The EU's Economic Partnership Agreements with African, Caribbean and Pacific (ACP) countries

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A. Introduction

The EU's Economic Partnership Agreements (or EPAs) are free trade agreements which the EU (and its Member States) are in the process of negotiating with almost 80 African, Pacific and Caribbean (ACP) countries.[1] These are ex-colonies of the EU Member States. In an important sense the EPAs are merely the latest stage in a trade relationship that stretches back to the beginnings of the EEC Treaty in 1958 (and before that right back to the nineteenth century).

At the moment, the EU has signed a full EPA with 15 Cariforum countries. It has also signed so-called 'interim' or 'stepping stone' EPAs with 10 African and 2 Pacific countries, and initialled these agreements with another 5.[2] The difference is that the full EPA covers more than just trade in goods, while the interim EPAs – in theory – do the bare minimum to comply with GATT rules on free trade agreements while full EPAs are negotiated. All of the signed agreements are being provisionally applied by both sides, and the initialled agreements have been provisionally applied by the EU since 1 January 2008.

There are however still some ACP countries still negotiating EPAs and interim EPAs and are trading under the EU's normal rules for developing and least

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[1] There are 79 ACP countries, but Somalia and East Timor have not played any part in negotiations.

[2] Signed: Ivory Coast (West Africa), Cameroon (Central Africa), Mauritius, Seychelles, Zimbabwe and Madagascar (ESA), Botswana, Lesotho, Swaziland and Mozambique (SADC), PNG and Fiji; Initialled: Ghana (West Africa), Zambia and Comoros (ESA), Kenya, Uganda, Tanzania, Burundi, Rwanda (EAC), Namibia (SADC).

developed countries. The interesting cases here are those which have gone on to GSP tariffs: Nigeria, Gabon and Congo. A separate case is South Africa, which has its own free trade agreement with the EU, although it is also involved in EPA negotiations.

I want to say a few words about these different trading regimes, how they came about, and why the EPAs in particular are controversial. But first of all I would like to do is to put the entire system in its proper historical context.

B. Background to the EPAs

1. The French, the colonies and the EEC

Let me then start with a brief run-down on the history of EU trade relations with its former colonies. It begins formally with Part IV of the EEC Treaty (1958), which is essentially a reciprocal free trade agreement between the EEC and a number of the Member States' colonies (though not all of them). The idea was that after 12 years, all trade barriers would be reduced between each of these colonies and each of the Member States.[3] There were also some other quite modern features of this system. Part IV sets out the objective of liberalizing investment and free movement of workers, though these were never really implemented.

And there was a financial package involved amounting to $581.25m over five years (this is between $4bn and $20bn in today's terms, depending on how you calculate it).[4] 90% of this money went to the French colonies, but France only paid 35%. Germany paid another 35% (a type of war reparation) and the others paid the remaining 30%. All in all, this was a good deal for France, which had forced this system on the other Five.

[3] Thanks to the 'Acceleration Decision' of 1966, internal EEC liberalization was achieved two years earlier in 1966.

[4] http://www.measuringworth.com/calculators/uscompare/result.php#.

1. The Yaoundé and Lomé Conventions

What happened next? Why does nobody know about Part IV of the EEC Treaty? Well, what happened was that between 1958 and 1962 all of these colonies declared independence. To continue the relationship, Part IV of the EEC Treaty needed to be replaced by treaties with the newly independent countries. This happened in the form of the Yaoundé I Convention in 1963, and an almost identical Yaoundé II Convention in 1969, which was also due to expire five years later. From a modern perspective, these treaties are quite familiar types of free trade agreements. But they have rather been forgotten because in 1976 they were replaced by the far more famous Lomé Convention. This Convention was followed by very similar Lomé II, III, IV and IV bis Conventions, each lasting 5 years each time signed by more ACP countries. The latest in the series was the Cotonou Agreement, signed by 79 ACP countries, which has been applied since 2000, and will last for 20 years.

The Lomé system was important for two main reasons. First, this was simply because it covered so many countries (the expansion from 19 Yaoundé countries to 46 ACP countries is explained by the fact that the UK brought along a number of its ex-colonies when it acceded to the EEC in 1973). Moreover, these formed into a new African, Caribbean and Pacific (ACP) Group which proved to be quite an effective bargaining coalition.

