the above, it is vital to first establish the regional integration efforts already registered in the area of the case study herein. This will require going into the historical background of the Cotonou Agreement which provides the framework within which EPAs were supposed to be negotiated and signed. The provisions of the WTO rules on reciprocity shall also be discussed, as the shift in trade relations between the EU and ACP is attributed to the need to comply with the stipulations of these rules.²⁴

²² The Cotonou Agreement Article 35(2).

²³ Partnership under pressure; an assessment of the European commission's conduct in the EPA negotiations. available at <http://tilz.tearfund.org/Research/Trade+policy+and+research/> [accessed on 10 December 2009].

²⁴ L Curran *et al*, (note 15) 529-553.

This chapter helps to lay the foundation for the study. The definitions and historical backgrounds for the varying concepts that will be discussed in this chapter, will effectively buttress the legal analysis of the impact of EPAs on regional integration on the regional blocs, which will be made herein.

2. Regional Integration in Africa

Efforts to get African States to coalesce into one regional bloc or the other, dates back to the colonial era of the late 1940s. This was a time when there were intensified cries for African countries to break free from colonial rule.²⁵ Some authors claim that integration efforts in Africa began in the 1970s. This was a time when most African nations that had recently gained their independence, wanted to quickly capitalise on regional integration to make quick economic gains akin to those attained by their former colonial masters.²⁶ They say that these moves to integrate African countries into regional economic blocs were done in phases. The first phase began during the time most of these countries gained independence. The second phase of efforts to integrate into regional blocs can be traced back to the mid 1990s.²⁷

The first phase can be attributed to the influences of the changing world at the time, and also the progressive successes of the European Community. This phase initially took the form of a regional political organisation that later took on an economic agenda.²⁸ The second phase of the regional integration process in Africa gradually focused more on the economic agenda, consolidating and expanding the mandates of the existing regional bodies. This phase may be traced to the period around which the Maastricht Treaty²⁹ was signed that subsequently led to the creation of the Euro currency and a deeper integration of the European Union in the early 1990s.³⁰

²⁵ M Maruping, 'Challenges for regional integration in sub-Saharan Africa: Macroeconomic Convergence and Monetary Coordination' in J.J Teunissen & A. Akkerman (eds) *Africa in the World Economy-The National, Regional and International Challenges* (2005) at 129.

²⁶ T Dinka & W Kennes 'Africa's Regional Integration Arrangements: History and Challenges' Discussion Paper No. 74 September 2007 available at www.ecdpm.org/dp74 [accessed on 10 December 2009] at 8

²⁷ Ibid.

²⁸ Ibid.

²⁹ The Maastricht Treaty was the founding treaty of the European Economic Community. It was signed on 7 February 1992 and came into force on 1 November 1993. See Maastricht Treaty available at http://www.unizar.es/euroconstitucion/Treaties/Treaty_Maast.htm [accessed on 16 May 2010]

³⁰ T Dinka & W Kennes (note 26) at 9.

2.1. Regional Integration in Eastern and Southern Africa

The Eastern and Southern Africa regions undoubtedly have very complex institutional structures. The bodies of these regions date back to the first integration phase. The Southern African Development Coordination Conference (SADCC) was founded in 1980 while the Preferential Trade Area (PTA) for Eastern and Southern Africa was created in 1981.³¹

SADCC was mainly conceived as a body for functional cooperation which was intended to reduce the dependence of Southern African countries in South Africa, particularly in transport and energy networks. In 1992, during the second integration phase, it was transformed into a regional integration arrangement—the Southern African Development Community (SADC), by the Windhoek Treaty. Following its first democratic elections in 1994, South Africa (the largest economy in Africa), joined SADC, which therefore instantly became the economic integration bloc with the largest combined GDP in Africa.³²

2.1.1. COMESA

The origins of COMESA can be traced to the commencement of the Preferential Trade Area (PTA) in 1982. Currently the COMESA has 19 members but only 11 of these participate in a Free Trade Area (FTA). The FTA was formed in 2000 in response to the gradual tariff reductions coupled with open regionalism that the members practiced. This has gone a long way in helping to liberalise intraregional trade to a greater extent.³³

Within the COMESA FTA, there is an extensive program of cooperation and technical assistance in trade facilitation and harmonization of standards. Alongside the above structure, COMESA also has a formal dispute settlement mechanism in the form of a Court of Justice. However, disputes have been successfully handled through an informal process of diplomatic consultation as the court is not operational. Alongside these structures, the COMESA

³¹ Ibid.

³² Ibid.

³³ P Khandelwal, 'COMESA and SADC: Prospects and Challenges for regional integration' (2004) IMF Working Paper WP/04/227 available at ideas.repec.org/p/imf/imfwpa/04-227.html [accessed 05 March 2010] at 8.

agreement has also incorporated safeguards related to temporary balance of payments to assist efforts to build a regional framework agreement for investment and a competition policy.³⁴

The short-coming of COMESA is that there is a lack of commitment of the member countries in making the regional arrangement viable. Consequently, the COMESA FTA has been hampered at country level, by institutional changes have prevailed upon the remaining 8 countries that have not joined the FTA. Even those that have joined are still bedevilled by cumbersome bureaucratic procedure and restrictive trade standards and some have even set up tariffs with discriminatory tax towards fellow members.³⁵

Over the years, the impediments to the goal of establishing a consistent and uniform customs union as a precursor to regional integration in COMESA regions, has been the issue of protectionism. Not only has it manifested itself in the failure of the members to lower tariff bands, but they have also failed to find harmony in the classification of goods into the four categories of raw materials, capital goods, intermediates, and finished goods. Coupled with little political will, this has stunted the regional integration process in COMESA.³⁶

2.1.2. SADC

Born out of a need to provide a mechanism that would enable the frontline States to better withstand the political and economic domination and destabilisation of the region by the apartheid regime in South Africa, the Southern African Development Community (SADC) first came into existence in 1980, after a declaration issued at a summit in Lusaka, Zambia. This declaration was the constitutive document for an organisation initially called the Southern African Development Coordination Conference (SADCC).³⁷

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Clement Ng'ong'ola, 'The reconstitution of the Southern African Development Community: some international trade law perspective' (2000) 3:3 *Journal of International Economic Law* 487-90.

The Declaration highlighted its principle tasks as, the reduction of economic dependence, particularly, but not only on the Republic of South Africa; the forging of links to create a genuine and equitable region integration; the mobilisation of resources to promote the implementation of national interstate and regional policies; and concerted action to secure international cooperation within the framework of the strategy for economic liberation.³⁸

In terms of the organisations structure, SADCC comprised of a supreme decision making body responsible for the general direction and control of the organisation. The Council of Ministers was responsible to the summit for coordination and supervision of the activities of the organs. The standing committee assisted the council in the execution of its work. The council was comprised of permanent secretaries of cabinet ministers. These were also national contact points for the purposes of intra- SADCC coordination of activities.³⁹

The reconstitution of the SADCC into the SADC was effected under the SADC Treaty signed by 10 Heads of State and Government in Windhoek, Namibia, on 17 August 1992. As highlighted by South Africa's much sought after membership was secured on 19 August 1994. Mauritius joined the organisation in 1995 and the Democratic Republic of Congo (DRC) and the Seychelles in 1997. The membership still stands at 15. The organisation in international trade law terms, comprises one developed country (South Africa; six developing countries (Botswana, Mauritius, Namibia, Seychelles, Swaziland and Zimbabwe); and seven least developed countries (Angola, DRC, Lesotho, Malawi, Mozambique, Madagascar, Tanzania and Zambia). This diversity creates difficulties in respect of the characterisation of SADC as an arrangement for developing countries or developing and least developed countries.⁴⁰

It is worth noting that SADC adopted its Protocol on Trade in August 1996 and which entered into force on 25 January 2000. Of the 15 member States two did not join the FTA. The objective was to liberalise 85 percent of intra-SADC trade by 2008 and 100 percent by 2012. The Protocol implied more rapid liberalisation for the sub-set of member countries that constitute SACU.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

In line with its original purpose, SADC has made progress on functional collaboration for example in cross-border transport infrastructure and connection of the electricity grid.⁴¹

The issues most critical to the assessment of the SADC integration in the WTO are covered in Part 2 of the Protocol Article 3(1). The Protocol provides for the establishment of an FTA through phased elimination of tariff and Non-Tariff Barriers (NTBs) in intra-SADC trade. This was to be done within eight years from the Protocol's entry into force. The trade barriers more specifically identified are import and export duties, quantitative import and export restrictions, and 'all existing forms of NTBs'.⁴²

2.1.3. EAC

The origins of the East African Community (EAC), comprising Kenya, Uganda and Tanzania, may be traced as far back as the early decades of the 20th century. Britain, as the colonial power of Kenya, Uganda and the protector of Tanganyika (Tanzania today), established a customs union comprising the three countries as an organ for the management of common services for ports, railways and air transport and with a common currency.⁴³

Disparities with respect to perceived benefits and other differences contributed to a gradual loosening of these three countries' common bonds and these outward pulls grew stronger following their independence in the early 1960s. These States attempted to address these differences which culminated in the 1967 Treaty establishing the East African Community. However, the clash of ideologies between Tanzania and Kenya, and the irreconcilable political tension between Uganda's Idi Amin Dada (who came to power through a *coup de tat* in 1971) and Tanzania's Julius Nyerere, created an untenable situation. The vast disparities in economic benefits were further exacerbated these disagreements with Kenya being seen as the principal beneficiary. In 1971 the total break-up of the EAC began and the Community Treaty was formally terminated in 1977. Most of the joint organs and common services were therefore dismantled.⁴⁴

