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The EU-ACP (African, Caribbean and Pacific) Economic Partnership Agreements and their Implications for Ethiopia

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**Addis Ababa University,
Faculty of Law
School of Graduate Studies
January 2010**

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**Submitted in Partial Fulfillment of the Requirements for
the Master of Laws Degree (LL.M) at the Faculty of Law,
Addis Ababa University**

**Addis Ababa University,
Faculty of Law
School of Graduate Studies
January 2010**

Approval sheet by the Board of Examiners

The EU-ACP (African, Caribbean and Pacific) Economic Partnership Agreements and their Implications for Ethiopia

I hereby certify that this is my original work. Works of others included in this paper are properly cited.

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Table of Contents

	Page
Acknowledgement	i
Abbreviations and Acronyms.....	ii
Abstract	iii
Introduction	iv

Chapter One

Proposal of the Paper

1.1 Background of the Study	1
1.2 Statement of the Problem	8
1.3 Objective of the Study	10
1.3.1 General Objective	10
1.3.2 Specific Objectives	10
1.4 Research Questions	11
1.5 Significance of the Study	12
1.6 Research Methodology	12
1.7 Limitations of the Study	12

Chapter Two

Background to the EPA Negotiations, from Yaoundé to

Cotonou

2.1 The Yaoundé Convention	14
2.2 The Lomé Conventions	16
2.2.1 Objectives and Principles of the Lomé Conventions	18
2.2.2 The new areas of cooperation	22
2.2.2.1 The STABEX systems	23
2.2.2.2 Industrial Cooperation.....	26
2.2.2.3 Trade Cooperation	28
2.2.2.4 Financial Cooperation	29

2.2.2.3 The ACP countries performance under the Lomé Conventions	30
2.3 Attempts to develop a new cooperation model between ACP and EU	32
2.4 The Cotonou Cooperation Agreement & its Legal basis for EPA Negotiation.....	34

Chapter Three

Review of the Economic Partnership Agreement (EPA) negotiations.....	41
3.1 Phases of Negotiating EPAs	43
3.2 EPA Negotiation in the Eastern and Southern Africa (ESA) Region	45
3.3 The ESA schedule for the negotiations	46
3.4 The Negotiating Clusters	47
3.4.1 Development issues	48
3.4.2 Market Access	53
3.4.3 Agriculture and Fisheries	55
3.4.4 Trade in Services	57
3.4.5 Trade –Related Areas	59
3.5 The structure of the ESA negotiation	61
3.6 The Status of the negotiation.....	64

Chapter Four

The Interim Agreement of the EPAs and WTO Compatibility

Issues

4.1 The Interim Agreement of the EPAs	68
4.1.1 Objectives and Principles of the Interim EPA	69
4.1.2 Initialling and Signing the Interim EPA	72
4.1.3 The development focus in the interim EPAs	77

4.1.4 Market access in the interim EPAs	82
4.1.5 Interim EPA in the ESA & EAC configuration	84
4.2 WTO Compatibility Issues of the EPAs	88
4.2.1 Neutrality to third parties	92
4.2.2 The Coverage of Regional Trade Agreements	93
4.2.2.1 Substantially All the Trade	93
4.2.2.2 “Other restrictive regulations of commerce” on “substantially all the trade”	98
4.2.3 Transition periods	101

Chapter Five

Ethiopia’s Main Concerns with the Negotiation of the Economic Partnership Agreement and the way forward

5.1 The MFN Provisions in the EPAs	105
5.2 Development Cooperation	110
5.3 Scope of Liberalization	116
5.4 Use of Quantitative Restriction	124
5.5 Export Tax	126
5.6 Customs Valuation Agreement.....	128
5.7 Loss of government revenues and the resulting dwindling of governments’ abilities	130
5.8 Competitiveness of Ethiopian products following liberalization	136
5.9 Substantial adjustment costs Ethiopia will face when opening for EU exports	141
5.10 Issues of the Regional Integration	145
5.11 WTO+ Issues in the EPA Negotiations	151

Conclusion and the way forward

I. Conclusion	156
II. The Way Forward	170

Bibliography

Acknowledgement

First and for most, I would like to thank the Almighty God who has always been on my side in all the ups and downs that I have been going through. Thank you so much my Lord, You are such a Wonderful Father!!!

I would like to express my deepest gratitude to my advisor Dr. Fikremarkos Merso who has read and commented on my draft works line by line and gave the most invaluable comments and an unforgettable & extraordinary advice for all my future works. His ideas and constructive comments were exceptionally superior, the most novel and exemplary.

I am greatly indebted to Mr. Stephen N. Karingi and Ato Mengesha Tadesse also. As I am thinking back all what they did for the successful completion of this research, it really amazes me a lot. They didn't hesitate to give me almost everything in their possession that may be of some help for this research and never got tired to give their constructive suggestions.

Abbreviations and Acronyms

ACP	African, Caribbean and Pacific Countries
AU	African Union
CAP	Common Agricultural Policy
CARIFORUM	Caribbean Forum of the ACP Countries
COMESA	Common Market of Eastern and Southern Africa
EAC	East African Community
EBA	Everything But Arms Initiative
EC	European Community
EDF	European Development Fund
EEC	European Economic Community
EPAs	Economic Partnership Agreements
ESA	Eastern and Southern Africa
EU	European Union
ECOWAS	Economic Community of West African States
FTA	Free Trade Agreement
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GSP	Generalized System of Preferences
HS	Harmonized System
IMF	International Monetary Fund
LDC	Least-Developed Country
MFN	Most Favored Nation
NDTPF	National Development Trade Policy Forum
RTA	Regional Trade Agreement
RNF	Regional Negotiating Forum
SACU	Southern African Customs Union
SADC	Southern African Development Community
SAPs	Structural Adjustment Programmes
SDT	Special and differential treatment
SPS	Sanitary and phytosanitary standards
TBT	Technical barriers to trade
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WTO	World Trade Organization

Abstract

The Cotonou Agreement foresees setting up free trade, Economic Partnership Agreements (EPAs), between the EU and regional ACP configurations. Consequently, the preferential system for ACP export products entering the EU market had to be replaced, beginning 1 January 2008, by a trade agreement based on reciprocity in a manner that is WTO compatible.

Owing to the fact that most countries didn't sign this agreement on the basis of the time table, it was not possible to put this agreement in to force and hence what is called the Interim Economic Partnership Agreement has been initialed and signed by various ACP countries to avoid trade disruption that may result from the expiry of the waiver from WTO in December 31, 2007.

Ethiopia didn't sign any of these agreements until today and have been negotiating to be party to it. But there have been divergence in wide range of issues, most of which are the major reasons for the country to involve in this negotiation, between the EU and Ethiopia. These specially include: the MFN provision, development cooperation, scope of liberalization, use of quantitative restriction, export tax, customs valuation agreement, loss of government revenue, competitiveness of Ethiopian products following liberalization, substantial adjustment costs the country will face, issues of regional integration and WTO+ issues in the negotiation. Understandably, all of these issues have their own very significant bearing on the market as well as overall economic activity of the country and hence it is quite essential to have clear and sound agreement that protects the best interest of the country on these issues.

Introduction

After the Treaty of Rome which is signed in 1957 indicating the beginning of a special co-operation in terms of trade and economic support measures between the African, Pacific and Ceridian (ACP) countries and the EU, the African-EC partnership was launched on a contractual basis in two important conventions: Yaoundé I and Yaoundé II, both of which concluded in the Cameroonian capital. Later on, the Lomé conventions succeeded the Yaoundé II Convention beginning from the conclusion of Lomé I in 1975 governing ACP-EU relationship for the next five years. This first agreement was then succeeded by additional three conventions, Lomé II-1980-1985 and Lomé III-1985-1990, each put in place for five years and the fourth one, Lomé IV-1990-1995 lasted for ten years until the Cotonou is signed in 2000.

The Lomé conventions, which have governed cooperation between EU and ACP for 25 years, were characterized by their innovativeness. These agreements broke with a tradition that merely reproduced the colonial relationships that formed the basis of a new development cooperation paradigm by laying emphasis on the need for the countries of the south to develop autonomously and by enabling ACP countries to formulate their own development choices.

Under these successive Lomé conventions, the EU granted a preferential trade regime to ACP countries through various ways. These include trade preferences, commodity protocols and other instruments of trade cooperation i.e. financial and technical aid. Generally the ACP-EU co-operation can be summed up in to two main pillars as economic and trade co-operation; and aid

The preferential market access to the ACP countries was provided on the basis of Article 7 the Lomé Convention which provides that "...the ACP States shall not be required, for the duration of this Convention, to assume, in respect of imports of products originating in the Community, obligations corresponding to the commitments entered into by the Community in respect of imports of the products originating in the ACP States." Hence the ACP states had no obligation to offer market access to products originating from the community. This is basically made by taking in to account the present development needs of the ACP states, i.e. different conditions of the two parties.

But later on there came about some situations that have urged the EU and ACP countries to embark up on a broad debate on the future of relations between them. The major ones are: the closeness of the expiry of the Lomé Convention in February 2000, the contractual obligation to embark on the next negotiations between the two parties at least 18 months before the expiry of the Lomé Convention, as well as the need to define, with in the context of strengthened disciplines of the WTO, a trade cooperation framework wholly in conformity with the new multilateral rules.

As a result, the Cotonou Agreement was signed between these two parties on 23 June 2000. This is a comprehensive aid and trade agreement concluded between 77 African, Caribbean and Pacific (ACP) countries on the one hand and the European Union and its member states on the other and it builds on twenty-five years of ACP-EU co-operation under four successive Lomé Conventions. The major distinguishing features of this agreement from its predecessor, the Lomé Convention, are: first, information and consultation of non-state actors such as the civil society in the process of programming of aid and program implementation; and the second one is the establishment of free

trade arrangements called EPAs, Economic Partnership Agreements, in the ACP region

This Agreement foresees setting up free trade, Economic Partnership Agreements (EPAs), between the EU and regional ACP configurations. Consequently, the preferential system for ACP export products entering the EU market had to be replaced by a trade agreement based on reciprocity in a manner that is WTO compatible. To this end, the agreement extended the lifetime of the non-reciprocal preferential trade arrangements of Lomé IV for a transitional period of eight years, ending on 31 December 2007, during which the negotiation of new trading arrangement called EPA will be finalized and replace the Lomé IV trade provisions beginning 1 January 2008.

Unfortunately, the agreement couldn't be concluded according to its time table in most of the ACP states and then came about what is called the Interim Economic Partnership Agreement. This is an agreement that predominantly the non- LDC ACP states have initialed with the view to avoid trade disruption that may result to their economy following the expiry of the waiver from WTO granted to finalize this agreement. Because EU will no longer be in a position to proceed with the preferential market access to these countries since the preference had to be replaced by a new WTO compatible partnership agreement.

Ethiopia has been negotiating this agreement under the regional group of Eastern and Southern African Countries since its inception. The country also belongs to the group which didn't sign the Interim EPA and chose to negotiate on the full EPA. Hence currently the country is undertaking the negotiation on the full EPA and has been dealing with several fundamental issues that need to be settled as a precondition to sign the agreement.

This paper, therefore, begins with describing the background of the cooperation between EU and ACP beginning from the Treaty of Rome up to the Cotonou Agreement in the second chapter. The third chapter is devoted to the negotiation of the Economic Partnership Agreement beginning from 2002 up to 2007. The fourth chapter analyzes the fundamentals of the Interim Economic Partnership Agreement and also the WTO conformity of EPA. Finally, Chapter five will elaborate the contentions issues in the negotiation of the EPA from Ethiopian perspective and the paper ends with conclusion and recommendations based on the findings.

Chapter One

Proposal of the Paper

1.1 Background of the Study

Co-operation between the ACP (African, Caribbean and Pacific) countries and the European Union (EU) dates back to the Treaty of Rome of 1957 that established the European Economic Community (EEC).¹ The 1st agreements between the ACP and the EEC countries were the Yaoundé I (1963-69) and the Yaoundé II (1969-75), which were signed between the French speaking countries and the EEC.² Then after Lomé I (1975-80) was signed between 46 ACP countries and 9 EEC member states by replacing Yaoundé II. This the first Lomé Convention was a precursor of three more consecutive Convention, i.e. Lomé II-1980-1985, Lomé III-1985-1990 and Lomé IV-1990-1995.³

The major objectives of all the Lomé Conventions was stated as fostering the development of the colonies and the overseas territories. To this end, EU granted a preferential trade regime to ACP countries through trade preferences, commodity protocols and other instruments of trade cooperation, i.e. financial and technical aid, through these successive Lome conventions. Generally ACP-EU co-operation had two major pillars;

1. Treaty establishing the European Economic Community, Rome, 25 March, 1957. http://openlibrary.org/b/OL22179945M/Treaty_establishing_the_European_Economic_Community_Rome_25_March_1957. Visited on Oct. 10, 2009

2. Wolfgang Benedek, The Lome Convention and the International Law of Development: a concretization of the New International Economic Order, [Cambridge University Press, Journal of African Law](http://www.jstor.org/stable/744451?seq=1), Vol. 26, No. 1 (Spring, 1982), pp. 74-93 <http://www.jstor.org/stable/744451?seq=1> Visited on September 2009

3. Ibid

the first one is economic and trade co-operation and secondly, aid. Specially under the aid component, Lomé cooperation provided for predictable aid flows over a 5-year period from EEC.⁴

This trade cooperation, as per Article 1 of the Lomé Convention, was designed to be implemented taking into account the respective levels of development of these countries, and in particular the need to secure additional benefits for the trade of ACP states, in order to accelerate the rate of growth of their trade and improve conditions of access of their products to the EU market so as to ensure a better balance in the trade of the contracting parties. As a result, products originating in the ACP states were imported into the EEC duty free.

Something very impressive about this agreement, seen from the ACP countries point of view, is that, despite the declaration in the Preamble of the Convention that provides for the establishment of cooperation on the basis of complete equality between partners, the Convention has recognized inequality of the parties.⁵ This is partly because throughout the negotiations leading to the signing of the Lomé convention, the ACP states emphasized that they were not equal to the EEC. This is especially well expressed by the Guyanese Minister of Foreign Affairs who stated in the inaugural meeting that: “Reciprocity between those who are unequal in economic strength is a contradiction in terms. In contemporary international economic relations, Aristotle’s dictum that ‘justice requires equality between equals’ must surely mean between those who are unequal in economic strength. Equity itself demands non-reciprocity”.⁶

4. Jane S. Nalunga and Douglas Kivumbi, *The Economic Partnership Agreements: Implications and Way Forward; A Case for Uganda*, October 2004, P.12
www.seatini.org/.../The%20EPAS%20Implications%20and%20way%20forward.pdf

5. Supra note 2

6. Supra note 4

Unfortunately, the objectives of the Lomé conventions were not attained in most ACP countries for the reasons both within the ACP and the EU countries; and within the Convention itself.⁷ Hence, in 1998, negotiations for a successor agreement to the Lomé conventions were launched and these culminated into the signing of the Cotonou agreement in 2000.⁸

This agreement is basically the successor of the agreement to Lomé Conventions and is a comprehensive aid and trade agreement concluded between 77 ACP countries and the European Union. It was signed on June 23, 2000 in Cotonou (Benin) and is therefore commonly referred to as “the Cotonou Agreement”. This Agreement builds on twenty-five years of ACP-EU co-operation under 4 successive Lomé Conventions. The agreement lasts for 20 years and contains a clause allowing it to be revised every 5 years.⁹

The central objective of the partnership is clearly indicated in Articles 1&2 of the first Chapter of the ACP-EU Partnership Agreement. As per these provisions, the main objective of the partnership is to reduce and eventually eradicate poverty while contributing to sustainable development and to the gradual integration of ACP countries into the world economy. This agreement also provides for the establishment of a free trade arrangements called the Economic Partnership Agreements (EPA) in the ACP region.¹⁰

7. Amin Alavi, Peter Gibbon and Niels Jon Mortensen, EU-ACP Economic Partnership Agreements (EPAs): Institutional and Substantive Issues, Copenhagen 2007, p. 52
www.diiis.dk/graphics/Publications/Andet2007/pgi_EPAs.pdf

8. Ibid

9. Tine Van Criekinge, Implications of Economic Partnership Agreements (EPA) on the EU-ACP Partnership and the possibility of ACP leverage, Paper presented at the GARNET Conference “The European Union in International Affairs”, April 2008,
http://www.ies.be/files/repo/conference2008/EUinIA_I_3_VanCriekinge.pdf