Second, the Lomé Convention contained various features that, at the time, were held up as best practice for the New International Economic Order (NIEO).

1. One of these, which had been trialled in the Yaoundé II Convention, was a system of commodity export price stabilization (STABEX), which was supposed to be a self-financing fund for the bad times, but, as commodity prices sank in the late 1970s and 1980s, it turned out to be yet another form of development aid.

2. A second, which was taken over from the UK, was a Sugar Protocol, which guaranteed purchases of sugar quotas at high internal EU prices. There were also some other commodity protocols, but this was the most

important, and some ACP countries (eg Mauritius) depended on it for their economic survival.

3. The third significant feature of the Lomé Convention, and the most important for present purposes, was that its trade regime was, compared to the Yaoundé model, based on an entirely different paradigm of non-reciprocity between developed and developing countries. That is to say, the EEC offered the ACP side virtually complete market access, without gaining additional market access to these countries in return.

As it turned out, as a means of achieving economic development, the Lomé system was pretty much a failure. With some isolated exceptions, such as canned tuna, in thirty years there was virtually no diversification of ACP export industries away from agriculture and minerals. In absolute terms ACP exports have remained relatively stable, but as a share of total EU imports, the ACP share declined in the period 1976 to 2005 from 7 per cent to 3 per cent; and as a share of total EU imports from developing countries it declined from 15 per cent to 6 per cent. Explanations for this situation vary, and it is not always accepted that the non-reciprocal aspect of the system is entirely to blame. But clearly it did not achieve its objectives.

Over the years, there were some changes to the fundamental workings of the Lomé system. Two were set out in the 2000 Cotonou Agreement: the abandonment of the STABEX subsidies system and the expiry of the non-reciprocal trade regime on 31 December 2007. One was not foreseen, at least not by all parties: the denunciation of the Sugar Protocol in 2007, which is linked to reduced internal prices for sugar as a result of reforms to the EU Common Agricultural Policy.

What then is left of Cotonou? It exists fairly much now solely as an institution for delivering development aid, and as a talking shop for political issues arising between the EU and the ACP countries. It is namely still possible under the Cotonou Agreement for financial sanctions and, indirectly, trade sanctions, to be imposed on countries for violations of human rights principles.

C. Death of the (Lomé/Cotonou) trade regime

But back to trade. Why did the Lomé/Cotonou regime change? The simple answer is that it needed to under WTO rules. The Lomé/Cotonou regime was both discriminatory, in that it only applied to ACP countries, and non-reciprocal, in that the EU gave preferences but received none in return.

This is problematic from a WTO point of view. In principle, trade preferences are a violation of the most favoured nation obligation in Article I of the GATT, so if you are a developed country wanting to give trade preferences to developing countries, there are two choices. One is to grant non-reciprocal preferences but to all developing countries on a non-discriminatory basis: this is done by what is usually called a Generalized System of Preferences (or GSP) program, which is authorized by the WTO Enabling Clause. Or, if you want to discriminate, you can do this by way of a free trade agreement (or customs union) so long as you receive reciprocal preferences in return. Because the EU's system was both non-reciprocal and discriminatory, it did not fall into either of these permitted categories. This was established by two GATT panel proceedings involving bananas in 1993 and 1994 (*Bananas I* and *II*).

2. Waivers

The EC lost these two panel reports, and blocked them. But in 1994 compulsory and enforceable dispute settlement was not far off, and the EC recognized that it was probably a good idea to obtain a waiver for its preferences. It managed to obtain one waiver in 1994 (L/7604) which was due to expire on 29 February 2000. For reasons connected with the establishment of the WTO, this was renewed in 1996 with the same expiry date (WT/L/186).

By 2000 nothing much had been done, and this despite the prominence of the *Bananas III* case. In fact, the main event in 2000 was not the abolition of the EU's non-reciprocal regime, but the conclusion of the Cotonou Agreement which continued this regime. On the other hand, the Cotonou Agreement also did something rather significant, which was that it treated this regime as a transitional regime and set a final expiry date of 31 December 2007. This was

apparently good enough. The EU managed to obtain a new waiver to cover this period at the Doha Ministerial in December 2001 (WT/L/436), after what was apparently a few bribes (involving tuna quotas), and the threat of not signing up to the Doha Development Agenda.[5] But what was going to come next?