⁴¹ T Dinka & W Kennes (note 26) at 9

⁴² Clement Ng'ong'ola (note 37) at 501

⁴³ T Dinka & W Kennes (note 26) at 9

⁴⁴ Ibid. (note 26)

In 1993, however, the three countries began a process to resuscitate the Secretariat of the EAC and in July 2000, a new treaty establishing the East African Community came into force. The treaty provided for the formation of a Customs Union—which became operational in 2005.⁴⁵ A Common Market was to follow at a later date. Although the developmental gap between the three countries has narrowed, the provisions of the Customs Union allow for some asymmetry in that certain Kenyan exports to the other two countries are subject to the payment of progressively declining tariffs for a period of five years.⁴⁶ The deep involvement of the private sector was also expected to solidify cooperation between the three countries. At the end of 2006, Burundi and Rwanda were accepted as new EAC members⁴⁷

One would aver that the current EAC appears to have been re-launched on a much better footing. Various commentators have considered the body to be a pace-setter for COMESA and the application of variable geometry or allowing countries to move at different speeds might be useful. However the practicality of this has become questionable as Tanzania is now a member of SADC while the other two countries are in COMESA.⁴⁸

2.1.4. SACU

There are a number of other important integration initiatives in Eastern and Southern Africa, which operate at the sub-regional level such as the Southern African Customs Union (SACU).⁴⁹

The Origins of SACU dates back to 29 June, 1910, when South Africa, Basutoland, Swaziland and Bechuanaland signed the 1910 SACU Agreement at Potchefstroom. Only Britain and South Africa were involved in the 1910 negotiations. This agreement lasted until the British protectorates gained independence in the mid-1960s. It was then renegotiated with the apartheid government, culminating in the 1969 SACU agreement.⁵⁰

⁴⁵ Ibid. (note 26) at 10

⁴⁶ Ibid. (note 26) at 10

⁴⁷ Ibid. (note 26) at 10

⁴⁸ Ibid. (note 26) at 10

⁴⁹ Ibid.

⁵⁰ R Kirk & M Stern 'The new South African Customs Union agreement' (2005) 28:2 *The World Economy* 160-70.

It is interesting to note that during the apartheid era in South Africa, the SACU agreement of 1969 served Botswana, Lesotho and Swaziland as they depended on South Africa for their imports and to a smaller extent, their exports. This agreement also entailed a revenue sharing arrangement that catered to the division of custom and excise revenue collected in the union which ensured that Botswana, Lesotho and Swaziland (BLS) received a significant proportion of their government revenue through this scheme. Consequently this group of four was to be formally joined by Namibia in 1990 upon gaining its independence. However, this was also at a time when the 1969 agreement seemed to have out-lived its purpose, due to the changing political climate in South Africa. As the South Africa gradually turned to a democratic state of politics, the National Institute of Economic Policy, in collaboration with South Africa's African National Congress (ANC)'s Department of Economics, commenced the process of reviewing the SACU agreement of 1969.⁵¹

The current SACU agreement was signed in 2002. It's a product of eight years of negotiation and it has all the five members which include South Africa, Botswana, Namibia, Lesotho and Swaziland. This Agreement was tailored around the desire to entrench a democratic approach to trade policy in the Southern African region while minimising revenue instability.⁵²

It is also interesting to note that SACU has a revenue sharing aspect in its agreements. This revenue sharing aspect has helped foster regional integration in the union as therein lay the cohesion that has managed to keep these countries together. While in the previous SACU agreement (1969) only four members shared revenue from the pool of funds collected. However, in the current formula of revenue sharing, all members receive revenue from the pool, albeit limited by the size of their customs and excise duties they collected as these custom duty funds make up the pool of funds anyway.⁵³

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid at 179.

2.2. EU-ACP Relationship

The relationship between the ACP countries and the EU goes back more than 50 years. This relationship was crystallised by the Rome Treaty of 1957 and was for the greater part characterised by non-reciprocal duty-free access to the EU market for most ACP exports.⁵⁴ The Treaty of Rome included a provision to extend cooperation with some twenty two countries and territories, all of which still had colonial ties with most of the EU member States. In 1964, shortly after the independence of most African countries, the EC and some 18 independent African States signed the Yaounde Convention in the capital of Cameroon. This was a move aimed at retaining ongoing trade relations. In 1969, the Yaounde Convention was renewed for another five years.⁵⁵

At the end of the colonial era, the EU still found a way to trade with their former colonies in ACPs through trade treaties. Principal among these treaties was the Lomé Convention of 1975. This treaty was structured to foster cooperation between the signatories on the numerous ways. The EU committed to grant a duty free entrance of agriculture and mineral exports into its region and that union would grant billions in financial aid and investment in the ACPs.⁵⁶

The Lomé Convention was negotiated and revised over several years. During which the need for annexing a new provision arose. These new provisions entailed a move away from reciprocal trade between the EC and ACPs to unilateral trade preferences of ACP goods. Secondly, the joining of EC by the UK meant that the convention would be signed with common wealth countries too. While it underwent various changes, the basic provisions were not significantly altered through the various Lomé Conventions: Lomé II (1980-85); Lomé III (1985-90), and Lomé IV, which ran from 1990-2000, though the number of ACP signatories

⁵⁴ A Keck & R Piermartini, 'The impact of Economic Partnership Agreements in Countries of the Southern African Development Community' (2008) 17:1 85 *Journal of African Economies* 46. Note that this Treaty established the framework of the EU, consequently establishing a unified party on one hand during these reciprocal trade agreement.

⁵⁵ Economic Partnership Agreements between the EU and Africa: The importance of trade and development, IPC Issue Brief 23 July 2007 see also Encyclopedia Britannica available at <http://www.britannica.com/facts/10/40920874/July-29-1969-Yaounde-Convention-covering-economic-association> [accessed 15 May 2010].

⁵⁶ First 15 Articles of the Lomé Convention.

increased every five years.⁵⁷ Since 1975, under successive Lomé Conventions, ACP countries have theoretically benefited from unilateral trade preferences in the EU market. However, such non-reciprocal arrangements became increasingly open to challenges in the WTO, because they discriminated against other developing countries.⁵⁸

A proposed solution came in the form of the Cotonou Agreement (signed in 2000), which stipulated that by the beginning of 2008, WTO-compatible trade agreements, known as Economic Partnership Agreements (EPAs), would be in place. In order to achieve WTO-compatibility, the EU stressed that EPAs would have to conform to Article 24 of the General Agreement on Tariffs and Trade (GATT), which governs Free Trade Agreements (FTAs). The article States that FTAs require an elimination of tariff barriers on ‘essentially all trade’ within a ‘reasonable length of time’ and will be discussed in greater detail in the chapter. A proposed solution came in the form of the Cotonou Agreement (signed in 2000), which stipulated that by the beginning of 2008, WTO-compatible trade agreements, known as Economic Partnership Agreements (EPAs), would be in place. In order to achieve WTO-compatibility, the EU stressed that EPAs would have to conform to Article 24 of the General Agreement on Tariffs and Trade (GATT), which governs Free Trade Agreements (FTAs). The article States that FTAs require an elimination of tariff barriers on ‘essentially all trade’ within a ‘reasonable length of time’ and this will be discussed in greater detail in the chapter.⁵⁹

⁵⁷ Economic Partnership Agreements between the EU and Africa: The Importance of Trade and Development, IPC Issue Brief 23 July 2007 available at www.agritrade.org/.../IssueBriefs/EPA_EU_Africa_Issue_Brief_23.pdf [accessed on 13 April 2010]

⁵⁸ S Powell, (note 4) 8.

⁵⁹ Ibid.

3. Cotonou Agreement

Following the dismantling of the Lomé Convention (which had existed between 1975 and 2000) on the account of WTO trade liberalisation rules, which enjoined member States to move away from non-reciprocity trade agreements, in 2000, a new trade agreement was signed. This agreement created a partnership between the members of the African, Caribbean and Pacific group of States and the European Community and its member-States. This agreement has also been called the Cotonou Agreement after the capital of Benin where it was signed.⁶⁰

The objective of the Cotonou Agreement is poverty reduction consistent with sustainable development and integration of ACP countries into the global economy. The agreement also endorsed internationally agreed targets and programs for development, which may be presumed to include the Millennium Development Goals. It also stressed governance, institutional capacity building, and local ownership of development strategies—all of which were broadly accepted concepts in contemporary economic development thinking.⁶¹

While partnership is a key term in this agreement, it is also the basis for the preceding series of the Lomé Conventions. The Cotonou Agreement engenders a new form of partnership unlike that of the first Lomé Convention. The new form of partnership in the Cotonou Agreement is based on differentiation and regionalisation according to level of development, needs and long term strategy.⁶²

Attaining the Cotonou Agreement's objectives is hinged on a three pillar strategy which incorporates political dimensions in the negotiations – an all inclusive and consultative approach to decision-making, emphasis on poverty reduction and social economic development and the removal of the non-reciprocity principle on which the preceding Lomé Convention were based.⁶³ The agreement charged its member-States with the determination of their 'development principles, strategies and models of their economies and societies in all sovereignty'. State parties were also to establish cooperation programmes as provided for in

⁶⁰ S Akiyama 'The ACP countries- the EU and the Cotonou Agreement: deepening development' available at <http://www.grips.ac.jp/csids/index.html> [accessed on 10 December 2009].

⁶¹ Ibid.

⁶² Ibid. See also Article 2 of the Cotonou Agreement.