10. Ibid

This free trade agreement, i.e. the Economic Partnership Agreements (EPAs), will be set up between the EU and different regional ACP configurations.¹¹ For this purpose, it extended the lifetime of the non-reciprocal preferential trade arrangements of Lomé IV for a transitional period of eight years, ending on 31 December 2007. Consequently, beginning from 1st of January 2008, the preferential system for ACP export products entering the EU market were to be replaced by a trade agreement based on reciprocity in a manner that is WTO compatible.¹²

As a result of this new demand for a reciprocal trading agreement, Ethiopia will be forced to liberalize its trade regime. Meaning, the country has to dismantle its import tariff and customs duties, remove all non-tariff barriers to trade, and provide wider access to its markets to European goods and services.¹³

In September 2002, negotiations of these EPAs were formally launched. These negotiations were carried out in two phases; the first phase is at the pan- ACP-EU level dealing with issues: to agree on principles and approaches to be adopted, the structure and the modalities for the negotiation and cross cutting issues of common interest for the ACP; and the second phase was to begin from September 2003 for negotiations on specific regional EPAs.¹⁴

11. Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities, (Economic Commission for Africa, Addis Ababa, Ethiopia, 2006) p.5

12. Ibid

13. Tadele Ferede, et al, The impact of COMESA and EPA trade liberalization on workers of Textiles and Leather Industries in Ethiopia, (Confederation of the Ethiopian Trade Unions, Ethiopia, 2007) p.2

14. The ESA-EU EPA Negotiations: Technical Issues in the 6 Negotiation Clusters, a guide for ESA countries, p. 27

www.seatini.org/publications/ESA-EU%20EPA%20negotiations.pdf

Basically there is a strong and convincing argument that EPAs have to be seen in the context of the overall objective of the Cotonou Agreement, ensuring sustainable development and economic growth in ACP countries that will contribute to poverty eradication.¹⁵ Needles to mention that, these nearly 80 ACP countries negotiating with EU are, for most part, the former colonies of Europe and have been under the condition that has substantially affected their economic growth. It is not surprising, therefore, that they are under a very atrocious poverty seriously seeking sustainable development and economic growth. So it is quite important that EPA has to have the same objective essentially focusing on the improvement of economic condition of these countries first and for most.¹⁶

However, there are four overriding EPA principles, including the one making the realization of sustainable development and economic growth of these ACP countries hardly possible. The first principle is the principle of reciprocity; secondly, there is the principle of regionalism, the third principle is Special treatment for Least Developed Countries (LDCs) and finally WTO compatibility.¹⁷

Ethiopia is negotiating this agreement being grouped in to the Eastern and Southern Africa (ESA) group which comprises of Burundi, Comoros, DR Congo, Djibouti, Eritrea, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Uganda, Zambia and Zimbabwe.

15. Supra note

16. Ibid

17. Unequal Partners: How EU-ACP Economic Partnership Agreements (EPAs) could harm the development prospects of many of the world's poorest countries, September 2006, Oxfam Briefing Note, p.2
<http://www.oxfam.org.nz/imgs/whatwedo/mtf/unequal%20partners.pdf> Visited on Jun, 2009

In preparation for the negotiations, this ESA Group came up with a Roadmap called Eastern and Southern African Region Roadmap for Negotiations on February 5, 2004 to guide the negotiations. This includes issues regarding the preparations for the negotiations, the negotiating structures, coordination of the negotiations and indicative schedule for the negotiations.¹⁸

The preparation stage for the negotiations, as provided in the roadmap, indicated that three main sets of activities are to be undertaken. First, making the national impact assessment studies and the establishment of National Development and Trade Policy Forums, with work program and agenda at the national level.¹⁹ The second and third activities will be undertaken at the regional level and these are: conducting a series of regional studies upon which the negotiating briefs for the negotiating teams will be based and the establishment of the Regional Negotiating Forum; and capacity building and training in trade negotiations, respectively.²⁰

It has been indicated in the schedule of the negotiation that the ESA will have three phases. The first phase is setting of priorities and negotiating procedures to be undertaken from March to August 2004.²¹ This is supposed to be the preparatory period for the negotiations as provided for by the Cotonou Agreement Art. 37(3) and was also to be used for capacity-building in the public and private sectors of ACP countries, including measures to enhance competitiveness, for strengthening of

18. Mamo E. Mihretu Ethiopia and EPA Negotiation, Review and Key Issues Ahead, Draft Final Report, 30 April 2008 p. 8

19. Supra note 4, p.17

20. Ibid

21. Ibid

regional organizations and for support to regional trade integration initiatives. Assistance to budgetary adjustment and fiscal reform, as well as for infrastructure upgrading and development and for investment promotion were also to be provided where deemed appropriate.²²

The second phase of the negotiation, which was to be launched from September 2004 – December 2005, was for substantive negotiations. These substantive negotiations are to take place in the six clusters: Development issues, Market Access, Agriculture, Fisheries, Trade in Services and Trade-related Issues. Negotiations on these identified clusters were to be carried out at two levels i.e. at Ministerial and Ambassadorial levels.²³

Finally, the third phase, which is scheduled to take place from January 2006 – December 2007, is for continuation and finalization. This means, substantive negotiations will continue, if necessary, and areas of disagreement will be revisited and compromises reached with the expectation to finalize, ratify and enact all the necessary legislations in order to allow the EPA to be in place on 1st January 2008 at the latest.²⁴

Obviously the agreement didn't proceed according to its time table for different reasons though there are some countries that have signed the agreement according to the plan. It is therefore of great importance to raise and have a clear position on the major contentious issues from the side of Ethiopia in relation to the newly adopted principles of the EPA at this particular time. Meaning, issues relating to development, scope of

22. Ibid

23. Id p.18

24. Ibid

liberalization, adjustment costs, regional integration, quantitative restrictions, export tax, custom valuation agreement and others are the areas in which the country will be most affected and hence need a particular attention to be given to.

1.2. Statement of the Problem

The concerns and difficulties facing African countries in general are clearly set out in both the Cairo and Nairobi Declarations on Economic Partnership Agreements adopted by the African Union Ministers of Trade in 2005 and 2006 respectively.²⁵ The major ones include: failure of the negotiations to have a development focus, the imbalance in the negotiations towards a focus on trade liberalization, and lack of appreciation of the major adjustment challenges that African economies would face in implementing EPAs.²⁶

Apart from these, the pace of negotiations has been greatly slowed by the time it takes for the EU to respond to issues that are formally presented to it and also there are problems of being inflexible.²⁷ From the side of the African negotiators, it has also been witnessed that there is lack of regular coordination meetings in each of the regions at the technical level.²⁸

25. AU (2007), "Brief on Negotiations for Economic Partnership Agreements", African Union, 26 May 2007

www.africa-union.org/root/au/AUC/.../TI/.../EPA_brief_2_AUC_May_07.pdf

26. Ibid

27. Supra note 17

28. ADDIS ABABA MINISTERIAL DECLARATION ON ECONOMIC PARTNERSHIP AGREEMENTS NEGOTIATIONS (AU Conference of Ministers of Trade 3rd Extraordinary Session, 15-16 January 2007, Addis Ababa, Ethiopia, Ext/Exp/Trade/Decl.2(III)) Visited on October 2009

http://www.africa-union.org/root/AU/AUC/Departments/TI/EPA/DOC/EPA_Declaration_Final_English.pdf Visited on October 2009

Consequently there happened to emerge divergences between the EU and Africa negotiating groups on several key issues, which still remain unresolved. These include, among others, divergences in the areas of regional integration and risks that EPAs pose, coordination among negotiating groups, WTO compatibility etc.²⁹ African negotiating groups want also the agreement to duly address potential adjustment costs, rules of origin, health and technical standards, regional coherence between the Doha Round and EPA negotiations etc. It, however, was not easy to have EU accept those issue included as a subject matters of the negotiation.³⁰

One of the issues raised as a problem of specially the Lomé Conventions is that they are non-WTO compatible. As a result, there have been proposed two alternatives making EPA WTO compatible. The first one is making some necessary changes to the EPA so as to make it WTO compatible; or the second option is, extending the advantages to all the WTO member countries so as to obey the principle of Most Favored Nation in WTO agreement.³¹ Both parties have accepted that the first option is much more preferable for the free trade agreement between the two groups and had chosen this over extending the preference to all WTO members.³²

But there came about another major problem that has to be addressed when making EPA WTO compatible. There is a requirement in Article 24 of GATT that in such kinds of free trade agreements, “substantially all

29. Supra note 17

30. Ibid

31. Marceau G. and Reiman C., When and How is a regional trade agreement compatible with the WTO? Legal issues of Economic Integration, Kluwer Law International, 2001, p.23
jiel.oxfordjournals.org/cgi/content/full/8/3/691

32. Ibid

the trade” must be liberalized between the two countries. This, according to EU, means 90% of the trade has to be liberalized between the two parties which is extremely difficult for specially countries like Ethiopia to liberalize this amount and keep its economy viable.

In addition, there are also issues relating to allocating additional fund over and above EDF, transition period, loss of government revenue, the need to make very wide structural adjustments and also other related issues that have to be sufficiently addressed in the negotiation. Hence it is of great importance that the Ethiopian government and also the negotiators representing the country need to make sure that these fundamental issues are addressed in the agreement. All the issues that have been raised above have the potential to lead to an unbearable burden to the already weak Economy and may lead it to collapse all together. Hence it is deemed essential to have a look at some of the major contentious issues and their possible impact on the economy so that the negotiators representing Ethiopia in this negotiation would make a sound decision before the agreement is signed.

After so many decades of absolute poverty, country Ethiopia is making all possible efforts to change the situation. Therefore, this agreement has to be molded in a manner that supports these endeavors and the individuals negotiating the agreement by representing the country need to make an informed decision. Hence an identification of these very crucial areas will be made there by suggesting the best possible position the country should take so as to come up with something meaningful for the country as a whole.

1.3. Objective of the Study

1.3.1 General Objective

The general objective of the study is to undertake a country-specific study of the implications of signing the Economic Partnership Agreement for Ethiopia, proposing informed and objective options as well as indicating the advantages that have to be secured as a bottom line from signing the agreement.

1.3.2 Specific Objectives

Describing the Economic Partnership Agreement, all stages and groups of negotiation and its current status.

Assessing the implications of agreements to be reached on various contentious issues and suggesting the best available option for the negotiators representing Ethiopia in the negotiation.

Examining WTO compatibility of the Economic Partnership Agreement.

Indicating the challenges and current status of Ethiopia in the negotiation of EPA and pinpointing issues fundamental to Ethiopia that have to be secured for signing the agreement.

1.4 Research Questions

This research will strive to seek an answer to the issues that will possibly be raised as a question in relation to the Economic Partnership Agreements specially in relation to the negotiation of Ethiopia. But the major ones include:

What particular benefit would the ACP countries in general and Ethiopia in particular gain out of signing the agreement?

What are the stages of negotiating the agreement and what is the current status of Ethiopia in the negotiation process?

What are the main problems in the process of negotiation and what would be its possible implication?

What is the relationship between EPA and the agreement of WTO, and how can they be compatible?

What would be the implication of signing this agreement to Ethiopia?

What are the advantages that Ethiopia should necessary need to secure out of signing the agreement, if it is to be signed?

1.5 Significance of the Study

The major benefit of this research will be the government officials and also trade experts in charge of negotiating the agreement. This is mainly because the research will explore currently existing situation in the country as well as the experience of other courtiers that are in somehow similar situation as Ethiopia. So the research will present a kind of comprehensive picture of the agreement in the issues that are deemed to be of great importance and its implications in its economic and legal dimension.

This research will also be a good reference for all other researchers interested in conducting further research in the area.

1.6 Research Methodology

Intensive analysis of the Economic Partnership Agreements and all other agreements preceding it will be made as much as possible.

The articles and commentaries available on the interpretation of the agreement will be analyzed specially from the African countries perspective.

Interviews will be made with high government officials in charge of negotiating the agreement and also trade experts preparing the documents.

1.7 Limitations of the Study

There are not adequate publications by different scholars on this particular subject matter except few works done by the UNECA. Specially on the case of Ethiopia, it was hardly possible to find any comprehensive study in this area and hence there was no choice other than relying on the few that are available and also taking the case of other African countries in relatively the same condition as Ethiopia.

It was not possible to get the attention of some individuals in the Ministry of Trade and Industry who could have given some more information for this research by way of interview as they claim to be extremely busy with their own work; and hence including the idea of few that were willing was the only option available to support the analysis of the agreement.

Chapter Two

Background to the EPA Negotiations, from Yaoundé to Cotonou

2.1 The Yaoundé Convention

The Treaty of Rome¹ signed in 1957 for establishing the European Economic Community (EEC) has indicated the beginning of a special co-operation in terms of trade and economic support measures between the African, Pacific and Caribbean (ACP) countries and the EU.² Since that time, the EEC agreed to apply a favorable economic treatment to African countries and has been making endeavors to that effect.³

The period after independence, in 1960's, Europe sought to strengthen its relations with the former colonies and to bolster their development process and, as a result, some African countries negotiated with the EEC for the continuation of their preferential economic relations.⁴ The special trade and economic support measures offered in the Treaty of Rome was immediately followed by setting up of the first European Development Fund (EDF) in 1958 to finance economic and social development projects, mostly in the then French territories.⁵ This gave rise to the beginning of the EU-Africa partnership, under which the European Community, then the European Union, and the group of African, later joined by Caribbean and Pacific countries, agreed on a frame work of economic, cultural and

1. Treaty establishing the European Economic Community, Rome, 25 March, 1957. http://openlibrary.org/b/OL22179945M/Treaty_establishing_the_European_Economic_Community_Rome_25_March_1957. Visited on Oct. 10, 2009

2. Stephen Karingi et al, The Economic and Welfare Impact of the EU- Africa Economic Partnership Agreements, (ATPC, Economic Commission for Africa, March 2005) p. 8

3. Ibid

4. Ibid

5. Ibid

political cooperation.⁶

The African-EC partnership was launched on a contractual basis in two important conventions. The first association of 18 African states and EEC member states (1963-69) Yaoundé I, was drawn up in the Cameroonian capital.⁷ The Convention contained provisions on a reciprocal and non-discriminatory trade preferences and financial aid with the trade provisions pursuing the trade arrangement of pre-independence time by specially giving a high profile to agricultural development as its peculiar nature.⁸

Yaoundé II, on the other hand, was signed in July 1969 and lasted up to 1975 having the main theme of increasing the European Development Fund resources for development projects in the ACP countries.⁹ On the top of that it has prolonged the reciprocal non-discriminatory trade arrangements.¹⁰

EEC-African partnership has introduced a major reform after the expiry of the second Yaoundé convention when the First ACP_EEC Convention signed at Lomé (28 February 1975), usually referred to as Lome Convention I, replaced it.¹¹ In this time, the EEC had experienced its first major enlargement following the accession of the United Kingdom which

6. Ibid

7. Jane S. Nalunga & Douglas Kivumbi, THE ECONOMIC PARTNERSHIP AGREEMENTS. IMPLICATIONS AND WAY FORWARD. A CASE FOR UGANDA. P.6 www.seatini.org/.../The%20EPAS%20Implications%20and%20way%20forward.pdf Visited on Aug. 2009

8. Ibid

9. Sylvia Hangen-Riad, Finding your way through the Cotonou agreement August 2004, p.2 www.fes-tz.de/doc/finding-your-way-through-the-cotonou-agreement.pdf, Visited on Nov. 20, 1009

10. Ibid

11. Karingi, et al, Supra note 2

was highly significant in that countries that had privileged trade relations with Great Britain in the Common Wealth had to introduce a shift in paradigm.¹² This UK's accession to the EEC also became a strong incentive for some Anglophone countries to engage in to a privileged partnership with the EEC. In addition, it has also played a crucial role in effectively creating the ACP group since it was extended to 46 members including, for the first time, Carribbean and Pacific countries.¹³

2.2 The Lome Conventions

A series of agreements have been signed beginning from 1975 in the capital of Togo. The first Lome convention was signed in 1975 and governed ACP-EU relationship for the next five years. This first agreement was succeeded by additional three conventions, Lome II-1980-1985 and Lome III-1985-1990, each put in place for five years and the fourth one, Lome IV-1990-1995 lasted for ten years.¹⁴

Concluded for the first time in February 1975 between the ACP countries and the EU and renewed every five years since, the Lome conventions were characterized by their innovativeness.¹⁵ These agreements broke with a tradition that merely reproduced the colonial relationships that formed the basis of a new development cooperation paradigm by laying emphasis on the need for the countries of the south to develop autonomously and by enabling ACP countries to formulate their own

12. Ibid

13. Ibid

14. Stephen Karingi et al, Assessment of the impact of the Economic Partnership Agreement between the ECOWAS countries and the European Union, (ATPC, Economic Commission of Africa, December 2005) p. 4-5

15. Ibid

development choices.¹⁶

The agreements have also recognized the right of the ACP countries to formulate autonomous development model by placing at forefront the freedom of the contracting states to formulate their development policies and choices.¹⁷

The primary reason in signing all the four Lome agreement is stated as fostering the development of the former colonies of the EU and the overseas territories.¹⁸ Basically the imperial powers believed that it is important to maintain the apron strings with the ACP countries in the post colonial era and this ultimately initiated the signing of these agreements. These Lome conventions, which are updated every 5 years form 1975, were to govern the cooperation between the ACP countries and EEC for the next 25 years.¹⁹

Seen from practical point of view, under these successive conventions, the EU granted a preferential trade regime to ACP countries through various ways. These include trade preferences, commodity protocols and other instruments of trade cooperation, i.e. financial and technical aid. Generally the ACP-EU co-operation can be summed up in to two main pillars as economic and trade co-operation; and aid.