D. Replacement of the Cotonou Agreement – as set out in the Cotonou Agreement

The Cotonou Agreement itself set out a negotiating framework for establishing agreements to replace the unilateral system in Annex V. It came up with two main options: the conclusion of reciprocal free trade agreements called 'Economic Partnership Agreements' and unspecified 'other' WTO compatible arrangements.

1. EPAs

The final coverage of the EPAs was left a little vague. What was clear was that they had to be WTO compliant free trade agreements. This means that they had to cover trade in goods, liberalizing substantially all the trade between the parties in conformity with Article XXIV GATT. On the other hand, this was supposed to be as sensitively done as possible. Article 37(7) stated that:

> 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.

There is even this, in Article 37(8):

> The Parties shall closely cooperate and collaborate in the WTO with a view to defending the arrangements reached, in particular with regard to the degree of flexibility available.

[5] Fatoumata Jawara, *The cunning bully: EU bribery and arm-twisting at the WTO*, The Transnational Institute, September 2003, available at www.tni.org/reports/wto/bully.pdf.

What about beyond goods? Well, nothing really to worry about. On services, Article 41(4) of the Cotonou Agreement states that:

> The Parties further agree on the objective of extending under the economic partnership agreements … their partnership to encompass the liberalisation of services …

And on investment Article 78(3) states that:

> The Parties … agree to introduce, within the economic partnership agreements … principles on protection and promotion of investments, which will endorse the best results agreed in the international fora or bilaterally.

But the 'objective' of liberalizing services, and on introducing 'principles' on protecting investments is not a hard and fast promise to make commitments on these subjects.

What is more, lest this seem too hard for the ACP countries to take, the Cotonou Agreement was shot through with caveats and calming words. At every stage it promised that the EU would bend over backwards to make the transition to a reciprocal regime as painless as possible. There was a good deal of reference to the 'development' objectives of trade liberalization, and lots on the need for cooperation on the supply side.

2. Alternatives

What is more, the entire EPA process was presented as optional. Article 37(5) Cotonou states that '[n]egotiations of the economic partnership agreements will be undertaken with ACP countries which consider themselves in a position to do so, at the level they consider appropriate and in accordance with the procedures agreed by the ACP Group, taking into account regional integration process within the ACP.' The alternatives differed according to whether the ACP countries were LDCs or non-LDCs.

(a) LDCs

For LDCs, the EU had quite a bit of flexibility. Paragraph 2(d) of the WTO Enabling Clause allows developed countries to give unilateral preferences to LDCs without giving the same preferences to non-LDCs. The EU promised to make as much of this flexibility as possible in Article 37(9), which said that:

> [t]he Community will start by the year 2000, a process which by the end of multilateral trade negotiations and at the latest 2005 will allow duty free access for essentially all products from all LDC building on the level of the existing trade provisions of the Fourth ACP-EC Convention and which will simplify and review the rules of origin, including cumulation provisions, that apply to their exports.

In fact, it made good on this promise. In 2001, one year after the signature of the Cotonou Agreement, the EU modified its GSP program to include the so-called 'Everything But Arms' initiative, which in simple market access terms offers an even better deal than under the Cotonou Agreement.

The exception is rules of origin, which is still somewhat inferior under the GSP program (including the EBA) than under Cotonou. Rules of origin are rules that say when a product 'originates' in a given country for purposes of gaining preferential treatment, although there have been some significant improvements in the most recent revision this year.

(b) Non-LDCs

What about non-LDC ACP countries who decided against an EPA? Here there was less leeway. According to Article 37(6),

> [i]n 2004, the Community will assess the situation of the non-LDC which, after consultations with the Community decide that they are not in a position to enter into economic partnership agreements and will examine all alternative possibilities, in order to provide these countries with a new framework for trade which is equivalent to their existing situation and in conformity with WTO rules.

The 2004 deadline soon passed, but this was not treated as particularly critical by either side. As late as November 2007, the ACP-EU Joint Parliamentary Assembly issued a Kigali Declaration calling on the European Commission to make good its promise to examine alternative possibilities.[6]

So what are these alternatives? In fact, there were only two feasible options here. One was a further waiver of WTO rules; the other was a GSP program enhanced to cover more Cotonou products. There were problems with both options. The problem with a waiver was political: it was accepted by all participants that the prospects of obtaining a further waiver at the WTO were virtually nil. No serious efforts to do so were ever made.