⁶³ Ibid.

the agreement, which process also required the recognition of the potential role that might be played by the participation of non-state parties.⁶⁴

The agreement also made room for political dialogue among member States, whose aim was to exchange information, foster mutual understanding and move forward a common agenda. Through political dialogue, the agreement, (it was hoped) would achieve 'peace, security and stability and promote a stable and democratic political environment'.⁶⁵

In keeping with some of the establishment of the Lomé Convention IV, the Cotonou Agreement emphasised the respect of 'human rights and all fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance' as these were deemed an integral part of the efforts to reach sustainable levels of development. The agreement is in ways much similar to the Lomé Convention IV and reiterated the need to respect human rights, which are 'legitimate aspirations of individuals, indivisible and inter-related'.⁶⁶

As already stated, the principal objective of the agreement was to reduce poverty and eventually eradicate it through sustainable development and progressive integration of the ACP countries into the world economy. These efforts were made along individual circumstances of each ACP member state. The Agreement encouraged the promotion of local ownerships of economic and social reforms as well as the integration of private sector and civil society actors into the development process.⁶⁷

The agreement also harped on the need for cooperation among the ACP member States as it encouraged effective assistance in achieving the general objectives that the various ACP States had set for themselves within the context of 'regional and sub-regional cooperation and integration efforts..'. The agreement further States, that regional cooperation can also involve overseas countries and territories. This cooperation would then result in a gradual integration of ACP member-States into the world economy; accelerate the economic

⁶⁴ Article 4 of the Cotonou Agreement

⁶⁵ Article 8 of the Cotonou Agreement

⁶⁶ Article 9 of the Cotonou Agreement

⁶⁷ Article 19 of the Cotonou Agreement

development within and between the regions of the ACP member States; or promote and expand intra-ACP trade with third parties.⁶⁸

Contrary to the Lomé Conventions, the Cotonou Agreement underpinned the need to conclude WTO compatible trade agreements, which entailed progressively removing trade barriers between themselves and enhance cooperation in all areas relevant to trade. The Member States, however, noted a need to avail a preparatory period to gradually introduce the economic partnership agreement as they gradually moved away from the non-reciprocal trade agreements of the Lomé Convention.⁶⁹

The Cotonou Agreement sought to steer away from non-reciprocal trade arrangements which had underlined trade agreements. It did so by introducing the EPAs as one of the mechanisms through which trade arrangements between the EU and the ACP would abide by WTO terms of reciprocity. This reciprocity consequently encouraged the formation of free trade areas amongst the ACPs. The Cotonou Agreement encouraged the need to gradually move from the non-reciprocal trade agreement, by introducing Interim EPAs which would eventually become full EPAs or free trade areas. The instrument provided a timetable and a preparatory period within which all necessary measures were to be taken to conclude the negotiations for the full economic partnership agreements within the allotted time.⁷⁰

While it set a framework within which the ACP member States would gradually integrate into the world economy, the Cotonou Agreement stipulated that this process would take into consideration the individual ACP member-States' political choices and development priorities 'thereby promoting their sustainable development and contributing to poverty eradication in the ACP countries.' With the emphasis on enabling the ACP States' participation in international trade affairs, the agreement underscored its ultimate objective which was to get:⁷¹

ACP States to participate actively in multilateral trade negotiations. Given the current level of development of the ACP countries, economic and trade cooperation shall be directed at enabling the ACP States to manage the challenges of globalization and to adapt progressively to new conditions of international trade thereby facilitating their transition to the liberalized global economy.

⁶⁸ Article 29 of the Cotonou Agreement.

⁶⁹ Article 36 of the Cotonou Agreement.

⁷⁰ Article 37 of the Cotonou Agreement.

⁷¹ Article 34 of the Cotonou Agreement

In keeping with one of the principle strategies to liberalise trade and gradually reduce trade barriers, the Cotonou Agreement introduced a series of trade agreements called the EPAs as mentioned above. These were to be negotiated upon, gradually adhered to and finally implemented along the time lines put in place.⁷²

3.1. Economic Partnership Agreements

EPAs constitute alternative arrangements to the long-standing Lomé Convention's regulation of EU-ACP relations, under which the ACP groupings had enjoyed privileged access to EU markets, as well as certain aid and political dialogue provisions as noted above. The birth of the EPAs could perhaps be traced to the 1996 European Commission's Green Paper on the relations between the EU and ACPs. While the EPAs were first proposed in this Green paper, their principles were subsequently enshrined in the Cotonou Agreement of 2000. The EPA negotiations eventually kicked off in September 2002 at the all ACP levels in which 6 regional groups were involved.⁷³

Under the 2000 Cotonou Agreement, the EU-ACP relationship transformations entailed a transition towards reciprocal free trade. This was a shift from the position whereby the ACP countries enjoyed non-reciprocal, privileged access to EU markets. Such a shift may be explained on two grounds. Firstly, non-reciprocal arrangements were deemed to be in breach of WTO rules (whereas reciprocal free-trade deals are not), and a WTO waiver allowing the temporary retention of the Lomé-style provisions was due to expire at the end of 2007.⁷⁴

Secondly, there was a claimed mutual recognition that existing non reciprocal trade preferences had not promoted the sustainable development or integration into the world

⁷² Article 36 of the Cotonou Agreement.

As regards the time lines, the Economic partnership agreements were to be negotiated during the preparatory period which was to end by 31 December 2007 at the latest and the Formal negotiations of the new trading arrangements were slated to start in September 2002 and the new trading arrangements were to be entered into force by 1 January 2008, unless agreed otherwise by the parties involved. This is highlighted in Article 37 of the Cotonou Agreement.

⁷³ Bilal (note 6).

⁷⁴ A Storey, 'Normative Power Europe ? Economic Partnerships and Africa' (2006) 24: 3 *Journal of Contemporary African Studies* 335.

economy of ACP countries. Testimony to that claim was the fact that the ACP share of world exports fell from 3.2 percent in 1970 to 1.3 percent in 2003, while even the ACP share of the EU market (where they enjoyed favourable access) declined over the same period from 4.1 to 1.0 percent.⁷⁵

It is interesting to know that the EPAs were designed around four core pillars to ensure, that while the Cotonou Agreement complied with the WTO, it also retained the goals and objectives progressively developed in the preceding Lomé Conventions.

These were partnership, regional integration, development and link to WTO and shall be discussed below.

3.1.1. Partnership

EPAs are partnership agreements which provide for rights and obligations of both parties. Compliance with the obligations by each party is essential for the success of the entire undertaking. While the EU is prepared to further open up its market to ACP products and break down other trade barriers, the ACP States must implement appropriate policies to strengthen their supply capacity and to reduce transaction costs.⁷⁶

3.1.2. Regional integration

Regional integration is a powerful means of fostering integration into the world economy. The EU has built its strength through regional integration. The recent progress made in regional integration within the ACP reflects the political decision of the said States to base their own integration into the world economy on regional economic integration. EPAs will therefore be based on regional integration initiatives existing in the ACP. They will keep in step with the integration process within the ACP, as provided for in the Constitutive Act of the African Union which is the overall Africa regional umbrella or as agreed among the ACP States as a whole.⁷⁷

⁷⁵ Ibid. See also A Borrmann, M Busse & S Neuhaus 'EU/ACP Economic Partnership Agreements: Impact, Options and Prerequisites' (2005) 40:3 *Intereconomics* 169–76.

⁷⁶ European Trade Commission webpage available at <http://ec.europa.eu/trade/wider-agenda/development/economic-partnerships/> [accessed on the 20 December 2009].

⁷⁷ Ibid.

3.1.3. Development

EPAs are instruments for development. They will therefore be designed with all the flexibility required to take account of the economic, social and environmental constraints of ACP countries and of their capacity to adapt to the new trading environment. They will also be integrated into the development policies of the ACP countries and into the support strategies of the EU.⁷⁸

3.1.4. Link to WTO

EPAs are not an end in themselves. Rather they are intended to act as a stepping stone for the gradual integration of the ACP countries into the world economy. They will therefore build on the rules of the WTO. However, EPAs will, in some respects, go beyond the WTO. This is because they will, within the broad framework of WTO rules, define more specific and more operational, bilateral trade-related provisions. These are intended to tackle the practical barriers to trade among the ACP countries and between the ACP and the EU. This will help establish closer integration among the parties and be supported through trade-related assistance.⁷⁹

In terms of the practical detail of the negotiations, the Caribbean and Pacific constitute separate regions in their own right. The African regional groupings with which the EU is negotiating were as follows.⁸⁰

- Eastern and Southern Africa (ESA) which includes Burundi, Comoros, Djibouti, DR Congo, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Uganda, Zambia and Zimbabwe.
- Southern African Development Community (SADC) which includes Angola, Botswana, Lesotho, Mozambique, Namibia, Swaziland and Tanzania, and with South Africa participating in a supportive and observer capacity.

⁷⁸ Ibid.

⁷⁹ It must be noted, however, that those mentioned are those relevant to this study. Ibid.

⁸⁰ Storey (note 74) at 335.

It must be noted that the original SADC, a pre-existing regional body, also contains six other members– Democratic Republic of Congo, Madagascar, Malawi, Mauritius, Zambia and Zimbabwe – but these have chosen to negotiate with the EU through the ESA.⁸¹

The intention of the contracting parties was to have EPAs agreed on in each region and be ready to enter into force on 1 January, 2008. Trade liberalisation would proceed asymmetrically, with the EU dismantling barriers faster than the ACP States (and with scope for the transitional protection of ‘sensitive’ sectors, particularly on the part of the ACP). However, differences of opinion have risen on the precise time periods and probable exemptions involved.⁸²

3.2. Article XXIV of the WTO Rules

As already mentioned above, the primary reason for a shift in the EU-ACP relations from the Lomé Convention to the Cotonou Agreement, was the need to comply with the WTO rule of trade. Upon signature of the Cotonou Agreement in 2000, its continuity was justified within the WTO by a ‘waiver’ that expired at the end of 2007 and was subsequently replaced by the EPAs.⁸³

Simply put, the WTO allows members that are creating an FTA or Customs Union (CU) to discriminate against outsiders, in favour of their partners. However, this can only be accepted if certain conditions are fulfilled. These conditions are related to the market access of goods and are covered by Article XXIV of the WTO Rule.⁸⁴

This provision sets out the requirements for an FTA as including⁸⁵ the elimination of duties and other restrictive regulations of commerce on ‘substantially all trade’ between the parties to such agreement; and within a ‘reasonable length of time’ (where reasonable length of time should exceed 10 years only in exceptional cases according to the WTO, 1994). The interpretation of these two clauses is, however, controversial since no specific figure is attached to ‘substantially all trade’ and neither is ‘reasonable length of time’ specified. The

⁸¹ Storey (note 74) at 336

⁸² Ibid.