16. Ibid

17. Karingi, et al, Supra note 2

18. San Bilal and Kathleen Van Hove, An overview of the ACP-EU negotiations: issues and timeframe

www.tcd.ie/.../Bilal%20Van%20Hove%20Overview%20of%20ACP%20EU%20negotiations

.. Visited on 12 Aug. 1009

19. Ibid

2.2.1 Objectives and Principles of the Lome Conventions

Article 1 of the Convention signed at Lome on February 28th of 1975 sets down the major purpose of the convention. It begins with delimiting the scope of the convention by the phrase used in the beginning of the provision saying 'In the field of trade cooperation'. With in this context of trade cooperation, the stated major objective of the convention was to promote trade between the Contracting Parties taking account of their respective levels of development and in particular the need to secure additional benefits for the trade of ACP States. This ultimately aimed at accelerating the rate of growth of their trade and improving the conditions of access of their products to the market of the European Economic Community so as to ensure a better balance in the trade of the Contracting Parties.²⁰

However, this treatment was not without any limitation. Article 2 of this Lome convention provides that only products originating in the ACP states were to be imported into the Community duty free and Title I of Protocol No. 1 annexed to the 1975 Lome Convention provides the definition of the concept of "originating products" in a way that looks some how stringent.

It sets out a specific qualification for any products to be treated as 'originating products' from the ACP states. As a result, there has been a limitation on ACP countries from purchasing parts of products from third countries other than EEC countries. The outcome was serious limitation of ACP products exported to EEC countries and this has discouraged the

20. Alessandro Spaventa, The Lomé Convention Objectives, Instruments, Results, Federico Caffè Centre Research Reports, Research Report 2/1999
www.ruc.dk/federico/publications/spaventa_2_99.pdf/ Visited on July 2009

growth of manufacturing and processing industries as well as undermined the development of integrated economies within the ACP states.²¹

The convention, in Article 4, also entitles the Community to take the necessary safeguard measures against imports from the ACP under some exceptional cases expressly stated. Hence the Community is authorized to make prohibitions or restrictions on imports, exports or goods in transit on conditions of: public morality, public policy or public security; the protection of health and life of humans, animals and plants; the protection of national treasures possessing artistic, historic or archaeological value or the protection of industrial and commercial property which will be implemented in a manner which doesn't constitute a means of arbitrary discrimination or a disguised restriction on trade.

On the other hand, the convention, in Article 10, has also entertained the cases where 'serious disturbances occur in a sector of the economy of the Community' or of one or more Member States or which 'jeopardize their external financial stability' or 'difficulties arise which may result in a deterioration in a sector of the economy of a region of the Community'. These grounds entitle the Community to put a restriction on import from the ACP so that there is accorded the necessary protection to domestic economy of the members.

Specific Protocols were also agreed on with provisions guaranteeing prices and specific quantities of cane sugar, beef, veal, bananas and rum

21. Ibid

and under the sugar protocol, for example, a fixed quantity at guaranteed price each year was allocated to different countries.²² Uganda, for example, was given 5,000 metric tons; but did not utilize this quota while countries like Mauritius, Fiji, Guyana, were said to have been able to transform their economies by utilizing their quotas.²³

Another very fundamental issue in the Lome Convention relates to the recognition of different conditions of the contracting parties. Concerning this, the convention has recognized the inequality of the contracting parties despite the declaration in the Preamble to the Convention which states parties are ‘anxious to establish, on the basis of complete equality between partners, close and continuing cooperation, in the spirit of international solidarity.’

This can be noted from what has been stated in Article 7 of the Convention which reads “...the ACP States shall not be required, for the duration of this Convention, to assume, in respect of imports of products originating in the Community, obligations corresponding to the commitments entered into by the Community in respect of imports of the products originating in the ACP States.” Hence the ACP states have no obligation to offer market access to products originating from the community which is basically made by taking in to account the prevailing development needs of the ACP states, i.e. different conditions of the two parties.

This can be said to be the outcome of the ACP states endeavors who throughout the negotiations leading to the signing of the Lome

22. Kivumbi & Nalunga, Supra note 7

23. Id P. 7

convention have emphasized that they were not equal to the EEC.²⁴ On the inaugural meeting, the Guyanese Minister of Foreign Affairs made a very notable speech concerning this issue saying: “Reciprocity between those who are unequal in economic strength is a contradiction in terms”; he went further explaining the matter by citing the very famous Aristotle’s dictum saying ‘justice requires equality between equals’.²⁵ The point he clearly makes out of this is that this dictum in contemporary international relations must surely mean between those who are unequal in economic strength and equity itself demands non-reciprocity.²⁶

Generally the ACP countries, in the international negotiations, have advocated a common platform comprising six points that summed up their perspectives on economic cooperation with the EU in the spheres of trade, industry and finance.²⁷ At the close of the negotiations of the Lome Conventions lasted 18 months, the two partners arrived at a common ground and were able to formulate an agreed platform, comprising a number of new principles in North-South multilateral cooperation, which constitutes the overall framework of the Lome conventions.²⁸

These are: an understanding that each state retains its right to determine its political, cultural and economic choices; it has been agreed up on that ACP countries need to develop self-focused development policies taking in to account their own needs and the existing realities

24. Ibid

25. D .Wadada Nabudere : Essays on the theory and practice of imperialism , Onyx press , London 1979)

www.econpapers.repec.org/.../v_3a41_3ay_3a1981_3ai_3a01_3ap_3a260-261_5f04.htm
visited on July, 2009

26. Ibid

27. Karingi, et al, Supra note 14

28. Id p.5

around them; the fact that ACP countries essentially need to develop their agriculture in order to ensure food self-sufficiency; industrialization is believed to play a key role in development policies; the need to diversify production in these economies and to depart from excessive specialization and, the sixth and the last principle is, developing cooperation and trade between these countries.²⁹

These six principles, taken together, have made the Lomé conventions an example of the new cooperation relation between the North and South. This is basically because, they cover the major areas as well as put in place fundamental principles on what a modern negotiation between two sovereign states should look like as well as they give due regard to the development policies and also cooperation. The fact that there are also mechanisms of the new areas of cooperation which have been put in place under the agreements makes the innovative nature of the Lomé Conventions even go beyond the platform established; these are the subject matters of the following topic of this paper.

2.2.2 The new areas of cooperation

It has been shown above that the principles introduced by the Lomé Conventions have made the agreement an exemplary in the new cooperation relation between the North and the South. But over and above the declaration of this set of general principles, the Lomé Conventions are celebrated for defining the new area of ACP-EU cooperation. The conventions introduced the STABEX system, industrial cooperation and trade cooperation between these two groups of countries as new areas of cooperation.

29. Ibid

2.2.2.1 The STABEX systems

The ACP states were excessively concerned with the question of stabilization of commodity export revenues from agriculture and mineral during the negotiation of the Lomé convention.³⁰ This is mainly because there has been fluctuation in the prices or supply of commodities leading to a shortfall in export earning in these countries and they became desperate to get compensated for such loss and have a stable economy.³¹

As a response for this need, the Lomé Agreements introduced what is called the STABEX, literally defined as System for the Stabilization of ACP Export Earning, system which had been a long-standing demand of the ACP countries whose economies, with few exceptions (Mauritius, Botswana, Lesotho, Namibia, Sierra Leone, Swaziland, Tonga, Antigua and Barbuda), are highly dependent on the revenues of very few primary products' exports.³² This system is put in place to remedying the adverse effects of unstable export revenues by attempting to guarantee stable revenues on exports from the ACP countries to the EU and other destinations of agricultural commodities on which their economies depend and which are affected by fluctuations in price, quantity or both.³³

This scheme for the stabilization of export receipts on agricultural products is put in place to give funds to offset losses on wide number of

30. Omari H Kokole, STABEX Anatomized, Third World Quarterly, Vol.3, No. 3, 1981, pp. 441-459, <http://www.jstor.org/stable/3990516> Visited on Jun 6, 1009

31. Ibid

32. Karingi, et al, Supra note 14, p. 7

33. Ibid

agricultural products such as cocoa, coffee, groundnuts, tea and others.³⁴ This, however, doesn't mean that any kind of loss on any of these products will entitle that particular ACP country to the benefits of the system. But there are selected 49 agricultural commodities that would entitle the country to the benefits of the system up on fulfillment of basic thresholds that have been put in place and the EEC would set in motion a compensatory transfer in the form of loan to be repaid when the reverse situation materializes or in the form of grant in the case of LDCs.³⁵

With respect to mineral commodities, the stabilization mechanism for export revenues was reinforced by the establishment under Lomé II of the system known as SYSMIN, literally meaning System of Stabilization of Export Earnings from Mining Products. This fulfills the same role in respect of mineral commodities as STABEX does for agricultural commodities.³⁶

With regard to the outcome of the STABEX system, although it has been seen by developing countries as a gain that has enabled them to stem the tide of price fluctuations to be able to count on fairly stable foreign exchange flows, it suffered certain short comings.³⁷ The main short comings of the mechanism were the inadequacy of financial recourses available for responding to falling prices, the criteria governing eligibility

34. Guy Martin, African-European Economic Relations Under the Lome Convention: Commodities and the Scheme of Stabilization of Export Earnings, African Studies Review, Vol. 27, No. 30 (Sep., 1984), pp. 41-66, African Studies Association pub., <http://www.jstor.org/stable/524023> Visited on Jun, 2009

35. Ibid

36. Ibid

37. Karingi, et al, Supra note 14, p.7

delaying reforms and, moreover, transfers to cover for losses in export revenues which should have been given with the final goal of promoting diversification and therefore macroeconomic and sectoral reforms.³⁸

Starting from the early 1980s, however, the system was shaken by the falling prices. These were manifested in a wide deficit with in the system and by the decrease in the rate of coverage for the drop in export revenues.³⁹ This supported A.Emmanuel's criticism which was made way back in 1976 saying the STABEX objectives were not apt to check the drop in commodity prices, but to spread out their impacts over time.⁴⁰

Stephen Karingi, et al, elaborate this assertion saying that the perception was founded on the fact that the reference period was fluid, in that today's revenue become the norm tomorrow and consequently the drop in revenue is merely deferred and the price trend in the long term is not really taken in to account under STABEX.⁴¹ To put it in another words, the system views the commodity prices to be stabilized as being normal and hence it does not take in to consideration changes in value of these prices and addresses even less the whole issue of price formation in developing countries by reference to development. As a result, the system has not allowed for an effective stabilization of the price system.

38. Id. p.9

39. Ibid

40. A. Emmanuel, *La stabilization, alibi de l'exploitation internationale*, Third World Review, Vol. XVII, April-June 1976 Cited in Stephen Karingi et al, *Assessment of the impact of the Economic Partnership Agreement between the ECOWAS countries and the European Union*, (ATPC, Economic Commission of Africa, December 2005) p.9

41. Karingi, et al, *Supra* note 14, p.9

2.2.2.2 Industrial Cooperation

It has been expressly provided in the preamble of the Lomé convention that “the contracting states affirm their determination to promote industrial development in the ACP countries through expanded cooperation actions between these countries and the member states.” This, i.e. having industrialization as a key objective of the convention, distinguishes the Lomé convention from its predecessor, the Yaoundé convention, which has made agriculture play a central role.

The next issue coming in to picture, therefore, is the issue of financial arrangement for the industrial development projects. In this sphere, the scope of the European Development Fund (EDF) and the European Investment Bank (EIB) was expanded as the financial instruments for the purpose.⁴² In doing so, it has been made that the EDF would be concerned with infrastructure development where as the EIB intervenes in the establishment or expansion of industrial enterprises.⁴³

Basically the convention puts in place two major institutions in order to foster industrial cooperation, namely, the Industrial Development Committee and the Industrial Development Center. The former was in charge of fostering industrial cooperation and monitoring the activities of the latter where as the latter is vested with other responsibilities such as formation dissemination, organizing contracts between business entities and industrial policy officials in the EU and ACP countries.⁴⁴ In addition,

42. Id, p. 6

43. Ibid

44. Wolfgang Benedek, “The Lome Convention and The International Law of Development: A Concentration of the New International Economic Order?” Journal of African Law, Vol.26, No.1, 1982, pp. 74-93

the Industrial Development Center is also in charge of conducting feasibility studies to accelerate the creation of industrial enterprises in the ACP countries identifying and utilizing opportunities for joint revenue and for sub contracting and seeking possible sources of funding.⁴⁵

It can be deduced from the given facts that the Lomé Conventions paid special attention to the industrial development in the ACP countries. The question begging itself, therefore, becomes whether it has enabled these countries to fundamentally transform their production structured towards diversification. This is basically because, since independence, many African countries embarked on the major effort to diversify their industrial structures in order to depart from the dominance of agro based export commodities with the view to achieve their goals of development.⁴⁶

These experiments, however, came to a dead end soon owing to the narrowness of domestic markets in most of the continents economies as well as technological and financial dependence which has limited their room of maneuver.⁴⁷ These together with the structural adjustments and the closure of many industrial plants in African countries in 1980's put a damper on the industrial modernization efforts.⁴⁸ Hence, these all taken together, crippled the Lomé Convention from making a meaningful contribution in Africa's industrial development and had impaired it from creating a coherent and competitive industrial structure.

45. Ibid

46. S.M. Kapunda, African Industrial Development –Beyond Impasse: the case of Botswana, Tanzania and Zambia, Paper for 11th CODESTRIA General Assembly, Maputo, Mozambique, December, 2005
http://www.codesria.org/Links/conferences/general_assembly11/papers/kapunda.pdf
Visisted on Jun 15, 2009

47. Ibid

48. Ibid

2.2.2.3 Trade Cooperation

The main innovation, perhaps the most controversial matter until presently, of the Lomé convention was departure from the principle of reciprocity. Unlike its predecessor, the Yaoundé Convention which has allowed exemptions on custom duties and taxes as well as dismantled all quantitative barriers of trade between ACP and EU, the Lomé Convention prohibited duty free admission for European exports to the ACP countries.⁴⁹

This, however, was not something easily welcomed by the developing as well as developed countries which were not party to the Convention. Measure of criticisms were made by developed countries, specially Japan and the United States of America, in the international forums alleging the principle as being incompatible with the ground rules of international trade.⁵⁰ The non-beneficiary developing states, on the other hand, demanded the same should be extended at least to “Third World” countries as a whole.⁵¹

As to the outcome to the ACP, just like was the case in the industrial cooperation, provisions of the Lomé Convention pertaining to trade cooperation have not had much impact on trade flows in the ACP countries.⁵² The whole arrangements have had very little impact on the trade relations with ACP countries as it has not been able to avoid the deterioration of their share in the trade flows, nor has it avoided the

49. Yash Tandon; The ESA-EU EPA Negotiations and the Role of COMESA (SEATINI Bulletin Vol. 7, No.09)
www.seatini.org/bulletins/pdf/Bulletin%207.09%20Comesa.pdf Visited on June, 2009

50. Ibid

51. Ibid

52. Karingi, et al, Supra note 14, p. 10

persistence of agro-based export in their trade structures.⁵³ As a result, the trend of specialization in agro-based exports in the international economic arena and the role of the ACP countries as suppliers of primary commodities to Europe could not be reversed.