There were some problems with the GSP program. As it stood, the EU's GSP program would be fairly useless for most ACP countries. This is no accident: when the GSP program was designed, it was designed on purpose to protect (by excluding from its coverage) the products exported by the ACP exports. The early versions of the EU's GSP Regulation even said this expressly. What about expanding the GSP program to cover ACP exports? As a short term solution, this would have been somewhat effective in terms of preserving existing market access conditions, but in the long run, this would be counterproductive from the ACP point of view, as it would put their products in direct competition with exports from other developing countries.

There were similar problems with the EU's GSP+ program, which is a part of the EU's GSP program under which the EU grants almost complete duty free access to products from countries that have ratified and implemented a set of human rights and good governance conventions. At the moment, this program is offered to South American countries, and a handful of others (Moldova, Georgia and Mongolia; Sri Lanka has been dropped from the program because of human rights violations, and Venezuela has been dropped for failing to ratify a human rights convention). The GSP+ program is only opened to new

[6] [2008] OJ C58/7, Annex, Kigali Declaration, para 6.

applicants at fixed time periods. Originally this was three years, but more recently this has been cut to 18 months.

The upshot is that for most non-LDC ACP countries there was really not much choice. It was an EPA or nothing.

E. EPA negotiations and substance

1. Negotiations

From 2000 to 2006 negotiations went rather slowly. In terms of process, it was agreed early on that the EU would negotiate with separate ACP groups. Indeed, the EU was pushing for these regions themselves to be the signatories to any final agreement, and not individual ACP countries.[7] Accordingly, the ACP countries divided into 6 groups: a Caribbean group, a Pacific group, and four African groups: West Africa, Central Africa, SADC, and ESA.

The idea was strongly to support existing efforts and regional economic integration.[8] As far as this was concerned, the Caribbean and Pacific groups made some sense, but it is probably fair to say that at least three of the four African groups did not. In almost all cases, the EPA configurations mapped very poorly onto existing organizations. The one group that worked best was West Africa which built on the Economic Community of West African States (ECOWAS)). But the others were more problematic. For example, the Southern African Development Community (SADC) has 14 Members.[9] Of these, 8 are in the SADC EPA group, 5 are in the new Eastern and Southern Africa (ESA) group, and 1 other in the Central Africa group. In the case of the ESA Group, there was another problem, in that this group was based on the Common Market for Eastern and Southern Africa (COMESA), an organization that includes two members (Egypt and Libya) that are not ACP countries. Given that almost all of these organizations aimed at being customs unions with

[7] ACP/61/113/03 Rev.1, Legal Issues, p 2.

[8] See further Aniekan Iboro Ukpe, 'Will the EU-Africa Economic Partnership Agreements Foster the Integration of African Countries into the Global Trading System?', Paper for 2008 Inaugural SIEL Conference, available at http://ssrn.com/abstract=1145537.

[9] Seychelles joined in September 2007.

common customs tariffs one does not need to be a genius at Venn diagrams to see the problems. The one positive development was that finally the five countries of the East African Community broke away from the ESA (in the case of Tanzania it was from SADC) to form their own EAC negotiating group – which actually ended up initialling (but not yet signing) an interim EPA.

Another problem was that negotiations went slowly because of disagreements both with the EU and, in some cases, among the ACP countries internally. For example, there was some disagreement about whether anything could be negotiated at the all-ACP level. The ACP initially wanted this for systemic issues (eg rules of origin, safeguard clause, dispute settlement mechanisms, etc) but the EU objected, saying that this would reduce 'flexibility'.[10] There were however mutterings about 'dividing and conquering' on the EU side.

Then there were disagreements between some groups and the EU on whether the EPAs were to be accompanied by development aid: basically the ACP side said that funding needed to be a part of the agreement, and the EU said that existing funding mechanisms (the European Development Fund under the Cotonou Agreement) should be sufficient. From my own experience, I have to say that I found these arguments not always put in the most convincing way. There was too little distinction drawn between additional funding for building export capacity and diversity, which does fit within the existing paradigm, and funding for the additional costs directly associated with the agreements, which does not.