⁸³ C Steven, ‘The EU, Africa and Economic Partnership Agreements: unintended consequences of policy leverage (2006) 44:3 *Journal of Modern African Studies* 444-5.

⁸⁴ Ibid.

⁸⁵ C M O Ochieng, *EU-ACP Economic Partnership Agreements and the development question: which way now?* (2007) 10:2: *Journal of International Economic Law* 363-395.

choices made here or agreed to may either impact negatively or positively on the ACPs' integration efforts.⁸⁶

4. Conclusion

For the proponents of the EPAs, reciprocal agreements are not only a prerequisite of the international trade between the two groups. It has also been posited as the best way in integrating African regional groups into the world economy. There are, however, those who oppose the EPAs. They argue that such agreements will only stifle the already existing efforts in integrating into effective regional bodies and shall be an impediment to regional integration.

To test whether or not EPAs are good for regional integration in Africa, especially in the areas of the focus of this study, the core pillars discussed above, will have to be juxtaposed against each other to evaluate how they affect the regional integration efforts already in place. A case point, if it has already been established that the countries of the ACPs were in the process of integrating into regional bodies and some had made progress in that regard, how does the reconfigurations of the regional bodies for the purposes of signing EPAs affect the already established groups.

By outlining the historical background of regional integration efforts in Africa, discussing the nature of ACP-EU relations, and defining the concept of EPAs and its WTO rationale, this chapter has laid the ground for an informed and comprehensive assessment of the legal impact of EPAs on regional integration in Southern and East Africa especially to the extent it affects the regional integration efforts already established in those areas.

It should also be noted here that in a bid to avoid newly imposed market restrictions such as high import duties, most ACPs opted to conclude Interim EPAs that covered market access in goods only. The other aspects of the EPAs which are non-trade issues were postponed for negotiation in the second phase of the negotiation, which was supposed to be undertaken between 2008 and 2009. For the purposes of clarity, this study shall use EPAs in reference to both those Interim EPAs and full EPA.⁸⁷

⁸⁶ Ibid.

⁸⁷ Bilal (note 6)

CHAPTER III : CONTENTIOUS ISSUES IN THE EPAs

1. Introduction

As already discussed in the previous chapter, ACP countries have for several decades, had preferential access into the EU market. However this arrangement required periodical authorisation in form of a waiver from WTO membership, as ACP preferences were discriminatory against other developing countries. The European Commission provided a solution in the form of EPAs. In 2000, it was agreed, under the 'Cotonou Agreement', that EPAs would be negotiated and concluded by the end of 2007. As a type of Free Trade Agreement, the EPAs were designed to preserve ACP preferences, but required these countries to open their markets to European goods in return. The ACP countries understood that EPAs would come with a strong development package to build the competitiveness of their industries and diversify their economies. The EC, however, asserts that the development dimension of the EPAs lies in the far-reaching economic and trade liberalisation that they should bring. Furthermore, the EU insists that the opening up of ACP markets should not be confined to trade in goods only (which would suffice to satisfy WTO requirements), but that 'full' EPAs should also include the liberalisation of services, investment and government procurement, the introduction of competition rules and the reinforcement of intellectual property rights protection.⁸⁸

EPAs were intended to be regional agreements, which would support the integration of small and fragmented ACP markets into stronger regional economies. However, as the negotiations have progressed, several African negotiators and politicians have raised concerns over the number of provisions contained in these agreements. They view such provisions as 'contentious' and demand that they be reviewed lest they compromise the main objective of these agreements which is deeper economic regional integration. These issues include, among others: the definition of 'substantially all trade', 'transitional periods', 'freezing of export taxes', 'the most favoured nation (MFN) clause' and 'rules of origin'.⁸⁹

⁸⁸ Traidcraft, 'EPAs: what MEPs need to know', August 2009. Available at www.aprodev.net/.../EPA%20MEP%20briefing%20Aug%202009%20web.pdf [accessed on 12 February 2010]

⁸⁹ Bilal (note 6)

Most ACPs are concerned that opening or granting free market access for the EU without addressing some of the aforementioned contentious issues in the EPAs, would undermine the scope for the ACP to first build up their own regional production chains. However, in a bid to retain their access to EU markets, with the 2007 deadline looming, a number of ACP countries were forced to conclude individual agreements - creating different trade regimes with the EU from those of their neighbours, consequently setting back regional integration.⁹⁰

This Chapter will discuss the so called ‘contentious issues’ around EPAs, with the primary objective of assessing their possible impact on regional integration, in light of self determined efforts in the East and Southern African region. The Chapter will also discuss the suggestions from various authors on how to remedy these contentious issues, while complying with the WTO and catering for the best interests of regional integration efforts in Africa.

2. Reciprocity and WTO Article XXVI

While the EPAs cover a broad agenda and are supposed to boost ACP countries’ economic growth, its primary focus is on the aspects relating to the reciprocity of trade in goods. It is for this reason why there was a move from the old fashioned Lomé Convention to WTO compatible EU tariff preferences. As mentioned in the preceding chapters, the WTO-compatible tariff preferences engender a quasi reciprocal free trade between EU and six groups of ACP countries. However, during negotiations, the question of market access has been a bone of contention and often remains unresolved.⁹¹

2.1. Analysing WTO Rules Article XXVI

In 2001, the EU and ACP States contracted as part of the Cotonou Agreement that they would replace the unilateral trade preferences, by entering into WTO-compatible EPAs which involved reciprocal dismantling of trade barriers with the goal of creating free trade zones. Under the EPAs, the EU would eliminate all remaining barriers on products coming from

⁹⁰ Powell (note 4)

⁹¹ A Bouet, *et al* ‘Searching for an alternative to Economic Partnership Agreements.’ Available at www.hubrural.org/pdf/ifpri_epa_113007_eng.pdf [accessed on 15 February 2010]

ACP countries. Reciprocating but in asymmetric way, all ACP countries would open their borders to European products. The understanding was that this asymmetry would be two dimensional: Up to 20 percent of ACP imports from the EU would be exempt from the agreement and ACP countries will have up to 20 years to implement this arrangement.⁹²

EPAs are found under WTO's GATT article XXIV. This article enables member States of the WTO to form a customs union or a free-trade area, provided that substantially all trade (SAT) between the parties are liberalised, that trade barriers on the whole are not increased as a result of the agreement, and that the formation be concluded within a reasonable length of time which may exceed ten years only in exceptional circumstances. However, the key principles up for discussion are 'substantially all trade', 'a reasonable length of time' and 'exceptional circumstances'. These terms are not defined in the GATT, thus leaving them open to various interpretation.⁹³

As Louise Curran *et al*, notes, the precise interpretation of the requirements of Article XXIV has subsequently spurred perhaps the most contentious debates in relation to the EPAs, with most of the antagonists accusing the EC of pursuing a stringent interpretation of those requirements.⁹⁴ Sophie Powell (2007) notes that the EC has tended to interpret 'substantially all trade' to mean 90 percent of trade, albeit with a willingness to consider asymmetry between the parties, which is that the EU might agree to liberalise close to 100 percent, while the ACP could liberalise close to 80 percent. The EC also acknowledges the need for transition periods before there is full liberalisation on the side of the ACP is expected to occur, but has rejected proposals from the ACP to link these transition periods to achievement of development indicators. The EC prefers instead to talk about pre-determined timeframes of little more than 12 years⁹⁵

Other critics of the EC like Third World Network Africa and Oxfam (2007) have argued that lower figures would be needed to avoid negative impacts of the EPAs. To support their argument, they have used Kenya as an example of a country that would need to exclude

⁹² Ibid. See also A Borrmann *et al*, 'The WTO compatibility of the Economic Partnership Agreement between the EU and the ACP States.' Available at <http://www.gtz.de/trade> [accessed on 3 February 2010].

⁹³ Curran *et al* (note 15) at 5

⁹⁴ Ibid.

⁹⁵ Powell (note 4)

more than half its trade from liberalisation to avoid the negative impact of EPAs with the EU. They state that if Kenya liberalises 50 percent of its imports from the EU and the EU liberalises 100 percent, it would mean that approximately 75 percent of trade between the two would be liberalised. Furthermore, if African countries reciprocate with tariff elimination on 60 percent of their European imports, the EPA would be neutral in terms of output. This, in turn, points to an overall degree of trade liberalisation of approximately 80 percent.⁹⁶

With regards to the 'reasonable length of time' for implementation, WTO members agreed in 1994 that it should exceed 10 years only in 'exceptional cases'. In the EU's TDCA with South Africa, the transitional period was set at 12 years. Unless the rules governing Article XXIV are changed, the substantially longer lead times of 20 or 25 years suggested by some ACP negotiators and NGOs would need to be justified on the grounds of being exceptional, a concept which is difficult, although not impossible to establish.⁹⁷

While the 'Understanding on the Interpretation of Article. XXIV' (GATT 1994, Annex I), which generally limits the period for liberalisation in a FTA/CU up to 10 years and fails to define what can be understood as 'exceptional case' that would justify an exceeding time frame for liberalisation, some authors have interestingly noted that Article XXIV of the WTO rules was not conceptualized to rule North-South FTAs between regional blocs. they state that it was created to regulate the conditions of FTAs and CUs vis-à-vis the multilateral trading regime. Consequently, EPAs between highly unequal partners are, without a doubt, a novelty which can be regarded as an 'exceptional case'.⁹⁸

Unfortunately Article XXIV does not foresee 'Special and Differential Treatment' for developing countries. But, as 'substantially all' and 'exceptional circumstances' are not defined, there is considerable leeway in the coverage of an FTA and the transition period that is used to reach that coverage. However, in the EPA negotiations the EU has unilaterally fixed the coverage at a minimum of 80 percent tariff elimination and the transition period to obtain this at a maximum of 15 years, for all ACP regions and countries without taking into account

⁹⁶ Curran (note 15) at 4

⁹⁷ Ibid.