2.2.2.4 Financial Cooperation

Beginning from 1984, the ACP countries were faced with a serious debt crises to the amount of \$US 12 billion and beginning from 1986 it was increasing at the rate of \$US 4 billion annually mainly because the drop in price of primary commodities which occurred during the late 1970s.⁵⁴ Later on, the EEC formulated a special program on debt with in the framework of the Lomé Conventions to supplement the structural adjustment programs (SAPs) of the IMF and the World Bank by providing export assistance to the ACP countries.⁵⁵

In this program, the EEC distinguished two categories of countries: those that had applied the SAPs and those that had not applied that SAPs.⁵⁶ In the first case, the EEC intervention was incorporated in to these programs and pursues the same objectives through the formulation of overarching programs or programs specifically focused on import assistance; where as in the second group of countries, the EEC simply propose that these countries adhere to SAPs in order to be able to benefit from import assistance from the EU.⁵⁷

53. Ibid

54. Idp.12

55. Supra note 44

56. Karingi, et al, Supra note 14, p. 11

57. Ibid

Under Lomé IV, however, the EEC imposed the conditionality of structural adjustment for the provision of assistance to the ACP countries.⁵⁸ This adjustment immediately faced a criticism from some quarters, the most notable of which being the criticism by Edgar Pisani, the Commissioner for Cooperation and Development of the negotiations under the third Lomé Conventions who said: “Lomé would no longer be Lomé if there was to be a commitment along with the path of adjustments, and that Lomé was pro-development instrument.”⁵⁹

Based on these facts, it can generally be concluded that the track record of the Lomé conventions is fairly modest due to the fact that there was wide gap observable between the stated principles and the practical dimension of these arrangements.⁶⁰ On the top of that, despite the arrangements, the financial aid and the industrial development support, African countries have not been able to put in place a robust and competitive growth impetus and at least from African point of view, it hasn’t achieved its purpose in view.

2.2.3 The ACP countries performance under the Lomé Conventions:

The Lomé Convention that has been put in place for 25 years providing trade preferences to the ACP countries couldn’t rescue the ACP exports from performing poorly. For the reasons attributable to factors both within the ACP and the EU countries and within the convention itself, the trade preferences failed to benefit the ACP in one way or another.

Looking from the point of view of export, within the time framework of

58. Ibid

59. Ibid

60. Ibid

the Lomé Conventions, the share of ACP exports to the EU fell, for example, from 8% in 1975 to 2.8% in 2000.⁶¹ Again if we look at the rate from the diversification of export point of view, in the aggregate ACP export, trade preferences have in general failed to promote diversification; the bulk, i.e. 95 per cent of the ACP products exported to the EEC comprised mainly of primary products, most of which restricted to one or two products from particular country, while manufactured goods accounted for a mere 3-4%.⁶²

As we look at the STABEX put in place, with its own shortcomings, by EEC to stabilize ACP export, most ACP countries that benefited under this scheme have failed to use the funds properly.⁶³ Instead of supporting the producers and addressing supply capacity constraints, they used it as budget support by governments and this played some role in so many ACP countries for the failure of the Lomé convention to attain its objective.⁶⁴

This questionable development impact of the Lomé conventions and other reasons such as incompatibility with the WTO rules, which will be discussed in the following parts of this writing, urged the stake holders to call to reassess the ACP-EU cooperation.⁶⁵ The linchpin of the reassessment would be to make the trade regime 'compatible' with the requirements of the WTO by reassessing the agreement so as to bring a meaningful development impact as well as making it compatible with other international multilateral trade agreements.

61. Kivumbi & Nalunga, Supra note 7, p.12

62. Ibid

63. Kokole, Supra note 30

64. Ibid

65. Kivumbi & Nalunga, Supra note 7, p.12

2.3 Attempts to develop a new cooperation model between ACP and EU

A new proposal of the European Commission emerged in what is called a “Green Paper” which is published in November 1996.⁶⁶ This document, which recalls the emergence of the internal market and the adoption of single currency, entails the review of the treaty, formulation of financial reform in the medium term and others which eventually necessitated embarking on major institutional review for Europe.⁶⁷

Another most important event during the same period was the conclusion of trade negotiations under the Uruguay Round. This on its part ended up creating a new multilateral context and accelerating the process of globalization of the economy by technological developments and by the liberalization of economic policies.⁶⁸

Hence, the commission expressed that at the dawn of the 21st century, a thoroughgoing reflection was called for the future orientation of the relations between the EU and the ACP countries.⁶⁹ Among the situations that have provided a unique opportunity for EU and ACP countries to embark up on a broad debate on the future of relations between them

66. Green Paper on the relations between the European Union and the ACP countries on the eve of the 21st Century; challenges and options for a new partnership, COM (96) 570 final of 20 November 1996

67. From Lomé to Suva: Confronting the real challenges of Africa?
by Geert Laporte, Programme Coordinator, European Centre for Development Policy
Management (ECDPM)
www.ieei.pt/files/CairoPaperGeertLaporte.pdf Visited on Jun. 2009

68. Ibid

69. Response to the Green Paper on Relations between the European Union and the
ACP Countries on the Eve of the 21st Century, September 1997
www.edpsg.org/Documents/SeeAlso/Sa1.doc Visited on Aug. 2009

are found: the closeness of the expiry of the Lomé Convention in February 2000, the contractual obligation to embark on negotiations between the two parties at least 18 months before the expiry of the Lomé Convention, as well as the need to define, with in the context of strengthened disciplines of the WTO, a trade cooperation framework wholly in conformity with the new multilateral rules.⁷⁰

Redefining its relationship with developing countries, Europe embarked up on some major objectives for the new EU/ACP convention. The first one was increasing the effectiveness of aid in light of the circumstances that have been leveled in recent years at the track record of the ACP agreements. The commission has stated this in its 'Green Paper' saying "... partners on both sides are now seeking to place more emphasis on the effectiveness of cooperation and to review their priorities with an eye to reflecting better the concerns of European and ACP societies".⁷¹

The Commission 'Green Paper', on the other hand, have also elaborated what the ACP countries will go through in this period of time. It has stated that the ACP countries are to face so many challenges in this rapid changing global and regional environment.⁷² To mention the most notable ones: the challenges of economic marginalization, integration in to international market, implementing the domestic political and social changes, market economy and creating the conditions for sustainable development and poverty alleviation in the context of still high population growth.⁷³

70. Ibid

71. "Green Paper", Supra note 66, p.3

72. Ibid

73. Id, p.4

Generally the proposal has embodied Europe's determination to normalize its relationship with ACP countries and to wave this in to the overall framework of economic liberalization and integration of the globalization process.⁷⁴ In addition, the existence of the formal agreement has resulted in making Europe effect specific treatment to ACP countries in order to help them build competitive growth dynamics.⁷⁵ Hence particularly the closeness of the expiry of the Lomé Convention in February 2000, as well as the need to define, with in the context of strengthened disciplines of the WTO, a trade cooperation framework wholly in conformity with the new multilateral rules has brought about what is called the Cotonu Agreement.

2.4 The Cotonou Cooperation Agreement & its Legal basis for EPA Negotiation

This ACP-EU Partnership Agreement is a comprehensive aid and trade agreement concluded between 77 African, Caribbean and Pacific (ACP) countries on the one hand and the European Union on the other. The agreement was signed on 23 June 2000 in Cotonou (Benin) and is therefore commonly referred to as "the Cotonou Agreement".⁷⁶ The Cotonou Agreement builds on twenty-five years of ACP-EU co-operation under four successive Lome Conventions and would last for 20 years governing ACP-EU partnership and contains a clause allowing it to be revised every 5 years as well as renegotiation of the financial protocols at

74. Karingi, et al, Supra note 14, p.13

75. Ibid

76. Stephen R. Hurt, Co-operation and Coersion? The Cotonu Agreement between the European Union and ACP States and the End of the Lome Convention, Taylor & Francis, Ltd. *Third World Quarterly*, Vol. 24, No. 1 (Feb., 2003), pp. 161-176
<http://www.jstor.org/stable/3993636> Visited on Sep. 2, 2009

the same interval.⁷⁷

The Cotonou Agreement can be distinguished from its predecessor, the Lomé Convention, by two distinct features. First, information and consultation of non-state actors such as the civil society in the process of programming of aid and program implementation and the second one is the establishment of free trade arrangements called EPAs, Economic Partnership Agreements, in the ACP region.⁷⁸

This Agreement foresees setting up free trade, Economic Partnership Agreements (EPAs), between ACP states in various regions, and between the EU and regional ACP configurations. Consequently, the preferential system for ACP export products entering the EU market had to be replaced by a trade agreement based on reciprocity in a manner that is WTO compatible.

The Cotonou Agreement did two important things with respect to trade: first, it extended the lifetime of the non-reciprocal preferential trade arrangements of Lomé IV for a transitional period of eight years, ending on 31 December 2007; and the second one is, it set out an agenda for the negotiation of new trading arrangements, called EPAs, that will replace the Lomé IV trade provisions beginning 1 January 2008.⁷⁹

There are provided four core principles of this agreement set out in Article 2 of the agreement along which EPAs should be formed. The first one is development; and the established rule concerning this issue is

77. Ibid

78. The Cotonu Agreement and Non-State Actors Basics www.fes-tz.de/doc/cotonou-introduction.pdf Visited on Jun 10, 2009

79. Olufemi Babarinde, The Changing Environment of EU-ACP Relations: The Cotonu Agreement, Department of International Studies Thunderbird-AGSIM, 2001 http://aei.pitt.edu/2047/01/001590_1.pdf Visited on Aug. 2009

that EPAs negotiations must be placed in the context of the overall development objectives of ACP countries and the objectives as defined in the Cotonou Partnership Agreement. To be of benefit to the ACP, EPAs must be 'economically meaningful, politically sustainable, and socially acceptable'. Hence, EPAs are not common agreements on trade; instead, they should be development-oriented trade arrangements that ensure sustainable development and economic growth in ACP countries that contribute to poverty eradication which in a way makes it different from earlier conventions.⁸⁰

The second and also the most debatable principle up to date is the principle of reciprocity which Article 37 Paragraph 7 provides. As per this provision, the agreement strives to establish a Free Trade Agreement, which will progressively abolish substantially all trade restrictions between both parties. This is a radically new element in ACP-EU trade relations and on the basis of that provision, ACP countries will have to open up, on a reciprocal basis, their own markets to EU products in order to retain their preferential access to the EU market.⁸¹ This will be discussed in the following parts as intensively as possible.

Thirdly, there is the principle of regionalism. The EU clearly envisages negotiations with ACP regional groupings which will be in a position to do so, though it has not ruled out the possibility of concluding agreements with single countries in exceptional cases.⁸² The principle of basing the future trade cooperation on regional integration initiatives

80. San Bilal and Kathleen Van Hove, An overview of the ACP-EU negotiations: issues and timeframe, European Centre for Development Policy Management (ECDPM) Onze Lieve Vrouweplein 21, 6211 HE Maastricht, The Netherlands, November, 2002 www.tcd.ie/.../Bilal%20Van%20Hove%20Overview%20of%20ACP%20EU%20negotiations Visited on Feb. 2009

81. Ibid

stems from the conviction that, as has been stated in Article 35 Paragraph 2 of the Cotonu Agreement, regional integration is a key stepping stone towards further integration into the world economy as well as a main instrument to stimulate investment and to lock in the necessary trade reforms.

The fourth and the last principle is the principle of differentiation. Considerable weight is given to differentiation and special treatment, which affirms the North-South character of the relationship.⁸³ The Cotonou Agreement, in Article 35 paragraph 3, states that EPAs to be concluded, will take into account the different levels of development of the contracting parties. Hence, EPAs should provide sufficient scope for flexibility, special and differential treatment and asymmetry. This is specially provided to procure some benefit to LDCs, small and vulnerable economies, landlocked countries and small islands who are highly vulnerable to a tricky situation if there isn't arranged some kind of special and differential treatment.

However, apart from providing for some basic principles and objectives of the new economic and trade cooperation between the ACP and EU, the Cotonou Partnership Agreement does not go any further to encompass a full-fledged trade regime.⁸⁴ The aim of the arrangement has been explicitly provided in Article 34, Paragraph 1&2 as 'fostering the smooth and gradual integration of the ACP States into the world economy, with due regard for their political choices and development priorities, thereby promoting their sustainable development and contributing to poverty

82. Ibid

83. Ibid

84. Mamo E Mihretu, *Alternative Trade Regime Applicable to Ethiopia Failing the Conclusion and Entry into Force of EPAs by 1 January 2008: Legal Issues*, July 2, 2007, p.7

eradication’ and to enable ‘the ACP States to play a full part in international trade’. This is to be achieved, as has been clearly stated in paragraph 2, by giving due regard to the need for the ACP states to participate actively in multilateral trade negotiation and also providing economic and trade cooperation to the ACP countries. This would enable them manage the challenges of globalization to adapt progressively to new conditions of international trade thereby facilitating their transition to the liberalized global economy.

On top of that, the Cotonou Agreement provides that the parties, i.e. ACP countries and the EU, have agreed ‘to conclude new World Trade Organization (WTO) compatible trading agreements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade’.⁸⁵ It is these agreements which would take the form of Economic Partnership Agreements (EPAs).⁸⁶

Basically signing the Economic Partnership Agreement is not the only option for the LDC and non-LDC ACP countries to get a preferential access to the EU market. Non-LDC countries which are not in a position to negotiate EPAs, alternative possibilities were to be considered as has been stated in Article 37 paragraph 6 of the Cotonu Agreement which reads: “In 2004, the Community will assess the situation of the

85. Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States on the one Part and the European Community and its member States of the Other Part, Signed In Cotonu, 2000, Article 36.1

86. Id. Art. 37.1

non- LDCs...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". But these countries contend that those alternative options have received little attention up to now and the most likely one for them remains to be the EU Generalized System of Preferences (GSP) if they decline to sign EPA.

As for the Least Developed Countries (LDCs), since March 2001 they can benefit from an almost free access to the EU market through 'Everything-But-Arms' (EBA), an EU unilateral initiative within the GSP.⁸⁷ This, according to many writers, has curbed the incentives to conclude the EPA negotiations for ACP LDCs.⁸⁸

Further more, Cotonu Agreement has also addressed the scope of coverage of this development oriented free trade agreement between the parties, i.e. EPAs, which is made to cover almost a whole range of trade facilitation and trade related matters on the basis of the provisions from Article 45 to 54 of this agreement. These include issues such as competition policy, investment, sanitary and phytosanitary measures (SPS), standards and certification, protection of intellectual property rights, anti-dumping and antisubsidy measures, customs procedures, rules of origin, public procurement, trade and environment, trade and labor standards and health and safety regulations.

To sum up, this new agreement generally rests on five interdependent pillars according to Stephen Karingi et al.⁸⁹ First, a comprehensive

87. Mamo, Supra note 84

88. Ibid

89. Karingi, et al, Supra note 14

political dimension consisting in an enhanced dialogue, and a special focus on conflict prevention and resolution as well as on governance issues and the respect of human rights and the rule of law.⁹⁰ Secondly, a set of participatory approaches, by giving greater emphasis on the role of civil society.⁹¹ The third one is a focus on poverty reduction, and a central role for the private sector and the regional integration in development strategies.⁹² Fourthly, a new framework for trade and economic cooperation that would put regional integration at the forefront and extended cooperation to non-trade areas in conformity with the World Trade Organization (WTO) arrangements.⁹³ The fifth and the last one is a reform of fiscal cooperation, through the simplification and enhanced flexibility of the financial instruments of the partnership as well as the introduction of performance criteria in the allocation of aid.⁹⁴

Generally, this agreement, which covers the period from 2000 to 2020, can also be said to have comprised cooperation in three major pillars: political; development; and economic and trade cooperation. Under the economic and trade pillar, the EU and ACP agreed to conclude new trading arrangements compatible with WTO provisions, which would be called EPAs. The following parts of this paper are devoted to looking at this agreement from the perspective of Eastern and Southern Africa (ESA)-EU EPA negotiations with special emphasis to the situation of Ethiopia.