I can give two examples of direct costs associated with trade liberalization. The first is trade remedies. If an ACP country is to liberalize agricultural exports, it needs to be able to protect itself against unexpected import surges. For this, there is the mechanism of safeguards clauses, countervailing measures and antidumping duties, but making use of these requires expertise – and this is expensive.[11] The second is the revenue function of tariffs. It is theoretically

[10] ACP/00/097/03, 24 Sep 2003, p 18.

[11] See Aprodev, *Solutions for dealing with import surges and dumping*, June 2008 (on file).

possible for tariffs need to be replaced by internal taxation, but in practice this does not happen. One study has found that while high income countries recover all of their lost tariff revenue, middle income countries recover only 45 to 60% of theirs, and low income countries (mainly least developed countries) recovered as little as 30% of their lost income. The Overseas Development Institute has calculated that Cote d'Ivoire will lose $83 million in tariff revenue in its first five years as a result of its newly initialled interim EPA.[12]

Finally, there was the problem that the texts that were being negotiated originated with the ACP countries, and these were basically just badly written.

All of these problems meant that as the December 2007 deadline approached, things became more critical for all groups except one: the Cariforum group was well organized and well on the way to initialling a proper EPA. For the others, a degree of panic set in. This led some to make late efforts to force the Commission to come up with alternatives, mainly along the lines of GSP and GSP+, but these were rejected. Commissioner Mandelson went on record saying 'there is no Plan B' (a common enough phrase in EU policy…). In other words, for any country that did not sign an EPA by the end of 2007 would have to be treated like any other developing country as of 1 January 2008.

In late November and December 2007 there was a lot of activity and the ACP countries split into a number of different categories, as I mentioned earlier.

1. 15 Cariforum countries initialled a 'full' Economic Partnership Agreement covering trade in goods and services as well a range of other issues. This agreement has a single liberalization schedule on trade in goods that applies to all CF countries.

[12] Stevens et al, *The new EPAs*.

2. 20 other countries initialled 'interim' EPAs on trade in goods only. Most – but not all of these – have now also been signed. These break down as follows.[13]

3. 44 LDCs now trade under the duty-free EBA program. These are not doing too badly, though for some of their processed products the stricter rules of origin are difficult to meet.

4. 10 non-LDCs (Nigeria, Congo (Brazzaville), Gabon and seven Pacific countries)[14] which now trade under the GSP program.

Here it is notable that these countries are comparatively little affected by being hit with higher GSP tariffs. In the case of the Pacific countries, this is because they trade relatively little with the EU anyway, and in the case of the African countries this is because they export mainly oil or minerals which enter the EU duty-free anyway. There are now GSP tariffs on 1.2% of Nigeria's exports, 3.5% of Congo's, and 6% of Gabon's.[15] This might not seem like much, but it can affect some sectors heavily. Nigerian cocoa production is a case in point. 90% of cocoa exports go to the EU, and with new GSP tariffs on cocoa Nigeria is now losing significant market share to EPA-initiallers Ghana, Ivory Coast, and Cameroon. According to the main industry body, Nigeria lost $360,000 a week as a result of GSP tariffs as a result of this loss of tariff preference.[16]

[13] This is conveniently set out in Stevens et al, *The new EPAs: comparative analysis of their content and the challenges for 2008 - Final Report* Overseas Development Institute, 31 March 2008, at 6-7.

[14] Cook Islands, Micronesia, Nauru, Niue, Palau, Marshall Islands and Tonga.

[15] Stevens et al, *The new EPAs: comparative analysis of their content and the challenges for 2008 - Final Report* Overseas Development Institute, 31 March 2008, p 68.

[16] Jean Boyle, 'Nigerian cocoa processors to lose millions' (2008) 7(2) Trade Negotiations Insights 4, at 4.