⁹⁸ Trade Matters, 'Ensuring development friendly Economic Partnership Agreements (EPAs); coherence between trade liberalisation and regional integration processes.' Available at www.gtz.de [accessed 15 December 2009].

their 'different needs and levels of development' as required by article 35.3 of the Cotonou Agreement. All those countries that had, under enormous pressure, initialled Interim Economic Partnership Agreements at the end of 2007, have indeed complied with the EU's demanded levels of coverage and timeframes. Some have even offered more. However, in the ongoing negotiations, many ACP countries, especially the LDCs, have argued that the EU is expecting too much and have questioned this demand, pointing out that it is not a WTO requirement but merely an EU interpretation of the WTO rules.⁹⁹

2.2. Progressive Liberalisation and Differentiation in Cotonou Agreement

In light of the above discussion about the interpretations of Article XXIV, it is imperative to note that in ensuring full compliance of the EU-ACP, EPAs with the WTO rules applied at the time the agreements are concluded. The Cotonou Agreement provides for progressive liberalisation of the ACP economies¹⁰⁰ stating that:

Given the current level of development of the ACP countries, economic and trade cooperation shall be directed at enabling the ACP States to manage the challenges of globalization and to adapt progressively to new conditions of international trade thereby facilitating their transition to the liberalised global economy.

The Cotonou Agreement emphasises the need for Special and Differential Treatment for ACP countries in both goods and services. It also provides for the internal differentiation between ACP members in favour of the LDCs. These countries would have to open their markets to EU products, to a lesser extent than the other ACP States, to gain privileged access to EU markets. The agreement provides that:¹⁰¹

Economic and trade cooperation shall be implemented in full conformity with the provisions of the WTO, including special and differential treatment, taking account of the Parties' mutual interests and their respective levels of development. (The Parties) underline the need for special and differential treatment to ACP suppliers of services. Economic and trade cooperation shall take account of the different needs and levels of development of the ACP countries and regions. In this context, the Parties reaffirm their attachment to ensuring special and differential treatment for all ACP countries and to maintaining special treatment for ACP LDCs and to taking due account of the vulnerability of small, landlocked and island countries.

⁹⁹ Negotiations - Financial Times, 'Critical issues in the EPA negotiations, An EU CSO discussion.' Available at <http://www.tradeteam.bb/cms/pstt/files/othersources/Trade%20Negotiations%20Insights%20-%20October%202009.pdf> [accessed 12 February 2010]

¹⁰⁰ Article 34(2).

¹⁰¹ Art.34 (4), see also articles 41(2) and 35(3) of the Cotonou Agreement

The EPA negotiations are intended to display maximum flexibility in this sense, particularly with regard to the duration of the liberalisation period and the asymmetrical structuring of the schedule for liberalisation. As the instrument provides:¹⁰²

Negotiations shall take account of the level of development and the socio- economic impact of trade measures on ACP countries, and their capacity to adapt and adjust their economies to the liberalization process. Negotiations will therefore 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 terms of timetable for tariff dismantlement, while remaining in conformity with WTO rules then prevailing.

The mirror-image framework of rules in the WTO, giving multilateral backing to Special and Differential Treatment in regional and bilateral agreements could be important for negotiating EPAs especially in light of the subjective interpretation of the requirements of the article XXIV of the WTO.¹⁰³

2.3. Impact on regional integration

As previously mentioned, ACP countries will have some flexibility regarding the opening up of their markets to EU imports under the EPAs, as not all trade has to be liberalised, rather 'substantially all'. However what this might mean in practice is still unclear.¹⁰⁴

Some authors however have theorised on a scenario where 'substantially all' is taken to mean 90 percent of trade between the EU and each EPA regional grouping – if the EU allows 100 percent duty-free access to ACP imports then the overall average could be achieved by the ACP countries dropping barriers on just 80 percent of their imports from the EU. They note that this could leave ACP States with a substantial amount of scope to maintain tariffs vis-à-vis sensitive sectors or to maintain those tariffs that generate significant government revenues.¹⁰⁵

The above theory however presents a challenge to regional co-operation. The products that any one country would probably seek to exclude from liberalisation would usually not be the ones that other countries in the region would likely seek to exclude. There is not a single

¹⁰² Article 37(7).

¹⁰³ Borrmann *et al* (note 94).

¹⁰⁴ Storey (note 74) at 337.

¹⁰⁵ *Ibid.*

product that would be common to the probable exclusions list of all individual country members of any of the regional groups. Unlike the estimate for trade effects, when it comes to regional integration ‘it looks likely that there will be a significant effect – but a negative one’.¹⁰⁶ A common suspicion of EU policies being prejudicial to African regional co-operation is a point made by other observers, and is already implicit in the projection of EU imports displacing those from Kenya on the Ugandan market—hardly a motive force to regional integration in East Africa.¹⁰⁷

Since the interim EPAs will be applied in a regional grouping, even on individual countries that may have not made the decision to join, they will consequently have an inevitable detrimental impact on the regional economic integration. He also notes various ACP countries are now submitting separate and un-harmonised tariff liberalisation schedules, not agreed to as a region. These schedules will commit them to liberalising to the EU before they have decided what to liberalise to each other. Ong’wen also observes that even countries that have not signed up to the EPAs, will consequently, have to impose stricter border controls to guard against EU goods entering their markets through neighbouring countries. This will lead to defensiveness between regional neighbours and greater barriers to regional trade.¹⁰⁸

3. Configuration of Parties

In establishing the approach that would be undertaken in the negotiation of the EPAs, the Cotonou Agreement States that¹⁰⁹

‘Economic and trade cooperation shall build on regional integration initiatives of ACP States, bearing in mind that regional integration is a key instrument for the integration of ACP countries into the world economy.’

This provision implies that negotiation and the signing of the EPAs shall be within the regional groupings already established by the various ACP member States. However, this has not been the case as reality has shown that the negotiation of these Interim EPAs has reconfigured the existing groups under which the ACP member States are required to

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ O Ong’wen, ‘East African Community-European Union interim Economic Partnership Agreement: state of play.’ Available at <http://www.seatini.org/publications/index.html> [accessed 15 December 2009].

¹⁰⁹ Article 35(2) of the Cotonou Agreement

conclude the EPA. It is feared that this policy and institutional obligation imposed on the ACP States, will consequently change the initial desired course of regional integration in Southern Africa.¹¹⁰

As already mentioned in preceding chapters, Southern and Eastern Africa are divided into two EPA negotiation groups not corresponding with Regional Economic Community (REC) boundaries. This is complicated by the fact that several countries in the region are members of two or more of the 'available' RECs. While the EU desires to undertake the negotiation of the EPAs with a coherent REC, the prevailing situations of overlapping memberships in different RECs does not favor a smooth undertaking. Admittedly, the case of overlapping membership is not the EU's fault. The reconfiguration of these different RECs that was done by EPAs (to fit its EPAs desires,) only exacerbates the problems accruing from overlapping membership and what consequences it will have on regional integration efforts. A case in point, the SADC EPA group currently consists of 8 out of the 14 usual SADC countries which include those of the Southern African Customs Union (SACU); Botswana, Lesotho, Namibia, Swaziland (BLNS) and South Africa; and Mozambique, Angola, and Tanzania (MAT). The remaining 14 are negotiating under the so called ESA-EPA grouping, which has its own complications. Consequently, a number of problems arise from this reconfiguration which impedes regional integration in these areas.¹¹¹

The first problem envisioned, is that South Africa, a member of SADC-EPA and SACU at the same time, has its own trade arrangement with the EU called Trade, Development and Cooperation Agreement (TDCA), much like the EPAs they are pursuing. This has undesired ramifications for the EU and efforts to harmoniously integrate into one bloc.¹¹²

The second concern raised by the SADC reconfiguration, is that SACU, being a customs union, shares an external tariff. This means it is obliged to negotiate all external

¹¹⁰ South African Department of Trade and Industry, 'SADC EPA Group - EC Negotiations: Assessing the Emerging Outcome.' Available at <http://www.dti.gov.za/parliamentary/EPAoutcomes.pdf> [accessed on 15 December 2009].

¹¹¹ P Draper, 'EU-Africa trade relations: the political economy of Economic Partnership Agreements' (2007) 2 *Jan Tumlir Policy Essay* available at <http://www.ecipe.org/publications/jan-tumlir-policy-essays/eu-africa-trade-relations-the-political-economy-of-economic-partnership-agreements> [accessed on 16 February 2010].