90. Ibid

91. Ibid

92. Ibid

93. Ibid

94. Ibid

Chapter Three

Review of the Economic Partnership Agreement (EPA) negotiations

It has been shown in the foregoing part that one of the major pillars of cooperation between ACP and EU entertained in Cotonou Agreement is economic and trade pillar. Under this pillar, the EU and ACP agreed to conclude new trading arrangements compatible with WTO provisions due to the fact that their preexisting agreement was doomed incompatible with WTO rules. As a result, there came about the negotiation of a new trading agreement called the Economic Partnership Agreements (EPA).

The Economic Partnership Agreements (EPAs) are the agreements under negotiation between the European Union and 79 countries in Africa, the Caribbean and the Pacific (ACP).¹ The EU started EPAs' negotiations with six ACP regions configured as the Caribbean (CARIFORUM), Central Africa (CEMAC), South-East Africa (ESA), West Africa (ECOWAS), Southern Africa (SADC), and the Pacific.²

According to some scholars, these agreements are perhaps the most

1. Unequal Partners: How EU-ACP Economic Partnership Agreements (EPAs) could harm the development prospects of many of the world's poorest countries, September 2006, Oxfam Briefing Note, p.2
<http://www.oxfam.org.nz/imgs/whatwedo/mtf/unequal%20partners.pdf> Visited on Jun, 2009

2. Sebastian Vollmer, et al, EU-ACP Economic Partnership Agreement Empirical Evidence of Sub-Saharan Africa, University of Göttinge, Background Paper, p. 3
<http://siteresources.worldbank.org/INTWDR2009/Resources/4231006-1204741572978/vollmer2.pdf> Visited on Aug. 2009

3. The rough guide to Economic partnership Agreements (EPAs), CAFOD briefing
www.cafod.org.uk/var/storage/original/application/phpfnAorh.pdf Visited on July, 2009

important trade talks by ACP countries given the fact that the EU is the biggest export market and also the largest aid donor for most of them.³ EPAs also have major implications for how ACP countries trade with their closest neighbors and for the national policies they put in place to try to help them succeed in a globalized world.⁴

These scholars also argue that EPAs will have a greater impact on ACP countries than even the outcome of the 'Doha Round' of World Trade Organization (WTO) negotiations, where the needs of developing countries said to have received much rhetorical attention.⁵ They also make reference to what one ACP negotiator recently stated saying "If we succeed under Doha and we fail in Europe, we fail."⁶ As a result, there has been growing disquiet among ACP governments, parliamentarians, development experts and nongovernmental organizations about their possible impact.⁷

At the opening session of the negotiations on the EPAs which was launched in Brussels on 27 September 2002, an agreement was reached to sequence the negotiations in two phases.⁸ The first phase would be at the pan- ACP-EU level to agree on principles and approaches to be adopted, the structure and the modalities for the negotiation and cross cutting issues of common interest for the ACP; where as the second phase, which was to begin in September 2003 was for negotiations on specific regional EPAs.⁹

4. Ibid

5. Ibid

6. Ibid

7. Ibid

8. San Bilal and Kathleen Van Hove, An overview of the ACP-EU negotiations: issues and timeframe, European Centre for Development Policy Management (ECDPM) Onze Lieve Vrouweplein 21, 6211 HE Maastricht, The Netherlands, November, 2002, p.14 ff www.tcd.ie/.../Bilal%20Van%20Hove%20Overview%20of%20ACP%20EU%20negotiations Visited on Feb. 2009

9. Ibid

Generally the ACP-EU EPA negotiations made a broad convergence on the overall objectives and structures of the EPA and issues.¹⁰ But there was divergence over requests for additional financial resources over and above the European Development Fund (EDF) provisions and the sequencing of support to build capacity for the regional trade arrangements envisaged by an EPA.¹¹ In aggregate, however, there was a general consensus on the fact that EPAs need to be accompanied by appropriate development support measures in order to allow ACP countries and regions to maximize the benefits they should be deriving from EPAs, as has been stated in Article 37 (3) of the Cotonu Agreement.¹²

3.1 Phases of Negotiating EPAs

The first phase of the negotiations between the ACP and the EU was launched in Brussels on September 27th 2002. The idea of the ACP group on the time framework was to make the first phase to run from September 2002 to 2004.¹³ This was because a number of events with a bearing to the negotiations would have been concluded during this time such as: the Doha work Program was to end in 2004, the review of the EU Generalized System of Preferences (GSP) and the enlargement of the EU were also expected to take place in 2004.¹⁴

Concerning the issues of the negotiation, the ACP Group decided that

10. Ibid

11. Mamo E. Mihretu Ethiopia and EPA Negotiation, Review and Key Issues Ahead, Draft Final Report, 30 April 2008 p. 8

12. Ibid

13. Jane S. Nalunga and Douglas Kivumbi, The Economic Partnership Agreements. Implications and Way Forward. A Case for Uganda, October 2004, P.12

www.seatini.org/.../The%20EPAS%20Implications%20and%20way%20forward.pdf

Visited on July, 2009

14. Ibid

negotiations at the All-ACP level would be conducted on several important issues of common interest. These include: compatibility with the WTO, dispute settlement, non-execution clause, definition of the parties to the EPA, procedures for entry into force of the EPAs, trade related areas, rules of origin, safeguard measures, commodity protocols, All-ACP/EU framework agreement on fishing, SPS issues, additional resources, mechanisms for the implementation of the EPAs, regular, formal and comprehensive reviews of the EPA preparations and negotiations.¹⁵

As a strategy for the negotiation, the ACP countries were guided by the overriding principle of unity and solidarity in their approach to the EPA negotiations.¹⁶ They believed that it is easier for them to secure a better deal from the EU if they negotiate collectively than if they negotiate individually, regionally or at a sub-regional level.¹⁷ Hence they concurred that it is important for them to ensure that the EPA negotiations and their resultant Free Trade Agreements (FTAs) will protect and promote the cohesiveness of the ACP region.¹⁸

The EU, on the other hand, wanted the first phase to last only from September to December 2002 including the Christmas recess, i.e. only three months, with the second phase being launched in January 2003.¹⁹ Eventually it was agreed up on that the first phase would last up to September 2003, with the second phase commencing soon then after.²⁰

15. Decision No. 1/03 of the Special Session of the ACP Council of Ministers Held in Brussels on the 1st of October 2003

16. EPA Negotiations: African Countries Continental Review", Review Report, African Trade Policy Centre, 19 February 2007 p. 3
www.uneca.org/crci/5th/DevIntTrdWTOEPAsNegtiations.pdf Visited on July, 2009

17. Ibid

18. Ibid

19. Nalunga and Kivumbi, Supra note 13, p.13

20. Ibid

Concerning the nature of the agreement, the ACP countries wanted the 1st phase to result in a binding agreement whereas the EU considered it only as a session of clarification of negotiation issues and not a negotiating phase.²¹ Later, the ACP groups have proposed an idea that those regional groupings which consider themselves ready to start the second phase can proceed though the first phase has not been concluded.²² It was also further agreed that the first and second phase would run concurrently until the first phase are completed 'not later than the 1st quarter of 2004'.²³ Among the ACP countries, Central Africa and Western Africa were recorded as the first to launch phase two negotiations on 4th and 6th October 2003 respectively.²⁴

3.2 EPA Negotiation in the Eastern and Southern Africa (ESA) Region

ESA is a diverse EPA group comprising of Burundi, Comoros, Congo, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Uganda, Zambia and Zimbabwe. This group agreed to launch the second phase of the EPA negotiations with EU on 7th February 2004.²⁵

In preparation for the negotiations, the ESA Group came up with a Roadmap that includes issues regarding the preparations for the

21. D P Chiwandamira, A Review Of The Negotiation Of Economic Partnership Agreements (EPAS) Between The European Union & SADC And The Implication for Small Scale Farmers, 29 November 2006, p.12-

14 <http://www.ifad.org/events/epa/8.pdf> Visited on Sep. 2009

22. Ibid

23. Ibid

24. Ibid

25. Eastern and Southern African Region: ROADMAP FOR EPA NEGOTIATIONS, 5th February 2004, p. 1

www.setni.org/.../Bulletin%207.16%20%20Economic%20Partnership%20Agreements%202.pdf Visited on Jun. 2009

negotiations, the negotiating structures, coordination of the negotiations and indicative schedule for the negotiations.²⁶ This is basically put in place with the view to guide the negotiations between these two parties.²⁷

On the part dealing with the preparation for the EPA negotiation of ESA-EU, there have been raised three main sets of activities to be undertaken. First, at the national level, national impact assessment studies and the establishment of National Development and Trade Policy Forums (NDTPF) with work programs and agenda.²⁸ Secondly, at the regional level, a series of regional studies up on which the negotiating briefs for the negotiating teams will be based and the establishment of the Regional Negotiating Forum (RNF).²⁹ The third and the last one is, again at the regional level, capacity building and training in trade negotiations.³⁰

3.3 The ESA schedule for the negotiations

In their negotiations to the EPA, the ESA agreed to have 3 phases of negotiations. Phase I, which lasts from March to August 2004, is devoted to setting of priorities and negotiating procedures.³¹

This was supposed to be the preparatory period for the negotiations as provided for by the Cotonou Agreement Chapter 2, article 37(3). It was also to be used by each ESA member to constitute the National Development and Trade Policy Forum (NDTPF) with clear rules of

26. Ibid

27. Nalunga and Kivumbi, Supra note 13, p.13

28. The ESA-EU EPA NEGOTIATIONS: TECHNICAL ISSUES IN THE 6 NEGOTIATING CLUSTERS, A guide for ESA countries, p. 10
www.seatini.org/publications/ESA-EU%20EPA%20negotiations.pdf Visited on March 2009

29. Ibid

30. Ibid

31. EPA Negotiations: African Countries Continental Review, Supra note 16, p. 63

procedures, terms of reference, work programs and funding mechanisms. The Regional Negotiating Forum (RNF) was also to meet during this period to agree on rules of procedure, prepare the work program, agree on the composition of the technical teams to support the lead Ambassadorial Spokespersons; and also carry out a number of studies in preparation for phase II negotiations.³²

Phase II is for substantive negotiations and it was scheduled to take place between September 2004 – December 2005. It will take place in six clusters: Development issues, Market Access, Agriculture, Fisheries, Trade in Services and Trade-related Issues. By the end of this period, it was envisaged that an outline EPA will have been agreed on.³³

Then comes Phase III which will be for continuation and finalization of the agreement and will take place from January 2006 – December 2007. Substantive negotiations will continue if necessary and areas of disagreement will be revisited and compromises reached. The EPA agreement was expected to be finalized, ratified and any necessary legislation enacted in order to allow the EPA to be in place on 1st of January 2008, at the latest.³⁴

3.4 The Negotiating Clusters

It has been touched up on hereinabove that the ESA region opted to negotiate in six clusters which include Development Issues, Market access, Agriculture, Fisheries, Trade in Services, and Trade –related Issues. The negotiations on these areas were to be carried out at two

32. “The ESA-EU EPA NEGOTIATIONS”, Supra note 28, p.17

33. Nalunga and Kivumbi, Supra note 13, p. 14

34. Ibid

levels, i.e. at Ministerial and Ambassadorial levels. Six Ambassadors based in Brussels and six ministers were chosen to be the lead spokespersons with alternates.³⁵ We will look at these clusters in the following part in a better detail.

3.4.1. Development issues

Discussing development as an issue, there inevitably comes the issue of its sustainability and then it becomes necessary to ask what this sustainable development means. Since the 1992 Rio Summit, the concept has been understood to mean “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.³⁶

In the context of economic cooperation and trade arrangements involving developing and developed countries, the guide on the technical issues in the six negotiating clusters of the ESA-EU negotiation provides a comprehensive meaning to the concept. It provides that sustainable development should address the imperative need, for developing countries, to achieve and maintain in the long term appropriately high rates of economic growth that transform and modernize their economies; and for the benefits of that economic growth to translate into continually improving living standards for all sections of society particularly the economically marginalized and the socially and politically weak sectors of

35. See Decision No.1/02 of the Special Session of the ACP Council of Ministers held in Brussels on the 25th and 26th September 2002 on the Structure for the Negotiation of the Economic Partnership Agreements (EPAs) for the All-ACP

Phase, <http://www.acpsec.org/gb/council/sept02/dr0702e.htm> Visited on Jun 2009

36. Rio Declaration on Environment and Development

<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163> Visited on Sep. 2009

the population.³⁷ In short, it requires taking fully on board the whole array of conditions for social, economic and human development, and the varying levels of development between the ACP and EU.³⁸

Notwithstanding the provisions which can be said fairly extensive for sustainable development in the Cotonou Agreement, it has been said to be crucial that the actual negotiations for the EPA do not detract from those provisions.³⁹ This is due to the fact that sustainable development makes an issue of paramount importance for ACP countries as a whole, with special significance to LDCs, and hence the EPA should be a further instrument to promote it. This, however, cannot be realized without applying some key tests to proposed positions so as to determine whether durable and tangible gains would accrue to ESA countries out of this negotiation.⁴⁰

Some of the major tests include: whether the proposed position guarantees the fullest possible market access for all key exports in the goods, services, intellectual property and any other sectors under consideration; whether the EU put in place measures in the immediate term to ensure that the market access agreed is not undermined or negated, for instance through non-tariff barriers and other disguised restrictions or through subsidies.⁴¹

The position also has to secure adequate policy space for implementing

37. ESA-EC EPA Negotiations on Development, Joint Summary Report, Mauritius, 17 July 2006
www.unctadxi.org/sections/DITC/SADC/docs/EPA/tncd_2005_11.pdf Visited on Sep. 2009

38. Ibid

39. "The ESA-EU EPA NEGOTIATIONS", Supra note 28, p. 13

40. Ibid

41. Ibid

development programs, in particular to address supply side constraints and to promote stable long-term investment having maximum linkages from all vantage points into the economy.⁴² Concerning the resources including the technical and financial, the position has to secure or duly mobilize, to effectively support the achievement of the goals and aspirations agreed, and to effectively implement the programs agreed.⁴³

Last but not least, the position has to show a clear agreement between the parties to ensure that relevant multilateral environmental agreements will govern or apply to the economic cooperation and trade arrangements, including the Convention on Biological Diversity and the International Treaty on Plant Genetic Resources for Food and Agriculture.⁴⁴ And generally progress in each of the negotiating areas should always be specifically and regularly examined to determine whether they have fully taken in to account the issue of sustainable development.⁴⁵

It has also been asserted that this issue is the linchpin of the EPA negotiations, as it will determine whether the EPAs are truly developmental or they are just like any other Free Trade Agreements.⁴⁶ This issue is also said to be cross cutting in all other areas of the negotiation and hence there have been provided some fundamental

42. Ibid

43. Ibid

44. Ibid

45. Ibid

46. Thomas DEVE, Whither ACP trade relations with the EU in the context of Economic Partnership Agreement (EPAs) Negotiations? A case for alternatives. Regional Round Table on Economic Partnership Agreement (EPAs) Negotiations: Challenges and Opportunities for Poverty Eradication in Sub-Saharan Africa, South Africa, October 23, 2006, p. 11

www.sarpn.org.za/documents/d0002201/EPAs_Trade_Deve_Oct2006.pdf Visited on Sep. 2009

principles of the negotiation of EPAs, to be briefly elaborated in the following parts, as a base for the negotiation.