2. Substance of the EPAs and interim EPAs

(a) Trade in goods

i. Liberalization

The Cariforum EPA and the Interim EPAs are similar in their treatment of trade in goods and so I will speak about this first of all. The core point here is that these agreements all purport to meet the central requirement of Article XXIV GATT that trade barriers must be eliminated on 'substantially all the trade' between the parties entering into the agreement. The question is course is what interpretation one gives to this term. The EU's stated definition for these purposes is 90% of trade between the parties by volume. But not only that: the EU claims to be able to get to this figure by an asymmetrical calculation. What this means is that the 90% figure is achieved by averaging 100% on the EU side with a correspondingly lesser figure on the ACP side. Whether or not this is permissible is an open question.[17] But it is precisely the sort of thing that I would suggest can be defended by using Part IV GATT, as I discussed earlier.

In practice, the EPAs provide for a relatively high degree of liberalization. About half of the schedules provide for liberalization of between 80%-86%, though for Mauritius and the Seychelles stands at 96-98%. The figures are similar for percentage of tariff lines liberalized, thereby also apparently meeting the qualitative criterion preferred by some WTO Members. The main

[17] More radical is the idea that one can take into account terms of trade in calculating 'substantially all the trade'. Calculated on this basis, far less than 80% needs to be liberalized for many ACP countries: see Christopher Stevens and Jane Kennan, *ACP Tariff Policy Space in EPAs: The possibilities for ACP countries to exempt products from liberalisation commitments under asymmetric EPAs - Final Report* Overseas Development Institute, July 2007, p7. It is explained this way: 'Suppose that the EU imports €100 million of goods from an ACP state, and that the ACP state imports €50 million from the EU. The total trade between them is €150 million and 90 percent of this (i.e. €135 million) must be liberalised. If the EU removes tariffs on all of its imports from the ACP state, it is liberalising €100 million of trade. This leaves a further €35 million that must be liberalised by the ACP state in order to reach the target of €135 million of fully liberalised trade (i.e. 90 percent of the total). If the ACP state liberalises on €35 million, this is equivalent to 70 percent of its imports from the EU (of €50 million).'

anomaly is the East African Community, which will liberalize only 74% of tariff lines.[18]

The timing is also interesting. The final date of liberalization for almost all of these countries is 2022/2023, in other words 14 to 15 years following the foreseen date of application of the agreements. This is more than the recommended 10 years in the Understanding on Article XXIV, but not greatly more than the 12 years that seems to be standard in the practice of WTO Members. It seems unlikely that the development status of these countries would not be taken into account in their being an 'exceptional case' within the meaning of this Understanding justifying a longer implementation period. But before getting to the endpoint (which is the only point regulated directly by the WTO) there are great variations. Most stage their liberalization gradually, but for some it is heavily front-loaded. Cote d'Ivoire, for example, will liberalize 60% of its imports within 5 years.

What does one make of this? Well, from a legal perspective there is probably not too much to object to. These agreements basically meet the 'substantially all the trade' requirement under Article XXIV GATT.

ii. Contentious clauses

Given the speed with which these agreements were negotiated and initialled, it is not surprising that some negotiators – not to mention the outside world – have had second thoughts. Some of this obviously has to do with the liberalization package which I have just been discussing, but there is also a set of liberalization multiplier clauses which the EU, in a somewhat cheeky way, forced into the negotiations at the last stages of negotiations. These clauses are arguably not necessary under Article XXIV GATT, and have been termed the 'contentious clauses'. I want so say a few words about these clauses and what they mean in a systemic sense.

[18] These figures from ECDPM, *EPA Negotiations: Where do we stand?*, 31 January 2008; also for more detail (and some discrepancies) Stevens et al, *The new EPAs: comparative analysis of their content and the challenges for 2008 - Final Report* Overseas Development Institute, 31 March 2008.

There are three of these in particular that I will discuss: on tariff standstill, on export restrictions, and on most favoured nation treatment.

Tariff standstill. The EPAs (except for the Cariforum) all have clauses preventing the parties from increasing their applied rates to bound rates. In some of the agreements this applies to all goods; in others (CF, SADC, Pacific) only to negotiated products. This is not required under Article XXIV, which only asks that there be a credible plan and schedule leading to liberalization within a reasonable length of time. Indeed, paragraph 14 of the WTO Transparency Decision expressly foresees renegotiations on tariffs within an already notified regional trade agreement, providing that in this case the revised agreement needs to be renotified.