¹¹² Ibid.

goods arrangements as a group and to make a common tariff offer. This in essence implies that South Africa's membership and TDCA existence can only undermine this legal requirement and creates division in SACU.¹¹³

Other complications presented by the SADC-EPA reconfiguration is that of the presence within SACU of a Least Developed Country: Lesotho. Technically Lesotho is not obliged to offer reciprocity, but by virtue of the fact that it is completely surrounded by South Africa, it may, *de facto*, be obliged to. However, if it wants to prevent liberalised EU imports from entering its territory, it will have to maintain border controls, and this has the potential of undermining the regional integration endeavours of the area.¹¹⁴

While EAC members Kenya, Uganda and Tanzania, also face similar problems of overlapping membership, the EPA reconfiguration process seems to worsen such problems with increasing strains on the region and integration process in that bloc. For instance Tanzania is a member of the EAC and SADC, while Kenya and Uganda are members of both EAC and COMESA. Now it should be noted here that EAC cooperates with COMESA on the implementation of its integration and trade liberalisation agenda and is regarded as a fast-track initiative for the COMESA customs union. As a result, Tanzania receives pressure to join COMESA and to leave SADC. Considering also that COMESA members Burundi and Rwanda recently took steps to join the EAC, this has since created doubts on the sustainability of the ESA configuration for EPA negotiations.¹¹⁵

Furthermore, the classification of some ACP countries as LDC creates problems for regional cooperation in the ongoing negotiation of EPAs. As already mentioned, LDCs qualify for almost unlimited duty-free and quota access to the EU market under the 'Everything but Arms' (EBA) scheme. It has been noted that unless differentiation provisions are considered, as the EU generally lowers the import barriers for all the ACP States under the EPA, the relative advantage acquired under the EBA scheme will be eroded, leaving the LDC worse off than they were under the EBA scheme.¹¹⁶

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ M Meyn 'Regional integration and EPA configurations in Southern and Eastern Africa - What are the feasible alternatives?' (2006) 9:7 *Seatini Bulletin*

¹¹⁶ Storey (note 74) at 337.

As the negotiations unfold, it is becoming clearer that different Southern and East African members of the ACPs will be required to undertake different obligations to the European Union under the various newly created EPA configurations. This clearly doesn't do much for the regional integration foundations initially stated.¹¹⁷

4. Most Favoured Nation clause

Another contested issue in the Interim EPAs is the 'most favoured nation' (MFN) clause.¹¹⁸ This clause laid out in the EPA framework initialled in Southern Africa, has elicited a lot of negative criticism from authors as it is viewed not to be in the best interest of the promotion of profitable bilateral trade agreements in the ACPs. Nkululeko Khumalo of the South African Institute of International Affairs has rightly argued that the MFN clause is unfair. The clause obligates EPA signatories to extend to the EU any trade concession that they grant in future to a third party, as long such third party is a developed country or has a one percent share of world merchandise exports.¹¹⁹ Both South Africa and Namibia have objected to it because the primary purpose of a bilateral or regional deal is to exchange concessions that are better than what is available to 'outsiders'. Khumalo says if for instance, China realises that entering an agreement with SACU means 27 or so developed countries in the EC automatically get similar treatment, the incentive to do so could be severely diminished,¹²⁰ and negatively impact on projected benefit from a regional cooperative perspective.

¹¹⁷ SADC EPA Group - EC Negotiations: Assessing the Emerging Outcome 30 January 2008, Pretoria:

¹¹⁸ Most-Favored-Nation (MFN): espouses the principle of treating other people equally. Under the WTO agreements, countries cannot normally discriminate between their trading partners. This principle States that if you grant someone a special favor (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members. This principle is embedded in the first article of the World Trade Organization's General Agreement on Tariffs and Trade (GATT), which governs trade in goods; from http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm [accessed 05 June 2009]

¹¹⁹ N Khumalo, 'Southern Africa: European trade deal challenges unity.' Available at <http://www.saiia.org.za/development-through-trade-opinion/southern-africa-european-trade-deal-challenges-unity.html> [accessed 16 February 2010].

¹²⁰ Ibid.

5. Conclusion

It is interesting to note how the EU has since reacted to some of the aforementioned contentions. It has acknowledged the existence of such contentions in the Interim EPAs. It is also in agreement with the proposal forwarded by the ACPs such as adopting a more flexible approach on some of the issues raised. However in regard to the issues as suggested by some East African countries, that refer to the non-trade related aspects of the EPAs, the EU is only willing to consider the ACPs demands to the extent that these non-trade related aspects of EPAs are only negotiated and included in the full EPAs and not during the Interim Period.¹²¹

Consequently, the EU's apparent inflexibility on certain issues has resulted in some ACP countries refusing to sign interim agreements, arguing that they say are flawed. While the ACP countries have proposed ways to improve these flaws, the EU, however, remains obstinate. This has obviously bred tension and threatened the cohesion of the regional integration process. An example of this scenario is the current situation in Southern Africa, where some members of SACU (namely Botswana, Lesotho and Swaziland) have recently signed their interim EPA and are actively engaged in negotiations towards a comprehensive EPA. Other members (Namibia and South Africa) continue to voice serious concerns about this process.¹²²

This chapter demonstrates that there are huge development disparities between the EU and ACP countries reflected in time frame and coverage of import liberalisation, that need to be bridged. This would ensure that while liberalisation is undertaken, ACPs still have the space to follow national and regional development priorities.¹²³

¹²¹ D Lui & S Bilal 'Contentious issues in the interim EPAs: potential flexibility in the negotiations', Available at www.ecdpm.org/dp89 [accessed on 20 December 2009].

¹²² P Draper & N Khumalo 'On the future of the Southern African Customs Union' (2009) 8:6 *Trade Negotiations Insights*. Available at www.acp-eu-trade.org/tni [accessed on 20 December 2009].

¹²³ *Ibid.*

CHAPTER IV : NON-TRADE ISSUES IN THE EPAs

1. Introduction

While the preceding chapter highlights the danger which hasty liberalisation poses to national and regional development priorities of the ACP (given the huge economic development disparities existing between these two contracting partners), this chapter will discuss the so-called non-trade related issues in the EPAs which are likely to affect the ACPs mandate and space of national and regional development priorities.

This chapter argues that while it is bad enough that EPAs' interpretations of the WTO requirements is stretched to suit the interests of the EU, the inclusion of a whole section of non-trade related issues, that are not a requirement of the WTO rules of reciprocity in the Interim EPAs, is likely to further impede or stifle efforts to integrate into regional blocks of ACPs' choice.

Non-trade issues in the EPAs *inter alia* are provisions in the agreements under which nationals of one country can sell their expertise in the services sector to another signatory of the EPAs.¹²⁴

It is common knowledge that the majority of the members in the ACPs do not have common policies in areas of investment, intellectual property rights, competition policy, procurements and institutional and negotiations capacities in those given areas. However the interim EPAs that these regions have initialed contain commitments to continue negotiating towards 'full EPAs'. These agreements contain commitments to accede to these non-trade related issues as mentioned above, to the detriment of regional integration of efforts in the ACPs.¹²⁵

The SADC EPA group has previously complained that the negotiation and inclusion of these non-trade related issues in EPAs, that were essentially introduced to rectify a trade anomaly in international trade, risk the danger of delivering unbalanced outcomes that may be

¹²⁴ J Barigaba 'East African EPA deal: impasse on services persists.' Available at http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=80640&cat_id=1052 [accessed on 20 January 2010].

¹²⁵ SADC EPA Group - EC Negotiations: *Assessing the Emerging Outcome* 30 January 2008, Pretoria (note 112)

prejudicial to the ACPs and limit national development objectives of the individual member States in ACPs and in effect foreclose prospects for deeper integration in the region.¹²⁶

In a bid to examine the impact that the inclusion of these non-trade related issues in the EPAs, will have on regional Integration efforts, this chapter will lay emphasis on how their inclusion affects on the mandate of already established efforts to move towards a deeper integration process in the various regional blocs.

2. Cotonou Agreement and the non-trade issues

During the ongoing negotiations of the EPAs, the EU has been accused of breaking the spirit of the Cotonou Agreement by pushing for the inclusion of the non-trade issues in the agreements.¹²⁷

As noted earlier in this study, EPAs are being negotiated within the framework of the Cotonou Partnership Agreement. While the Cotonou Agreement focuses on capacity building and economic cooperation, it does not make any provisions for the negotiation of these non-trade issues. Nevertheless, the EU through its rhetoric on development, managed to push for their inclusion in the EPAs and their negotiations despite strong resistance from ACPs.¹²⁸

To illustrate disagreements over non-trade issues, this study uses the various pertinent provision in the SADC-interim EPA as a back ground to the on-going debate on these issues.

The SADC-Interims EPA Draft Consolidated Proposal of 2007, just like the EAC-EPA employs the same language on regional integration. For example the parties to this agreement both recognise that regional integration is an integral element to their partnership and a powerful instrument to achieve the objectives of this Agreement. They also reaffirm the importance of regional and sub-regional integration amongst the SADC EPA States to achieve greater economic opportunities, enhanced political stability and to foster the effective integration of developing countries into the world economy. The parties to this agreement,

¹²⁶ Ibid.

¹²⁷ Powell (note 4) at 7.

¹²⁸ M. Griffith & S Powell (note 21) at 17

without prejudice to the commitments undertaken in this agreement, the parties agree that the pace and content of their regional integration would be determined exclusively by the SADC EPA States in the exercise of their sovereignty. The Language in the agreement also alludes to the Parties support, in particular, of the integration processes based on the SACU, SADC and Africa Union Treaties and political agendas. They aim at building and deepening their partnership on the basis of those processes and at implementing the present Economic Partnership Agreement in a mutually supportive manner with those instruments, as well as with the EC-SA TDCA, taking into account the respective levels of development, needs, geographical realities and sustainable development strategies.¹²⁹

On the various non-trade issues, the interim EPA agreement acknowledges the importance of free and undistorted competition among the parties trade. Citing that example of the competition issue in the interim agreement, parties agree that practices restricting competition in their trade relations are incompatible with the proper function of the EPA. These are highlighted as undertakings between the parties, which have the object or effect of substantially preventing or lessening competition in the territory of the Community.¹³⁰

On another service related, but non-trade issue in the EPAs, the interim SADC EPA draft States, in respect of intellectual property rights, that the EC and the signatory SADC States will ensure an adequate and effective implementation of the international treaties dealing with intellectual property to which they are parties and of the Agreement on Trade-related Aspects of Intellectual Property.¹³¹ The agreement further States that the signatories may, implement in their law more extensive protection than is required by this section of the agreement, provided that such protection does not contravene the provisions of this Section.¹³²

Another non-trade issue that has raised concerns in the EPAs is that of procurement. The interim agreement States that parties are to set as their objective, reciprocal and the gradual opening of the government procurement markets and each party shall ensure that the procurement of its entities as listed in the agreement takes place in a transparent, reasonable

¹²⁹ Article 4 of the SADC-EPA Draft Consolidated Proposal of 5 June 2007.