The first principle provides that EPAs should not be seen as an end in themselves but as a means to achieving broader objectives. But in any case, the bottom line is that it should contribute to the development of ACP countries and be mainstreamed into development cooperation policies.⁴⁷

Other than this, the EPAs should take into account the capacity of ACP economies to adjust to the introduction of free trade with the EU.⁴⁸ In doing so, it should be accompanied by capacity building programs and support for industrial development of ACP states and also it should be consistent with and should support regional integration.⁴⁹

With regard to the areas of negotiations, it has been provided that it should include the preparations, which were agreed upon in the Cotonou Agreement to be done before beginning the substantive negotiations. As per Article 37(3) of Cotonu, the preparatory period shall be used for capacity-building in the public and private sectors of ACP countries; meaning, it has to include measures to enhance competitiveness for strengthening of regional organizations and for support to regional trade integration initiatives, where appropriate, with assistance to budgetary adjustment and fiscal reform, as well as for infrastructure upgrading and development and for investment promotion.⁵⁰ This is, according to Jane S. Nalunga and Douglas Kivumbi, the litmus test of EU's commitment to

47. Ibid

48. Ibid

49. Ibid

50. Nalunga and Kivumbi, Supra note 13, p.16

making EPAs really developmental.⁵¹

In addition, the negotiation should also include additional funding, with simpler and swifter deployment procedures, to finance the many programs required to meet the challenges of reciprocal trade arrangements with the EU.⁵² Basically the ACP countries do not want to divert the existing resources away from existing development priorities, whereas the EU insists that there's no need for additional funding as long as there are EDF funds which the EC has reiterated fall outside the scope of the EPA negotiations.⁵³

The next issue of negotiation would be on the sequencing of restructuring assistance. The idea was that it has to be made available and programs implemented before the EPAs are signed so that ESA countries can meet the challenges of free trade with the EU.⁵⁴ But the EU insisted that the EPAs have to be signed first before designing and implementing restructuring programs which ultimately became an issue of fundamental disagreement between the ACP and the EU.⁵⁵

The final issue of negotiation in this development issue is addressing the issues of both fiscal and economic restructuring through the formation of specific instruments and programs.⁵⁶ The ESA negotiators faced two major challenges in this area also.⁵⁷ The first one is on how to come up with specific negotiating positions to address the above issues, especially

51. Ibid

52. Ibid

53. Ibid

54. Id p. 17

55. Ibid

56. Ibid

57. Ibid

that of upfront funding and implementation of fiscal and economic restructuring programs; and secondly, how to ensure that the above principles are streamlined within the other negotiating areas.⁵⁸

3.4.2 Market Access:

The products that the ESA countries rely on mainly constitute: agricultural products in their primary form which account for the big majority of their exports, processed and semi-processed products and services as well as manufactured products to some extent.⁵⁹ What these countries need to secure from this negotiation is market access for these products and adequate capacity through addressing supply and demand side constraints to effectively utilize that market access by following up the market openings.⁶⁰

When look at the negotiation, in phase I, the ACP and EU agreed on the objectives and principles of market access. There are three major principles which this phase has put in place as a stepping stone to the forthcoming negotiations.

The first principle provides that no ACP state should be left worse than it currently is.⁶¹ The second one is, EPA negotiations should build on and improve the Lome acquis as well as take into account the principle of Special & Differential treatment.⁶² The third and the last one is, EPAs

58. Ibid

59. Mareike Meyn, The Challenges of Economic Partnership Agreements (EPAs) for Regional Integration and Trade Capacity Building in Southern Africa, Conference Paper to be presented as the Biennial Conference of the Economic Society of South Africa (ESSA), Institute for World Economics and International Management (IWIM), University of Bremen, Durban 7-9 September 2005, p.9-10
<http://www.essa.org.za/download/2005Conference/Meyn.pdf> Visited on Aug. 2009

60. Ibid

61. Nalunga and Kivumbi, Supra note 13, p.17

62. Ibid

should build on regional integration as spelt out in Article 35(2) of the Cotonou Agreement, and since EPAs are meant to build markets, both parties concurred the on sequencing of liberalization.⁶³

Having said this much about the agreements reached in phase I, let's proceed to the issues for negotiation under Phase II. This phase is devoted to negotiations on some issues identified as important and basic based on the agreements reached in phase I. The first issue for negotiation in this phase is on product coverage of EPAs which the ESA countries argued saying it has to take in to account their level of development, socio-economic constraints and also capacity of the economy to adapt to the liberalization process.⁶⁴ The next issue to be negotiated in this phase is Rules of Origin so as to make it recognize the increasingly global nature of input procurement as well as making them support value addition.⁶⁵

The third issue in this phase relates to tariff reductions or dismantlement and its linkage to the attainment of predefined development indicators. EU has made its position in this regard clear that it is of the opinion that tariff reductions should be linked to clearly defined timetables. The fourth and the final issue is that of the nature and scope of safeguards to be taken.⁶⁶

These obviously invited so many challenges to the parties of the negotiation. The questions such as how to sequence liberalization, and also how to ensure that no country is worse off given the process of CAP

63. Ibid

64. Ibid

65. Ibid

66. Ibid

reform which is eroding the value of ACP preferences by reducing the prices paid on the EU market which for ACP exports; and also the process of preference erosion resulting from multilateral trade liberalization under the WTO; all pose a serious challenge to the parties and they had to be duly addressed if the parties have to reach on an agreement.⁶⁷

3.4.3 Agriculture and Fisheries:

Undeniably agriculture and fisheries play the central role in the economies of most ACP countries and both parties to the negotiation have concurred on that idea.⁶⁸ Being exporters of the primary products in vast majority, they have had these two as the backbone of their economy since long.⁶⁹

But just agreeing on their importance without duly addressing it in their negotiation will not be of any value to the ACP. The negotiations, to that end, had to focus on the commodities and the possible future of Commodity Protocols, as well as on general principles on SPS measures. As a result, they have reached on an agreement on several issues having direct or indirect bearing on these products which include: negotiations in the area of agriculture will build on the Lome aquis; processing, Marketing, Distribution and Transport (PMDT) which are essential for value –addition; and also EPAs should address SPS as they constitute

67. “The ESA-EU EPA NEGOTIATIONS” Supra note 28, p.23

68. Oliver Morrissey and Evious Zgovu, The Impact of Economic Partnership Agreements on ACP Agriculture Imports and Welfare, Centre for Research in Economic Development and International Trade, University of Nottingham
www.nottingham.ac.uk/economics/credit/ Visited on Oct. 5, 2009

69. Ibid

barriers to trade.⁷⁰

In addition, the parties have also agreed that EU is to offer assistance to ACP countries to build their capacities to meet SPS standards. Apart from that, they have also agreed on the fact that the impact of CAP reform has to be addressed during EPA negotiations and also export refunds agreements to be concluded in accordance with Article 54 of the Cotonou agreement.⁷¹

This being the case with the ACP group in general, there have also been identified additional matters for negotiation under this cluster from the perspective of the ESA countries. First and for most, the ESA group believes that the Processing, Marketing, Distribution and Transport (PMDT) programs, which both parties concurred on their importance for value-addition, have to be put in place before the phasing in of the EPAs; which EU opposed saying the program should be established once the implementation of EPAs is underway.⁷² This ESA –EU negotiation also brings in to picture the issue of the SPS measures. The idea that EU raised in this case is that new SPS measures have to meet genuine EU health standards.⁷³ The ACP, countries having made prolonged debate on EU's claim of its right to establish its health rules, have clarified their position that there have to be sufficient assistance to build capacities to meet those SPS standards and called for identifying their nature in advance.⁷⁴

70. Suffyan Koroma & J.R. Deep Ford (editors) The agricultural dimension of the ACP-EU Economic Partnership Agreements, FAO Commodities and trade technical paper, Food and Agricultural organization of the United Nations, Rome, 2006
www.fao.org/docrep/009/a0676e/a0676e00.htm Visited on July 2009

71. Nalunga and Kivumbi, Supra note 13, p.18

72. Ibid

73. Ibid

74. Amin Alavi, Peter Gibbon and Niels Jon Mortensen, EU-ACP Economic Partnership Agreements (EPAs): Institutional and Substantive Issues, Copenhagen 2007, p. 52
www.diis.dk/graphics/Publications/Andet2007/pgi_EPAs.pdf Visited on Jun 2009

In addition, there have also been raised that the export refunds, the production and distorting outcomes of the Common Agricultural Policy (CAP)⁷⁵ reforms have to be duly addressed during the negotiation.⁷⁶ And finally, concerning what agreement has to be reached on the fisheries area, it has been said that a fisheries agreement which includes fundamental principles on responsible and sustainable fisheries management and measures to promote local fisheries sector has to be concluded making part and parcel of the EPA.⁷⁷

3.4.4 Trade in Services:

Article 41 of the Cotonou Agreement commits the ACP States and the EC to be interested in the WTO services negotiations and to the architecture of the GATS. Specially Article 41(3) of this agreement reads “In the framework of the negotiations for progressive liberalization in trade and services, as provided for in Article XIX of GATS, the Community undertakes to give sympathetic consideration to the ACP States’ priorities for improvement in the EC schedule, with a view to meeting their specific interests.”

On the other hand, the guideline for ESA-EU EPA negotiations on technical issues in the six negotiating clusters is specially interested in elaborating what Article 41(4) of the Cotonou agreement provides. It asserts that the architecture of GATS should still apply to EPA trade in

75. The Common Agricultural Policy (CAP) is a system of European Union agricultural subsidies and programmes introduced with the aim of providing farmers with reasonable standard of living, consumers with quality food at fair prices and to preserve rural heritage. The Common Agricultural Policy, A Brief Introduction, Institute for Agriculture and Trade Policy, Global Dialogue Meeting, Washington, D.C. 2007 available at <http://www.iatp.org/iatp/publications.cfm?refid=100145> Visited on Jun 2009

76. Alavi, et al, Supra note 74

77. Ibid

service negotiations which follows a positive list approach where by a party determines which selected services sectors to open up.⁷⁸ Meaning, the ESA countries have to be at liberty under EPA to determine which service sector to exclude and also which one to open up based on the level of sensitivity.⁷⁹

The same provision, i.e. Article 41(4) of the Cotonu Agreement, also provides that the provisions of Article 5 of GATS will apply to the EPA negotiations on services. On the basis of this provision, the application of the requirements such as “substantial sectoral coverage” is required to be “flexible”.⁸⁰ It generally allows the application of Special and Differential treatment which in the case of EPA would offer a great advantage to the ACP side.⁸¹

In essence, there are number of issues on which an agreement has been reached between the ACP and EU in the 1st phase of the negotiations. These include: support in the context of the EPAs to be provided by the EU for the development of services sectors in the ACP countries, and should target the specific needs of ACP countries and regions as well as the importance of establishing a regulatory framework for service sector development.⁸² Apart from that, the parties have also accepted that there should be designed some mechanism to establish the Special Safeguard Mechanism.⁸³

The agreement between the parties concerning liberalization is that if it

78. “The ESA-EU EPA NEGOTIATIONS”, Supra note 28, p.49

79. Ibid

80. Ibid

81. Ibid

82. Nalunga and Kivumbi, Supra note 13, p.18

83. Ibid

has to be undertaken, they should be underpinned by four basic principles. These include: Special and Differential treatment, asymmetry, positive regional discrimination and also progressive liberalization based on the 'positive list' approach and adapted to the development level of ACP countries and regions.⁸⁴

When we come back to the ESA negotiation, it was made to take an account of other areas of negotiation in addition to concretizing on the above issues. These include: additional funds to develop the services sector; improvement in Mode 4, i.e. movement of natural persons, of services suppliers, which by the way is a very sensitive area for EU.⁸⁵ Apart from these, on the position held concerning the scope of the negotiations it has been asserted that ESA should not go beyond what has been negotiated in a multilateral context although the EU favors a WTO-Plus approach.⁸⁶

3.4.5 Trade –Related Areas

When discussing trade related areas in the EPA negotiation, perhaps the first thing coming in to picture is the scope of the negotiations on trade-related areas. Chapter 5 of the Cotonu agreement which covers Articles from 44 to 51 provides for negotiations in the areas of competition policy, intellectual property rights, standardization and certification or technical standards, sanitary and phytosanitary measures or health standards,

84. The SADC Economic Partnership Agreement: To What Extent Have The Priorities Of The EU-SADC Business Council Been Achieved? Next Steps For The Private Sector? Sustainable Commerce Consulting, May 2008, p.5
www.ebcam.org/.../TheSADCEconomicPartnershipAgreement-DiscussionPaperforESBC.doc Visited on July 2009

85. Nalunga and Kivumbi, Supra note 13, p.18

86. Ibid

trade and environment, trade and labor standards, and consumer policy all under the heading of trade related areas.

EU's position concerning the scope of the negotiation under trade-related area is that they seek to include negotiations in the areas of investment and government procurement.⁸⁷ This is the response of EU to the developed countries refusal to introduce these issues in the WTO⁸⁸ and now they are unduly prevailing upon ACP States to negotiate these same areas in the EPAs.

In the WTO multilateral trade negotiation, the three so called 'Singapore issues': Investment, Competition and Government Procurement, have been dropped from the Doha work program,⁸⁹ while in the EPAs, the EU has made them to be on agenda. During the WTO negotiation, EU was the major proponent of these issues and now what it does in the name of EPA is taken as trying to introduce these issues through back door.⁹⁰ But the important thing is that negotiation in a certain area does not necessarily result in legal instruments or commitments under the EPAs since there is nothing that one party can do alone. Because, as a rule, negotiations in a certain areas can fail where suitable positions are not reached or where it is felt that meaningful negotiations cannot be concluded.⁹¹

With regard to the first phase of the EPA negotiation took place on these areas, both the ACP and EU agreed that trade related areas are

87. Supra note 74, p.60

88. Ibid

89. UNDESTANDING THE WTO: The Doha Agenda

http://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm Visited on August 2009

90. Supra note 74, p. 60-62

91. Ibid

important for ensuring smooth trade flows and the minimization of transaction costs.⁹² They also recognized the need to have clearly defined and transparent regulatory frameworks and efficient and well functioning institutions for the design and implementation of measures in trade related areas.⁹³

To sum up, in addition to the debate on going beyond the trade related areas listed in the Cotonu agreement and addressing issues which have been set aside in the Doha work program,⁹⁴ there have also been raised the issue of commitments on trade related areas. The basic concern in this regard is that the ESA countries should not go beyond what is committed at the WTO level inspite of the fact that the EU favors a WTO-Plus approach.⁹⁵ And finally, sequencing of the provision of capacity building support which should be implemented before entering into negotiations, together with the development of specific services sector makes an issue of negotiation in this cluster.⁹⁶

3.5 The structure of the ESA negotiation

Basically all the ACP level negotiations were concluded at an ACP-EC ministerial meeting of 2nd October 2003 with a joint report that provided a point of reference for negotiations with six regional groupings of ACP states.⁹⁷ With regard to the ESA region, each ESA country was to establish a multi-sectoral National Development and Trade Policy Forum

92. Nalunga and Kivumbi, Supra note 13, p.19

93. Ibid

94. Alavi, et al, Supra note 74, p.60

95. Nalunga and Kivumbi, Supra note 13, p.19

96. Ibid

97. Bilal and Hove, Supra note 8, p.14

(NDTPF) which is a forum with representation from both the public and private sector and is responsible for formulating a national position in each country.⁹⁸ This is then presented to the Regional Negotiating Forum (RNF) which is entrusted with preparing negotiating briefs for use by the Lead Ambassadorial spokespersons.⁹⁹

Regional Negotiating Forum (RNF) is Composed of three representatives of each NDTPF (NDTPF chair, a representative from the public sector, and one from the NSA), the six lead spokespersons for each of the negotiating sectors at ambassadorial level from Brussels, one representative from the ACP secretariat, up to 2 representatives from the secretariats of the East African Community (EAC), the Indian Ocean Commission (IOC), the Inter-Governmental Authority on Development (IGAD), a representative from COMESA (secretariat); and other participants and resource persons to be authorized by the chairperson.¹⁰⁰

In order to ensure the active participation of NGOs and non-State sector, it was agreed that selected NGOs in the trade and development arenas be invited to the RNF.¹⁰¹ So far, Southern and Eastern African Trade, Information and Negotiations Institute (SEATINI) has been invited and has attended the 2 RNF meetings.¹⁰² In their statement to the 2nd RNF meeting held in Entebbe, Uganda (19th –21st July 2004), the Civil Society Organizations called for more NGOs to be substantive members

98. J. N. Kosure, Overview of EPA Negotiations, a paper presented during a workshop on Fostering Trade Through Public-Private dialogue: Business Implications of EPA negotiations for EAC, Kigali, Rwanda, AUGUST, 2008, p.7
www.intracen.org/btp/wtn/expert_meetings/rwanda/kosure.pdf Visited on August 2009

99. Ibid

100. Nalunga and Kivumbi, Supra note 13, p.21

101. Ibid

102. Ibid

of the RNF.¹⁰³

The chairperson of the RNF is the most senior delegate of the NDTPF of the country holding the chair of COMESA at the time of the meeting. The secretariats of the Regional Organizations involved in the ESA EPA negotiations i.e. COMESA, EAC, IOC, and IGAD act as the secretariat for the RNF, with COMESA taking the overall coordinating role.¹⁰⁴