Export restrictions. Virtually all the EPAs have a ban on export restrictions. From a development perspective this is controversial, because many developing countries have traditionally use export taxes to keep raw materials at home with the aim of developing higher-value processing industries. Whether or not this is a good idea from an economic perspective is of course debatable, but this is what is commonly done. Now, under the GATT this is perfectly fine. The GATT does not ban export taxes at all, and while it does ban quantitative export restrictions (Art XI) at least has an exception for situations of critical shortages of food and other products. So how does one approach this under Article XXIV? The South Centre, which is an international organization that advices developing countries on trade negotiations, has taken the view that a ban on export restrictions is entirely unnecessary under Article XXIV and that there is not justification for including a ban on these in the EPAs. I disagree. To my mind there is no reason to exclude exports bans from the 'duties and other restrictive regulations of commerce' that have to be eliminated on substantially all the trade. But this also means that a total export ban is too much, and this for two reasons. First, these bans can still exist on an insubstantial amount of trade. And, second, except for the SADC EPA the clauses on export bans do not replicate the GATT exception for critical

shortages. What is more, it is allowed to, because that exception is one of the permitted exceptions to 'substantially all the trade' requirement in Article XXIV. So here the EU has indeed overdone it a little.

Most-favoured-nation treatment. Finally let me say a few words about the MFN clause in the EPAs. According to this clause, any more favourable treatment subsequently granted in FTAs with other countries must be granted to the other EPA countries. For the EU this applies to all new agreements; for the EPA countries it only applies to new agreements with developed countries or with developing countries with more than 1% share of world trade (India, China and Brazil). An MFN clause of this type is not entirely unique – one sees it a bit in services chapters (eg China-NZ FTA; US-CAFTA) – but it is rare in goods. The closest I have come to it is a soft MFN clause in the Pacific Agreement for Closer Economic Relations (or PACER) between Australia, New Zealand and a group of Pacific countries which requires negotiations, though not directly MFN treatment.[19]

This clause is upsetting because it allegedly inhibits future trade agreements with third countries, and in particular with Brazil, India and China. This argument has been put both on the ACP side and on the side of Brazil and India. The thinking is that these countries cannot now get any more out of the EPA countries than the EU got out of them: if the EPA country does this, it will have to give the same to the EU, so it simply won't give these concessions. What is also assumed is that the big three will not therefore be interested in trade agreements with the EPA countries. But I cannot see why not. They can still get the same deal as the EU did, and they will still give concessions to obtain this deal. On the other hand, in terms of more serious liberalization the argument does have some traction. Indeed, Australia and New Zealand have

[19] Oddly, the opposite also exists: Article 14 of the 1973 Panama-Costa Rica FTA agreement says that 'The Contracting Parties agree not to grant, through a most favored nation clause, the concessions they grant to each other through this Treaty now or in the future to third countries from outside Central America with whom they may sign trade treaties or conventions.' In September 2007 this FTA was upgraded, probably without this clause.

recently invoked the PACER MFN clause based on the EPA initialled by some Pacific countries.

This has not remained an idle complaint. In January 2009 Brazil complained about these MFN clauses in the WTO General Council. It did so on the quasi-legal basis that they contradicted paragraph 2(c) of the WTO Enabling Clause. This, you will recall, authorizes South-South preferential agreements that do not have to comply with normal Article XXIV GATT requirements. Brazil's claim is that the purpose of paragraph 2(c) was to promote South-South trade and that the MFN clause contradicts this purpose because it inhibits these agreements. What is one to make of this?

Well, interestingly, there are indeed two ways of looking at paragraph 2(c). The conventional way of looking at it is that it makes life easier for developing countries but not at the expense of other forms of liberalization. But during the 1970s there was also, in the UN, a strong movement in favour of what was called 'collective self-reliance' by developing countries. For example, UN General Assembly Resolution 3202 of 1974 setting out a Programme of Action on the Establishment of a New International Economic Order referred to the notion of 'collective self-reliance' and went as far as stating that developing countries should 'ensure that no developing country accords to imports from developed countries more favourable treatment than that accorded to imports from developing countries' and that '[w]herever possible, preferential treatment should be given to imports from developing countries and the exports of those countries'. This also gives some political background to the anti-MFN clause in the 1973 Costa Rica-Panama FTA I quoted before.