¹³⁰ Article 1 of the SADC-EPA Draft Consolidated Proposal of 5 June 2007.

¹³¹ Ibid.

¹³² Ibid.

and non-discriminatory manner, treating any supplier of either party equally and ensuring the principle of open and effective competition.¹³³

Against the back drop of the above provisions in the Interim EPAs, it is imperative to note that the contentions with these non-trade issues in the EPAs do not only stem from the fact that they are not a prerequisite of the WTO rules, the basis of which the EPAs were initiated. They were also not mentioned in the Cotonou Agreement, the framework within which the EPAs are negotiated. Yet, they enjoin the ACPs to undertake obligations that not only compromise on the issue of internal economic policy of the various ACP members but also threaten self-determined efforts of these ACPs to integrate into regional economic blocs.

3. The debate concerning non-trade issues

The EU, in defense of its inclusion of the non-trade issues, states that the EPAs are part of the overall effort to build up the economic governance framework, the stable, transparent and predictable rules necessary to lower the costs of doing business, attract fresh domestic or foreign investment and make ACP producers more diversified and competitive. This is why the EPAs must be comprehensive, dealing with all the rules and issues that concern private investors and traders. As a result, issues such as competition policy, procurement, investment rules are no luxuries but fundamental factors that affect the decisions of traders and investors.¹³⁴

Critics however remain very skeptical. They have suggested that the EU is only pushing its commercial self-interests through the guise of development rhetoric. They are using it as a decoy while the truth is that these non-trade issues go to the very core of the EU's ambitions of expanding its spheres of influences and competitiveness in the world under the so called 'global Europe'.¹³⁵

A host of other authors have criticised the EU's intentions by highlighting the following claimed elements of its EPA negotiating stance with the ACPs:¹³⁶ Of particular concern are

¹³³ Ibid.

¹³⁴ Commission 2005 a:32 cited by Storey (note 74) at 341.

¹³⁵ Griffith & Powell (note 21) at 17

¹³⁶ Storey (note 74) at 340

the demands for liberalisation of public procurement in the ACP States which allows EU firms to bid for public works contracts there and not allowing ACP governments support or prioritise local contractors; the movement towards liberalisation of all service sectors, that is, an even more ambitious approach than the GATS one; and the pressure to ensure European firms receive at least as favourable treatment as local ones in the ACP countries. This means that ACP governments would not be allowed to discriminate in favour of locally owned firms or require European companies to abide by special conditions with regard to local employment or procurement.¹³⁷

This attempt to extend the agreements beyond trade and into areas considered to be of domestic economic agreement has continuously been controversial ever since the negotiation for the EPAs begun. One could interpret it as an attempt by the EU to lock ACP States into a particular model of economic governance, reflecting a longer-term shift in EU-ACP relations from 'a redistributive, interventionist approach to one founded on the principles of free trade and neo-liberal orthodoxy'.¹³⁸

It has been noted that due to the potential disadvantage of these issues, their complexity, uncertainty over their likely implications and a general lack of capacity to identify offensive and defensive interests in these areas on the part of ACPs, has led to a reluctance to negotiate over these issues.¹³⁹ The SADC region has expressed concerns that entering into regional rules on these issues with the EU before regional frameworks are in place, would risk crowding out regional investors and hence undermining regional integration. It stated that 'Negotiating (non-trade issues) under such conditions, runs the risk of delivering unbalanced outcomes that may be prejudicial to national development objectives and to prospects for deeper integration in SADC'.¹⁴⁰

The SADC-EPA group opposes the negotiation of these non-trade issues in the interim EPAs for the following reasons: Firstly, there is no compulsion to negotiate the so-called new generation trade issues under the EPA to meet the requirements of WTO compatibility in both

¹³⁷ Ibid.

¹³⁸ Ibid. See also A Nunn & S Price 'Managing Development: EU and African relations through the evolution of the Lomé and Cotonou Agreements' (2004) 12:4 *Historical Materialism* 203-30.

¹³⁹ Critical issues in EPA negotiations, An EU CSO Discussion Paper 1 August 2009

¹⁴⁰ Powell (note 4) at 7.

the Cotonou Agreement and the TDCA.¹⁴¹ Secondly, some new generation trade issues are currently under negotiation in the WTO (in services, intellectual property, and environment), while others have been excluded (such as investment, competition, procurement, labour) consequently they found no reason to hastily include them in the negotiation.¹⁴²

Thirdly, the SADC-EPA member States have limited institutional and negotiating capacity, which would be further strained if these issues were to be negotiated under the EPAs. Moreover, non-trade issues pose serious policy challenges, as SADC has no common policies in these areas as noted above. Consequently, contracting under such terms presents a danger that may fore close prospects of deeper integration, as such an agreement would likely deliver unbalanced outcomes that may be prejudicial to the ACP parties and limit their national developmental objectives and policy space.¹⁴³

Like most ACP countries, the SADC-EPA group prefers to deal with these issues on an autonomous basis first, which is at a national or regional level. This, it should be noted is in the spirit of the Cotonou Agreement which explicitly States that liberalisation of services can be negotiated when ACP countries 'have acquired some experience in applying Most Favoured Nation (MFN) treatment under GATS'.¹⁴⁴

On the EAC-EPA side, the Permanent Secretary of Uganda's Ministry of Tourism, Trade and Industry, Mr Julius Onen recently vowed that when his country finally gets round to signing the interim agreement for market access and development aid this year, it will not be an agreement that includes trade in services as well as other controversial issues such as investment rules and government procurement. This will remain the case until the EU accepts that 'the EPA is part of an older agreement (Cotonou) which recognised that the developing world is not equal to the EU'.¹⁴⁵

Echoing the concerns raised by these ACP countries, some authors have posited that by

¹⁴¹ SADC EPA Group (note 112).

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Critical issues in the EPA negotiations (note 139). See also article 41(4) of the Cotonou Agreement

¹⁴⁵ J Barigaba 'East African EPA deal: Impasse on services persists.' Available at http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=80640&cat_id=1052 [accessed on 20 January 2010].

'locking in' neo-liberal models of trading; EPAs may oblige ACP countries to surrender important elements of autonomy and flexibility of economic policy in the future. This may lead to a controversial 'norm' of economic governance related to a 'shrinking of development space', as in this case, trade agreements serve to preclude countries from pursuing the types of interventionist policies which stimulated economic development in currently developed economies.¹⁴⁶

The authors further suggest that 'the extensive scope of the EU-proposed EPA would limit the policy space of ACP countries to pursue more interventionist policies which stimulate the competitiveness of their industries and the endogenous sustainable development of their economies'.¹⁴⁷ Whether the motive for this 'lock-in' is short-term, commercial self-interest on the part of the EU may, at the end of the day, be less important than the fact of the imposition of a certain 'one-size-fits-all' economic orthodoxy.¹⁴⁸

While the EU through its Trade Commissioner, Catherine Ashton, said that these non-trade issues are only included if wanted and indeed some ACP countries have embraced the idea of a full EPA such as the Caribbean governments which includes the non-trade issues, the bulk of the ACP are still reluctant and still reviewing their options on several issues. A case in point here is SADC, which communicated to the EU that it did not wish to take commitments on the non-goods issues in the EPAs.¹⁴⁹

4. Conclusion

The discussion above suggests that EPAs may be tools for development and for fostering a deeper integration of the ACPs into the world economy. The fact that the ACP countries discussed herein are not deeply integrated especially in light of the subject of non-trade issues; the inclusion and negotiating of these issues in the EPAs can only hasten divisions in the territories they claim to integrate into an economic bloc.

¹⁴⁶ Storey (note 74) at 341. See also R Wade 'What strategies are viable for the developing countries today? The World Trade Organisation and the shrinking of "development space"' (2003) 10:4 *Review of International Political Economy* 620-44.

¹⁴⁷ Bilal & Rampa (note 123) 69.

¹⁴⁸ Storey (note 74) at 341.

¹⁴⁹ 'Critical issues in the EPA negotiations' (note 139)

While the EU waxes lyrical that it ‘fully respects the right of all ACP States and regions to determine the best policies for their development’, it should be remembered that the pressure to negotiate liberalisation and disciplines in non-goods issues comes from them as noted above and this pressure continues to be the subject of much criticism.¹⁵⁰ The ACPs’ rejection of the EU’s inclusion of these issues in the EPAs, has led to rifts in the regions and consequently the EU has decided to move with willing countries such as Botswana, Lesotho, Swaziland and Mozambique in SADC.¹⁵¹

¹⁵⁰ Ibid.

¹⁵¹ ‘Critical issues in the EPA negotiations’ (note 139)

CHAPTER V : CONCLUSION AND RECOMMENDATIONS

1. Conclusion

Central to this study, has been the impact of the EPAs that are currently being negotiated, on the self-conceived policies of SADC and ESA, in place to integrate into viable regional economic blocs. By carefully studying some contentious issues in these EPAs and engaging with the various literatures on the EPAs and their impact on regional integration, this study contends that the EPAs in their current state are likely to be detrimental to the regions focused in this study.