The next and also the most important body to ensure coordination between the ESA Group and the EC at the technical level is called ESA-EU Regional Preparatory Task Force.¹⁰⁵ It is not a decision making body as such but it is the one which supports the negotiations through the official negotiating structures with the main objective of exchanging information on issues pertaining to the negotiations so that areas of divergence and convergence are known to both sides so that negotiations at the Ambassadorial/Senior officials and Ministerial/Commissioner level can concentrate on those areas where there is divergence.¹⁰⁶ It is also charged with exchanging views on a number of issues including opportunities for debt cancellation, Rules of Origin, how to preserve or improve market access into EU.¹⁰⁷

Then comes the issue of maintaining the cohesiveness and solidarity of the ACP group in general, and Africa in particular. Concerning this coordination, it was agreed that the ESA Group would liaise continuously with the rest of the ACP region through the all-ACP follow up mechanism

103. Ibid

104. Ibid

105. EPA Negotiations, African Countries Continental Review, ATPC, Review Report, February 2009

www.africa-union.org/.../Comprehensive_Review_of_EPAs_Negotiations_in_Africa_ACP_Final_Report.pdf Visited on Jun, 2009

107. Ibid

and with the AU.¹⁰⁸ The regional economic bodies such as COMESA, EAC, IOC, and IGAD would also work closely together whereas coordination with SADC being through the SADC-COMESA Task Force Mechanism.¹⁰⁹

3.6 The Status of the negotiation

The first RNF meeting was held in Mombassa Kenya from 19th –22nd April 2004 followed by the second one after only three months in Entebbe Uganda from the 19th-22nd July 2004.¹¹⁰ The purpose of the first RNF meeting was to chart out a way forward as far as the ESA-EPA negotiations are concerned.¹¹¹ The meeting received progressive reports from member countries regarding the establishment of NDTPFs and the implementation of Impact Assessment Studies and also approved the terms of reference and rules of procedures for the establishment of the RNF.¹¹² During this time, the forum found out that some member countries had not established the National Development Trade Policy Forum (NDTPFs) yet and most of them had not carried out the Impact assessment studies.¹¹³

The 2nd RNF meeting, on the other hand, reported that the NDTPFs were in place but there were complaints about delays in funding the studies, the selection of consultants and the execution of the studies.¹¹⁴ There were also some complaints that the completed studies were too academic and did not take full account of national interests and hence were below expectations.¹¹⁵

108. Nalunga and Kivumbi, Supra note 13, p.22

109. Ibid

110. Id p. 23

111. Ibid

112. Ibid

113. Ibid

114. Id p. 24

115. Ibid

With regard to the Impact Assessment studies, which the EU through the Project Management Unit (PMU) funds, most member countries had not yet carried out any sectoral studies to guide them in formulating positions in specific areas. This meeting also approved the terms of reference of the Regional Trade Policy Forum (RTPF) and discussed the Memorandum of Understanding (MoU) proposed by the AU for collaboration with the Regional Economic bodies in order to ensure the coordination and solidarity of the Africa region in the EPA negotiations.¹¹⁶

The recommendation of the meeting was that a Chief Technical Advisor (CTA) be recruited to give technical backup to the RNF but especially to the ambassadors and ministers. Given the agreed upon Road Map between the EU and ESA countries, it was proposed that the ESA Group could begin to formulate negotiating positions in Ocean Fisheries, Development, Rules of Origin, and Sanitary and Phytosanitary (SPS) Measures which were clusters where some progress had been made.¹¹⁷

At the beginning of the negotiation, the negotiators, specially the ESA countries, sincerely hoped that the EPAs would give them the chance to reduce poverty by reforming their infrastructure and adjusting their production capacities.¹¹⁸ On the top of that, there was a clear tendency to considering the negotiation as an instrument for the creation of bigger regional markets that will ultimately stimulate trade and investment.¹¹⁹ These visions and objectives of the EPA agenda, however, couldn't last

116. Ibid

117. M. Pearson, (2007) 'Negotiating an Economic Partnership Agreement for Eastern and Southern Africa', in Bilal, S. and Grynberg, R. (eds.), Vol. 2 pp 157-77 (London, Commonwealth Secretariat)
www.rtfp.africonnect.com/media/negotiating.pdf Visited on August 2009

118. Ibid

119. Ibid

any longer as the more pragmatic considerations, such as making the Cotonou Partnership Agreement compatible with WTO rules and preventing trade disruptions, replace them.¹²⁰

According Mamo E. Mihretu, most ESA countries engaged in EPA negotiations with reluctance, minimalist and mercantilist approach for the prime objective of maintaining their preferential market access to the EU while making minimal commitments in terms of opening markets or regulatory reforms.¹²¹ As a result, most ESA countries perceived EPAs not as an opportunity but as cost to be paid to continue to export to the Europe.¹²²

The final shape of the EPA negotiation is said to have come about in November 2007 on the negotiation took place in Brussels. The most significant bearing it had on the ESA group was that it resulted in the irrevocable split of the group.¹²³ After the negotiations in Madagascar, it became apparent that there would be no ESA region market access offer and therefore different groups determined to make their own market access offers to the EC which led to the EAC group leaving the ESA configuration.¹²⁴ The EC, on its part, agreed that individual market access offers could be made and hence almost all the countries of the ESA group, with the exception of The Horn states, made individual market access offers to the EC.¹²⁵

This time, it became crystal clear that the full EPA would not be

120. Ibid

121. Mamo, Supra note 11

122. Ibid

123. Ibid

124. Id p.9

125. Ibid

completed by the end of 2007 and as a result the EC offered what is called an Interim Agreement, with the view to avoid market access disruption, to those countries willing to sign. We will see this in the following parts as briefly as possible.

Chapter Four

The Interim Agreement of the EPAs and WTO Compatibility Issues

4.1 The Interim Agreement of the EPAs.

Both the EU and the ACP had been working to put in place the new Economic Partnership Agreements by the end of 2007 because they have promised non-ACP developing countries that they will have put in place a new system compatible with WTO rules on 1st January 2008.¹ Beginning from this day, i.e. 1st January 2008, the legal waiver non-ACP developing countries have extended to cover the existing trade arrangements between the ACP and the EU will expire and the new WTO compatible EPA was to be put in place.

But by the deadline of 31 December 2007, none of the African Negotiating groups was able to conclude a full EPA. This, according to Mark Pearson, is attributable to the fact that both the EC and the ACP underestimated the complexity and the time needed to negotiate EPAs, especially for African countries.² Hence most non-LDC countries in Africa were forced to initial Interim EPAs with EU mainly to avoid trade disruption which may result in their economy.³ Consequently, all African non-LDCs except Nigeria signed interim Economic Partnership

1. Update: Interim Economic Partnership Agreements, Trade policy in Practice, Global Europe, 19 December 2007
www.trade.ec.europa.eu/doclib/docs/2007/november/tradoc_136959.pdf Visited on Sep. 2009

2. Ibid

3. Ibid

Agreements right away with EU under this pressure.⁴

4.1.1 Objectives and Principles of the Interim EPA

Interim agreements are full international agreements, legally binding, under WTO rules and cannot be challenged by WTO Members.⁵ Each interim EPA is unique because it was negotiated with specific ACP region with its own unique mix of LDCs and non-LDCs, particular interests and integration plans. The extent of regional coverage also varies as well as the degree of comprehensiveness.⁶ Nevertheless, all the interim EPAs have in common provisions on objectives and principles, trade in goods and development cooperation. They all address also the mandate for continuation of the negotiations, the institutions involved and dispute settlement mechanisms.⁷

UNECA categorizes the objectives of all the present interim EPAs in to five major aspects; the first one being development aspects.⁸ These development aspects in the interim agreements touch up on wide range of issues in relation to poverty eradication, gradual integration into the world economy, economic adjustment and diversification, building trade policy and trade related capacity and also establishment of legal frameworks consistent with WTO rules.⁹ This will be further discussed in the following topic in a better detail.

4. Ibid

5. Stephen N. Karingi and Laura Deotti, Interim Economic Partnership Agreements Point to the Classic Regional Trade Agreements after all: Should African countries really be worried? (ATPC, Economic Commission for Africa, April 2009) P. 5

6. Ibid

7. Ibid

8. Ibid

9. Ibid

The second objective is maintaining and promoting market access for ACP products into the EU markets; and thirdly, promoting regional integration in ACP regions.¹⁰ The fourth objective is putting in place a legal framework for promoting trade and investment; and the fifth and last one is promoting solidarity and mutual interest between ACP countries/regions and EU.¹¹

There is considerable similarity even in the wording used in the objectives, particularly in the objectives of poverty eradication and regional integration in the interim agreement of all regions.¹² But a slight departure the ESA and EAC Interim EPAs have made from the other regions is that they structurally distinguish between general and specific objectives. The specific objectives of both agreements are basically about seeking compatibility with Article 24 of GATT and hence are similar to each other.¹³ They, additionally, set out areas for further negotiations and potential areas for further negotiations and also they contain entering in to an interim EPA in order to avoid trade disruption as their specific objective.¹⁴

With regard the principles of the interim agreement, there is also one fundamental principle shared by all the Interim EPAs. That is, all the interim agreements should build on the achievements or the acqui of the Cotonou and previous ACP-EU agreements, especially for what concerns the areas of regional integration and cooperation, i.e. trade and economic

10. Ibid

11. Ibid

12. Francis Mangeni (Dr.), North-South FTAs After all? A Comprehensive and Critical Analysis of the Interim Economic Partnership agreements and recommendations on how they could be made to really address Africa's developmental objectives, Trade and International Negotiations Section: (Trade, Finance and Economic Development Division, ECA) P. 25

13. Ibis

14. Ibid

cooperation.¹⁵

Narrowing down our discussion to the case of EAC and ESA interim EPAs, they are largely similar in their provisions on principles, in both subject matter and wording.¹⁶ Both interim EPAs have provided as their principle that the agreement has to be built on the *acquis* of the Cotonou Agreement, promote regional integration, asymmetry in trade liberalisation as well as the application of trade related measures and trade defence instruments, and regional preferences without extending these to the EU.¹⁷

But what can be mentioned as a difference is that the EAC EPA additionally includes the principle of contributing to addressing the production, supply and trading capacity of the EAC.¹⁸ On the other hand ESA EPA includes, which the EAC EPA doesn't, the references to special and differential treatment in the level and pace of trade liberalisation for LDCs taking into account the vulnerability of small, island and landlocked countries; and also the principles that LDCs should benefit from the agreement even where they have not yet submitted tariff offers, and that they may submit these after signature of the agreement.¹⁹ In addition, it also doesn't contain the principle of variable geometry where some countries can undertake faster trade liberalisation.²⁰

15. Economic Partnership Agreements Negotiations: A Comparative Assessment of the Interim Agreements, First Joint Annual Meetings of the AU Conference of Ministers of Economy and Finance and ECA Conference of African Ministers of Finance, Planning and Economic Development, Addis Ababa, Ethiopia, General, E/ECA/COE/27/12a, AU/CAMEF/EXP/12a(III), March 2008, p.5
www.uneca.org/cfm/2008/docs/EcoPartnership.pdf Visited on August 2009

16. Mangeni, *Supra* note 12, p.28

17. *Ibid*

18. *Ibid*

19. *Ibid*

20. *Ibid*

The UNECA explains these in its publication on a Comprehensive and Critical Analysis of the Interim Economic Partnership Agreements saying: these omissions in the ESA EPA could be explained on the basis that the agreement includes the principle of special and differential treatment.²¹ For the case of the EAC it also tries to justify by saying it is a customs union and as such made a single tariff liberalisation offer to the EU side.²²

4.1.2 Initialling and Signing the Interim EPA

It has been discussed above that when the ACP countries couldn't sign the EPA as per the deadline of 31st December 2007, the issue of avoiding the resulting trade disruption immediately came in to picture since the waiver obtained from WTO expires at the same time and EU can no longer proceed with the preference. This gave the EU a better bargaining power in the negotiation of the agreement specially with regard to the non-LDC ACP countries and EU took this advantage to exert pressure on these governments to sign the agreement.²³ Because if they decline to sign this interim agreement, exports from that country would immediately face a higher tariffs under the Generalized System of Preferences (GSP) and this basically leads to loss of markets to other countries.²⁴

The problem these countries will face, however, is not just the enormous difficulties in their trade with EU, but there are numerous menaces following it. The loss of export markets in EU could lead to company

21. Ibid

22. Ibid

23. "Economic Partnership Agreements Negotiations", Supra note 15, p.2

24. Ibid

closures, which in turn will lead to increased unemployment, which is already one of the major problems in Africa.²⁵ This fear of industry closure and costly adjustments in the job market, which emerges as a major issue in this case, leaves the African countries with no option but signing the interim EPAs to avoid labor market adjustments which will result from de-industrialization.²⁶ But the truth is, this can only be viewed as a short-term solution since the market access offers made by African countries in the interim agreements will most likely result in job losses in various sectors unless there are strong mitigation measures.²⁷

Coming back to the case of Least Developed Countries (LDCs) where Ethiopia belongs to, there are also countries in this group such as Comoros and Madagascar have signed Interim EPAs despite being covered by the “Everything but Arms” (EBA) initiative.²⁸ These countries are mainly motivated by the improved Cotonou plus rules of origin, which some negotiating groups managed to secure in the Interim Agreement.²⁹ Ethiopia and other LDCs that are not signatories to the Interim Agreement will not be able to use such rules of origin and they will also not have access to the additional funding that may come with appending signatures to the new agreement.³⁰

Concerning the way the negotiation took place, originally, in Africa, EPAs are being negotiated between EU and four negotiating groups formed specifically for that purpose. But in the interim EPA, each of the negotiating groups of Africa negotiated separately with the European Commission, with the risk of concluding group EPAs that are

25. Ibid

26. Ibid

27. Ibid

28. “Update: Interim Economic Partnership Agreements”, Supra note 1

29. “Economic Partnership Agreements Negotiations”, Supra note 15, p.2

30. Ibid

inconsistent with each other or even that contradict the continental programs for economic integration.³¹

On the other hand, since the inception of the negotiations, EU asserted that its objective was to deepen regional integration.³² The EU originally expected to conclude separate EPAs with the Regional Economic Communities (RECs) by declaring giving new impetus to advancing the regional integration agenda as the ultimate objective of the EPAs.³³ When the EU was unable to reach agreement with any of them, it decided to negotiate interim agreements with any country or economic grouping willing to conclude before the end of 2007.³⁴

However, as the negotiations came to the 31 December 2007 deadline, a new EPA configuration emerged. The East African Community (EAC) moved out of the ESA-EPA group and signed a separate interim Agreement with EU.³⁵ Eventually there came about the tendency to apply pressure to individual countries within the negotiating groupings and this confirmed fears expressed in the continent that the regional integration processes stood to be strained by EPAs.³⁶

This, therefore, brings us to deal with one major issue to be determined first and that is what the ESA configuration means at the moment. Mama E. Mihretu asserts that the EAC states, excluding Tanzania, had agreed to negotiate the EPA within the ESA configuration, but now as

31. Karingi and Deotti, Supra note 5, p.5

32. "Economic Partnership Agreements Negotiations", Supra note 15, p.2

33. Ibid

34. Ibid

35. State of EPA negotiations in May 2009, Briefing note, European Centre for Development Policy Management (CDPM), Maasticht, The Netherlands, May 2009, p. 5 www.natura.di.uminho.pt/~jj/natura/numberof/cetem.oco.palavras.ord.txt Visited on July 2009

36. "Economic Partnership Agreements Negotiations", Supra note 15, p.2

they have gone alone, it appears that the ESA configuration may no longer be a “legal entity”.³⁷ As a result, he suggests that it may be necessary to agree a new configuration as the fact remains for Ethiopia that the loss of the EAC means that the countries that remain in the configuration, excluding the Horn countries, are geographically distant and in reality little trade occurs between these countries and Ethiopia.³⁸

Mamo also argues that the signing of the interim agreement by some countries and not others within the region demonstrates that the region is not unified.³⁹ And hence, the establishment of some form of unity between the remaining parties has become absolutely essential in the absence of which the region will not be able to negotiate an EPA beyond individual agreements.⁴⁰ On the other hand, the long term implications of the split in ESA could have negative impacts on the COMESA configuration also due to the individual nature of the EAC group’s offer to the EC.⁴¹

The logic in initiating and signing this agreement, which in a way made the EPAs a “two step agreement”, lays on the fact that the parties have to be on solid ground in WTO with regard to their negotiation.⁴² It actually makes sense that rather than refusing to sign the agreement until every part of a negotiation is complete, the EU and the ACP have agreed to initiate and sign an interim agreement so as to reach agreement on the question of trade in goods which is identified as the single most

37. Mamo E. Mihretu, Ethiopia and EPA Negotiation; Review and Key Issues Ahead, Draft Final Report, 30 April 2008, p.9

38. Ibid

39. Ibid

40. Ibid

41. Id p.10

42. Ibid

important thing that can keep them in truck with WTO.⁴³ Meaning, the EU will be in a legal position with regard to WTO to further extend preferential access to the EU market once the question of trade in goods have been addressed and then the rest of the agreement will be completed in due course. In addition, reaching an interim agreement on trade in goods will prevent a disruption to ACP trade with Europe until the comprehensive agreement be concluded between these parties and is believed to deliver the full development potential in view.