Having said all of this, in my view Brazil has no case. I have not found anything in the preparatory work on the Enabling Clause – including in statements from Brazil – that indicates that paragraph 2(c) was meant to privilege South-South liberalization at the expense of other forms of liberalization. This also makes sense. If Brazil is right, then paragraph 2(c)

would mean that multilateral liberalization cannot undermine South-South agreements. This is obviously problematic.

(b) Trade in services and other areas

i. Cariforum EPA

The EU-Cariforum EPA covers a whole range of issues beyond trade in goods. First of all it aims to be an 'economic integration agreement' in services within the meaning of Article V GATS. For this, the agreement has to meet the criterion of 'substantial sectoral coverage'. In fact, the EU liberalises 94% of sectors while for CARIFORUM countries it is 65% or 75% depending on their level of development. Whether this meets the requirement is an interesting question: we know even less about the GATS criteria than about the GATT criteria.

Second, the Cariforum agreement includes a raft of TRIPs-plus issues.

Third, it includes the traditional developed country wish-list of 'Singapore issues', which is to say investment, competition, transparency in government procurement and trade facilitation. These are called 'Singapore issues' because it was at the WTO Singapore Ministerial Meeting in 1996 that they were placed on the WTO agenda for further discussion. Except for trade facilitation they were taken off the agenda in August 2004 but they reappear in regional trade agreements, this being a good example.

Finally, and this is rather unique in terms of the EU's treaty practice, the agreement includes some fairly robust labour and environmental clauses. The strongest are in the investment title. The parties must take measures [to prohibit corruption]; to act in accordance with core labour standards [defined by the ILO]; and not to operate their investments in a manner that circumvents international labour or environmental obligations. This provision is fully subject to dispute settlement, including suspension of concessions. There is then a second set of provisions in a different title applicable to trade measures. Here the parties are obliged to 'seek to ensure' high levels of environmental

and labour protection and not to lower existing standards to encourage trade or investment. On the other hand, the parties also agree not to use labour standards for protectionist purposes. Unlike the provisions specifically linked to investment, while these are subject to dispute settlement the procedure is more unwieldy and sanctions are not available.

ii. Interim EPAs

To a significant degree, the Cariforum EPA presages future EPAs for the other ACP regions? It is worth recalling that the Cotonou Agreement was rather vague on this subject. But despite this the interim EPAs all contain so-called 'rendezvous clauses' promising negotiations on these subjects in the context of EPA negotiations. These differ a little, both in terms of subject matter and in terms of their deadline. All of them except the Pacific agreements include the Singapore issues, and for these all except EAC and ESA have a deadline of the end of 2008 for negotiating these topics. The deadline can be quite specific: for example, the SADC agreement contains a provision stating that '[n]o later than 31 December 2008 the Parties will complete negotiations on services liberalisation', and 'to negotiate an Investment chapter, taking into account the relevant provisions of the SADC Protocol on Finance and Investment, no later than 31 December 2008'.

Needless to say, these objectives are not entirely shared by the ACP negotiating parties. How this plays out this year will be interesting to watch.

F. Procedural issues: the EPAs and the WTO

The final topic I would like to address is the procedure that has been followed as far as the WTO is concerned. As I have mentioned, the EC has been granting preferences to all countries that initialled EPAs since 1 January 2008 by way of an EPA Regulation (Reg 1528/2007). This is regardless of whether those agreements were being applied reciprocally.

This is a problem from a WTO point of view. The basic problem is that the EU has not notified these EPAs to the WTO as it has to do under Article XXIV:7,

and more particularly under the 2006 Decision on Transparency for Regional Trade Agreements. This Decision states quite clear that a WTO Member is not permitted to grant any preferences, including by way of provisional application, until the RTA until it has been notified.

Now it seems fairly clear that the EU is in violation of these procedural WTO obligations and, to be fair, the EU barely bothers to hide this. This raises a valid legal point. But aside from this, the EU's position does make one wonder about the EU's high-pressure tactics in the negotiations leading up to the initialling of the EPAs in late 2007. Its claim was that it needed EPAs in place by the end of the year to meet the deadline of the expiry of the Cotonou Waiver. But then, when it gets these agreements, it does nothing with them. Apparently what is urgent in 2007 is not so urgent in later years.

Thank you!