What is currently happening with the on-going EPAs is a clear case of what will happen if an external power tries to force the pace of change in other countries.¹⁵²

This study has also noted that the Cotonou Agreement, the frame-work within which the EPAs are signed, underlines ACPs overall target as the eradication of poverty through the ideas of partnership, focused development aid and ownership of development process. However, in light of prevailing problems highlighted in the previous chapters, most critics of the EPAs state that there is a clear shift away from these Cotonou targets hence rendering them as merely rhetorical targets.¹⁵³

As previously discussed, the argument that interference in the operation of free trade is non-beneficial to the ACPs and an impossible option in the current climate, is quiet a controversial one. It dismisses the benefits of protectionism yet it is especially through protectionism that the EU gained its current strength. Most pertinent to this study though, is the use of the WTO as the major justification of the EPAs. One would concur that perhaps WTO is used as a strategic attempt by the EU to externalise its own policy and not simply a justification for the undertaking of the EPAs.¹⁵⁴

¹⁵² C Steven (note 11) at 454

¹⁵³ S R Hurt 'Co-operation and coercion? The Cotonou Agreement between the European Union and ACP States and the end of the Lomé Convention (2003) 24:1*Third World Quarterly* 174

¹⁵⁴ Ibid.

There are questions about the value of maintaining preferential access into the EU. It has been noted that the value of the EU's preferences to ACPs is going to rapidly diminish within five to 10 years since the EU is already negotiating Free Trade Agreements (FTAs) with Central America, Andean countries, ASEAN, India and others. Therefore, for preferences that will diminish in such a short time, one wonders why African countries are being asked to sign away their trade policy space.¹⁵⁵

On the use or misuse of the WTO rules, some authors have also added that the EU has deliberately put WTO rules at the centre of the debate over the Cotonou Agreement. 'They are portrayed as fixed and immutable and not the political construct which they really are'.¹⁵⁶ The irony is that while the EU has flaunted the WTO rules in the on-going negotiation as some sort of immutable construct, it has also on many occasions discarded them. This study has illustrated that from the beginning of the EPA negotiations, the EU has been trying to go beyond the WTO and Cotonou requirements, to obtain agreements that fit its broader trade policy objectives at the expense of its development objectives. Needless to say, these have been pursued at the expense of regional integration and sustainable development in ACP countries.¹⁵⁷

It therefore comes as no surprise that the EU is pushing its self interests in increasing access to ACP markets. This is despite the fact that the current nature of the EPAs can only weaken the regional integration of these States, since 'EU relations with Africa have always been a mix of exploitation and philanthropy'.¹⁵⁸

2. Recommendations

Having highlighted the potential impact of a hastily signed EPA on SADC and ESA's efforts at regional integration, this study offers a number of solutions that would alleviate the potentially detrimental effects on the regional integration process or the already established efforts to integrate into a regional economic bloc.

¹⁵⁵ A Kwa 'South Centre Cautions African Countries when approaching Economic Partnership Agreements.' Available at www.SouthCentre.org [accessed on 10 February 2010].

¹⁵⁶ Hurt (note 153) at 174.

¹⁵⁷ Critical issues in the EPA negotiations (note 139)

¹⁵⁸ Killander (note 13) at 578.

The most contentious issue at the heart of the EPAs is the liberalisation of trade. As discussed in Chapter III, there are questions on: how a liberalisation schedule with a stronger partner like the EU would look like; how the effects of liberalisation on the regional integration process in the region could be mitigated. Pegging the liberalisation schedules to development benchmarks has been mooted as a viable solution to this daunting challenge. This would ensure that only when countries attain a certain level of development will they have to undertake very far-reaching reforms of their trade regimes *vis-à-vis* a very strong economic partner such as the EU.¹⁵⁹

In the event that development benchmarks are pegged at the liberalisation schedules, it has been proposed that such schedules kick in 10 years after the entry into force of an EPA. If at that time, countries have attained 20 percent the economic size (measured by per capita gross national income and per capita value of manufactured exports) of the EU and if their exports show a certain level of diversification, they would eliminate tariffs on 20 percent of their tariff lines.¹⁶⁰

If after 15 years, the EPA has facilitated their development; they attain 50 percent of the economic size of the EU (in per capita terms); the countries fulfill other criteria illustrating that their economies are diversified; and they have a certain level of trade integration with other African countries, then the countries will eliminate tariffs on 50 percent of their tariff lines in trade with the EU.¹⁶¹ If after 20 years they have attained 70 percent the size of the EU and fulfilled the diversification and regional integration criteria, they would eliminate tariffs on 70 percent of their tariff lines over five years.¹⁶²

Secondly, a number of critics of the EPAs have rightly suggested that certain clauses be removed from the agreement for the benefit of regional integration efforts in the ACPs. Such clauses as the MFN make it mandatory for the ACP countries to offer to the EU what they offer to another major economy after the entry into force of the EPA. This works against regional integration and the promotion of south-south trade. It also goes beyond the

¹⁵⁹ Kwa (note 155) at 1

¹⁶⁰ Ibid at 2

¹⁶¹ Ibid.

¹⁶² Ibid.

requirements of the WTO's article 24 on regional trade agreements and free trade agreement.¹⁶³

Clauses such as the standstill clauses should also be removed from the negotiation of the EPAs as well. As discussed in Chapter III the inclusion of this clause, disallows the application of new customs duties while the existing ones cannot be raised for sensitive products, after entry into force of the EPA. This again goes beyond Article 24 of the WTO and could prevent African countries from industrialising and increasing their domestic agricultural production, something that consequently affects the depth of regional integration.¹⁶⁴

Further to the above, it is recommended that the clause in the EPA which provides for the freezing of export taxes and duties be removed because it impedes the development of ACPs and is in any case not within WTO requirements. It would seem that without the export taxes and duties, the EU wants to have unlimited access to Africa's raw materials for it to maintain its superior position in trade. Such export taxes and duties encourage diversification and add value to African economies and the WTO allows countries to impose them.¹⁶⁵

Lastly, the fact that the EPAs were essentially mooted as a remedy to the EU-ACPs trade relations that seemed incompatible with the WTO rules, the inclusion of a non-requirement such as the clause on non-trade issue in the EPAs is beyond the scope of that remedy. Considering that through this section the EU is pushing hard for countries to liberalise services, intellectual property, investment, competition, and government procurement, issues are more suited when African economies have grown and can negotiate from a stronger position, rather than from the weaker positions they are in now. It is therefore recommended that the liberalisation that is intended here in the EPA be undertaken under an agreement that does not necessarily include these non-trade related issues.¹⁶⁶

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

Alternatively, another solution that has been mooted as remedy for the prevailing drama in the ongoing negotiation of the EPAs, is the negotiation of country specific EPAs or bilateral EPAs (EPAs between individual ACP countries and the EU). These would be much similar to the TDCA that southern Africa undertook with the EU. It has been noted that although all ACP countries have decided to negotiate within regions, not all of the negotiating regions are customs unions according to Article XXIX of the WTO. This means that each ACP country will have to sign an EPA individually with the EU and to comply with the provisions of Article XXIV.¹⁶⁷

Consequently, this means that the determining threshold for substantially all trade, degree of asymmetry, product coverage and transition period should be at the national level. Whilst these can be harmonised at the regional level, there is no compelling reason why a country cannot choose to negotiate a bilateral EPA directly with the EU and besides, this would likely provide greater flexibility for some countries that seek SDT in an EPA.¹⁶⁸

While all the above recommendations are ideal and technical, one could aver that real biggest solution to these inconsistencies between with the Cotonou Agreement and WTO rules is a genuine 'partnership' between the EU and ACP, as this would provide a powerful alliance in attempting to foster regional integration and integration into current trends within the multilateral trading system.¹⁶⁹

This genuine partnership would engender a turnaround in the negotiations instead of merely introducing hesitant flexibilities on a few issues. The EU must at least respond favourably and unconditionally to ACP requests for the renegotiation around the cited contentious issues and refrain from pushing countries that have initialled EPAs to hastily sign and ratify these agreements without amendments. But, beyond this, the EU should refrain from further overloading and complicating the negotiations by demanding that ACP countries include issues and rules in the agreements that are not required for WTO compatibility (such as the MFN clause and rules on export restrictions, as well as services, intellectual property rights and the non- trade issues).¹⁷⁰

¹⁶⁷ Bilal & Rampa (note 123) at 83.

¹⁶⁸ Ochieng (note 87) at 17.

¹⁶⁹ Hurt (note 153) at 174.

¹⁷⁰ 'Critical issues in the EPA negotiations' (note 139)

The EU should also respond positively to proposals for flexible market access arrangements and to requests for reliable and additional aid for regional economic development programmes. Where ACP countries express that they are not ready to conclude an EPA because they believe the agreement will advance their development, the EU must fully support any request for alternative solutions that ensure that these countries are not left worse off than they were under the provisions of the Cotonou Agreement that were in place before the end of 2007.¹⁷¹

It should be closely remembered here that, the initial objective of EPAs is to foster regional integration and not hinder it. The challenge here would be to find common ground among regional partners and for the EU to provide sufficient flexibility to accommodate specific concerns in order for regional groupings to conclude final regional agreements, which harmonise commitments in a coherent manner among all countries within a region.¹⁷²

Should some countries continue to see little benefit from concluding an EPA, it is likely that divergences over an EPA will remain in some regions, with the possibility of some EPAs *à la carte* being concluded, an outcome that could seriously complicate regional integration initiatives.¹⁷³

¹⁷¹ Ibid.

¹⁷² Bilal (note 6).

¹⁷³ Ibid.

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