On 15 October 2008, a full regional Economic Partnership Agreement had been signed between the EU and Caribbean/CARIFORUM (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Surinam, and Trinidad and Tobago).⁴⁴ This agreement covers wide range of areas such as goods, services, investment, trade rules and development.⁴⁵ Following the signature and notification of the same to the WTO, the EPA has been applied provisionally during the process of ratification by the European Parliament and Caribbean and EU national parliaments.⁴⁶

In all other negotiating regions, interim agreements covering mainly trade in goods were initialed between the EU and individual ACP countries and

43. The Interim Economic Partnership Agreements: Update on current status, contents and contentious issues, Background note for the seminar on the Cotonou Agreement and Economic Partnership Agreements, Ministry of Foreign Affairs, Helsinki, 3-4 June 2009 Submitted by ECDPM, p. 2

www.ecdpm.org/.../Content/.../ECDPM%2005-2009%20Interim%20EPAs.pdf
Visited on July 2008

44. Ibid

45. Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part
<http://www.oas.org/dsd/environmentLaw/EnvlawDB/Agreements/CARIFORUM-EU%20ECONOMICPARTNERSHIPAGREEMENT.pdf> Visited on Aug. 2009

46. "The Interim Economic Partnership Agreements:" Supra note 43, p.3

subgroups of countries with a view to continuing negotiations towards full regional EPAs.⁴⁷ Once the agreements are signed, they go through the ratification phase by the European Parliament as well as national parliaments in the ACP and in European member states. The European Parliament, for example, gave its assent to the CARIFORUM-EC EPA and to the Cote d'Ivoire-EC interim agreement on 25 March 2009.⁴⁸ But before ratification is completed, the (interim) EPAs are provisionally applied once the country signs the agreement until ratification.⁴⁹

Parallel to the preparations for signature of the interim agreements negotiations towards comprehensive regional EPAs take place in all regions in line with the rendez-vous clauses contained in the interim deals.⁵⁰ These clauses specify areas in which negotiations are to be held, in particular relating to trade in services and trade related issues, and in most cases set a deadline for concluding these by the end of 2008 except for the agreements with ESA and EAC, which do not indicate a timeframe.⁵¹

4.1.3 The development focus in the interim EPAs

Both the interim EPAs and the full CARIFORUM EPA contain dedicated parts and chapters on development. Though the approaches taken differ in some respects, there are considerable similarities. One approach taken by EAC, which is more or less along the lines that EC negotiators initially proposed, is to have just a few clauses setting out basic principles on

47. Ibid

48. Ibid

49. Ibid

50. Id p. 3

51. Ibid

development cooperation.⁵² At the same time, the EAC EPA also clearly stipulates that further work is required on the two clauses and accordingly provides for further consideration of development cooperation in the next phase of the negotiations.⁵³

The CARIFORUM EPA came up with a different approach for its development provisions of the agreement. Its mechanism is to have a scheme for development cooperation which sets out a basic understanding of sustainable development which further sets the priorities for cooperation against the background of key objectives and principles of the entire agreement as well as commitments on regional integration and monitoring.⁵⁴ SADC took the approach of elaborating a more detailed scheme that sets out areas for cooperation and interventions after key objectives and principles and commitments on monitoring, regional integration, and development finance cooperation.⁵⁵

The ESA followed an approach of setting out the understanding of development, specific commitments and obligations, detailed areas for development cooperation including a development strategy and matrix.⁵⁶ This is said to be the most detailed among the provisions on economic and development cooperation and are to be incorporated into EPA as annexes.⁵⁷

Although all of the approaches seem to have their own merit, the more

52. Economic Partnership Agreements Negotiations, Supra note 15

53. Id, p. 6

54. CARIFORUM EPA, Supra note 45, Articles 1-51

55. Economic Partnership Agreement between the SADC group of states, of the one part, and the European Community and its member states, of the other part.

http://www.bilaterals.org/article.php3?id_article=9719 Visited on Aug. 2009

56. Interim Agreement Establishing a Framework for an Economic Partnership Agreement between Eastern and Southern Africa on the one Part and the European Community and its Members States on the Other Part, Articles 36-38

57. Karingi and Deotti, Supra note 5

detailed approaches followed by ESA seem better because it provides a fuller picture of development. The divergence in understandings of what pro-development EPAs constitute, that persisted for most part of the previous phases of the negotiations among some negotiators, makes it quite essential to have a detailed approach. The detailed approaches of the ESA, for example, clearly set out the expectations, shared understandings, commitments of the parties and render the provisions into justifiable or at least monitorable obligations. They already reflect the considerable work put into the development component of the EPAs, leaving less room for unfortunate disagreements in the implementation of the agreement while providing clearer guidance for the implementation exercise and for any further refinements and adjustment subsequent to the conclusion of the agreements.⁵⁸

In line with this, it has been strongly suggested that the full EPAs should have parts or chapters on development cooperation, setting out specific commitments and obligations for the parties, and indicating the areas of cooperation as well as required interventions. Stephen and Laura suggest that African negotiators should take some lesson from CARIFORUM-EU full EPA which enshrined the trade partnership for sustainable development which, despite it is a full EPA, it is comparable in detail and content to the interim SADC-EU EPA.⁵⁹ So it would be quite essential to make some improvements perhaps drawing on ESA-EU EPA which is proved to be the more detailed interim EPAs in terms of development cooperation.⁶⁰

EAC and ESA interim EPAs have explicitly set out that development will

58. Id p. 6

59. Ibid

60. Ibid

continue to be a matter for further consideration in the current phase of negotiations.⁶¹ Other interim EPAs have also made this clear by virtue of the provisions they include to negotiate additional areas with implications for development. There is, therefore, an opportunity for making comparisons of the various approaches taken in the various EPAs to draw an appropriate lesson for the rest of the regions, especially given that the EU side has agreed to certain commitments and obligations such as those in the ESA-EU EPA.⁶²

The common African position on EPAs indicates that the development chapters of the agreement should have certain key elements.⁶³ First and for most, it should have shared understanding of development including references to overcoming major trade-related constraints and achieving certain satisfactory living standards within given time frames.⁶⁴ Secondly, it should have shared unequivocal commitments to putting development at the centre of EPA and the understanding that all provisions of EPA are about and should support development.⁶⁵ Thirdly, it should have clear commitments on adequate resources with clear obligations on EU and the member States.⁶⁶ Finally, it should have an appreciable indication at some length of areas of cooperation and interventions with a clear prioritization of regional integration, infrastructure, regional and global competitiveness, diversification and value addition, investment generation and industrialization, and references to key international instruments on development and aid.⁶⁷

61. Interim Agreement Establishing a Framework for an Economic Partnership Agreement between Eastern African Community on the one Part and the European Community and its Members States on the Other Part, Article 37 (h) and ESA EPA, Supra note 56, Article 53 (h)

62. Karingi and Deotti, Supra note 5, p.6

63. Ibid

64. Ibid

65. Ibid

66. Ibid

67. Ibid

A major critique on the interim EPAs which UNECA makes concerning this particular issue is that the European Commission negotiators don't seem to have shared the same understanding as the African negotiators on the interpretations of the development component.⁶⁸ The EC view development mainly as a process of trade liberalization and of adopting rules that prohibit discrimination against foreign investors.⁶⁹ Standing on this view, the EC has insisted on African negotiating groups adopting common external tariffs and eliminating tariffs to all imports from the EU.⁷⁰

On the other hand, Africa's argument is that economic liberalization by itself cannot guarantee development.⁷¹ Hence the current interim EPAs should address the development concerns regarding supply-side constraints, infrastructure bottlenecks and adjustment costs by providing adequate financial and technical resources, full market access to European market for African goods and service providers and policy space and flexibility for implementation of development programmes.⁷²

But the request of the ACP countries for binding commitments on EU development support aimed at responding to supply-side constraints and

68. P.H. Katjavivi, (2007), "the Role of the EU-Africa Relationship within the Cotonou Framework" on the occasion of the international conference Exchanging Ideas on Europe 2007, University of Portsmouth 3-5 September 2007.

www.uneca.org/atpc/Work%20in%20progress/75.pdf Visited on July 2008

69. AU (2007), "Brief on Negotiations for Economic Partnership Agreements", African Union, 26 May 2007

www.africa-union.org/root/au/AUC/.../TI/.../EPA_brief_2_AUC_May07.pdf Visited on Jun 2009

70. Ibid

71. AU (2006), "Nairobi Declaration on Economic Partnership Agreements", AU conference of ministers of Trade – 4th Ordinary Session, 12-14 April 2006, Nairobi, Kenya

www.africa-union.org/.../AU/.../Nairobi%20Declaration%20on%20EPAs%2014%20April%202006 Visited on Sep. 2009

72. Karingi and Deotti, Supra note 5, p.6

diversifying the production base has not yet been fulfilled. Moreover, several concerns had been raised to the fact that the EPAs do not address most of the main developmental problems, nor do they address the lack of adequate infrastructures and appropriate institutions.⁷³

4.1.4 Market access in the interim EPAs

Other than the development issues, the market access provisions on trade in goods are fundamental in all the interim EPAs. Basically they aim at ensuring the continuation of importation into the EU markets of ACP products on terms that were better than those that would have applied in the absence of the agreement. Hence this always makes an issue of top priority in the every negotiation process and for many countries it is the main reason behind getting in to this deal with EU.⁷⁴

With the exception of only some aspects, the market access provisions on trade in goods are pretty much similar across EPAs.⁷⁵ Their treatment of customs duties, non-tariff measures, and the special provisions on administrative cooperation; as well as in the provisions on trade defense measures are all similar. On the other hand, there have been witnessed a departure in the Pacific and CARIFORUM EPAs which contain provisions on agricultural export subsidies and also SADC, Pacific and CARIFORUM EPAs which have additional provisions covering customs and trade facilitation, TBT and also SPS measures.⁷⁶

73. Ibid

74. Economic Partnership Agreements Negotiations, Supra note 15, p.7

75. Ibid

76. Ibid

In addition, there are differences also with respect to the additional areas covered in the full CARIFORUM -EU EPA, such as investment and trade in services, and government procurement which became controversial in the negotiations.⁷⁷ The provisions on trade in goods contain provisions stating the obligation to eliminate export taxes and duties, the prohibition of quantitative restrictions, the requirement to accord national treatment to EC imports; the maintenance of current subsidy levels in EU and the offer to phase them out over unspecified periods for some ACP countries on products that they undertake to eliminate customs duties.⁷⁸

These provisions impose some far-reaching obligations which are likely to have appalling implications and hence an ample attention has to be given by the rest of the ACP negotiators when dealing with them. Particularly the exceptions made to some of the imperative obligations and the periods in various areas would need particular attention to be paid to.⁷⁹ Where certain obligations imposed might prove to be far reaching, the negotiating parties might usefully have another look at them in the continuing negotiations with a view to improving upon them through appropriate modifications to better take into account the trade and development needs of ACP.⁸⁰ Hence African countries with special focus on LDCs and other small and vulnerable economies belong to the group for which the trade and development needs must be addressed with special emphasis.⁸¹

Basically different agreements and obligations and rights for the regions

77. CARIFORUM EPA, Supra note 45, Title II and Title IV

78. Economic Partnership Agreements Negotiations, Supra note 15, p.7

79. Ibid

80. Ibid

81. Ibid

are likely to contribute to a further weakening of the solidarity of the ACP group of states assuming there are good reasons for maintaining the group as a global player and in particular in relations with the EU. So there is a strong argument supporting achieving a degree of coherence or harmony in the structures and subject matters dealt with under the chapters on trade in goods. From the side of EU, a uniform EU offer to the ACP regions would enable the EU to maintain a quite manageable common regime in respect of imports from ACP countries under EPAs.⁸² Where as from the side of ACP, though regions have specificities, there are large areas of commonality that enable a large degree of coordination or harmonization and hence if both parties do their homework, there cannot be any reason why the desired goal of harmonization cannot be achieved.⁸³

As we look at the exceptions provided on various grounds, they also display great deal of resemblance. All the interim EPAs provide for some general, security and taxation exceptions as detailed in the legal audit of these agreements.⁸⁴

4.1.5 Interim EPA in the ESA & EAC configuration

All the Interim EPAs display one common element in their content; extension of full duty and quota free market access to the EU market. With the exception of rice, which will be liberalized in 2010, and sugar, which will be liberalized after 2015, all the goods from the ACP will enjoy full duty and quota free market access to the EU market.⁸⁵ As to the

82. Ibid

83. Ibid

84. Ibid

85. Mamo, Supra note 37, p.10

commitment of the ACP countries, they are allowed to adopt an asymmetric liberalization schedule on their side.⁸⁶ In addition, the issue of time and degree of liberalization still make among the top crucial issues and on these, the East African Community was able to negotiate a transition period of 25 years within which about 82% of the trade volume will be liberalized where as the ESA countries come up with a separate country- specific liberalization schedule for more than 80% of trade volume with a transition period of 15 years.⁸⁷

The Interim EPAs have been specially praised for their liberal rules of origin and most often this is raised as one of the major reason why the LDC ACPs sign the interim EPA.⁸⁸ These rules of origin apply for a number of important ACP exports such as for agricultural, fisheries and particularly for textiles. While the EBA and Cotonou required multiple transformations, the EPAs only requires a single transformation to be eligible.⁸⁹

Coming back to the ESA configuration to which Ethiopia belongs, five Eastern and Southern African countries (Kenya, Uganda, Tanzania, Burundi, and Rwanda) signed an Interim EPA in the framework of the East African Community and the Indian Ocean states and Zimbabwe signed as ESA configuration.⁹⁰ But both EAC and ESA Interim Agreements remained open for others for accession and include a commitment to the conclusion of a comprehensive EPA by July 2008 and

86. Ibid

87. Ibid

88. Ibid

89. Mr Perreau de Pinnick, DG TRADE Civil Society Dialogue: PREFERENTIAL RULES OF ORIGIN Brussels, 9 October 2007

http://trade.ec.europa.eu/doclib/docs/2007/october/tradoc_136503.pdf Visited on July 2009

90. Mamo, Supra note 37, p.10

December 31st 2008 respectively.⁹¹

Mamo raises very important question when he was addressing this issue in his writing on Ethiopia and EPA negotiation saying: why do the East African LDCs sign the Interim EPA?⁹² Along Lesotho, Mozambique, Madagascar and Comoros, are the EAC LDCs that chose to join the agreement, liberalizing further than the 80% liberalization which the EU felt is necessary to defend the Interim agreements at WTO.⁹³ The East African LDCs, i.e., Uganda, Tanzania, Rwanda, Burundi, which have already committed to have a common external trade regime under the East African Community have signed the interim EPA.⁹⁴ But Ethiopia, Somalia, Djibouti, Eritrea, Sudan and Malawi among the group of ESA LDCs declined to sign the interim EPA.⁹⁵

The East African LDCs which are members of the EAC have signed the Interim EPA along with Kenya basically because they didn't want to undermine the integrity of the Community by failing to do so.⁹⁶ They acted under the assumption that if each country had entered into a different deal with the EU, the Customs Union would be splintered and considering that the community is still at a relatively nascent stage, it is possible that the Customs Union would have survived such a fragmentation.⁹⁷

Uganda acted under the belief that "EBA has no commercial sense for its

92. Ibid

93. Ibid

94. Ibid

95. Ibid

96. Babajide Sodipo, The EAC interim EPA and Rwanda, TNI, Volume 7. Number 2 / March 2008

www.ictsd.org/downloads/tni/tni_en_7-2.pdf, Visited on Sep. 2009

97. Ibid

exporters given their high degree of association with Kenyan firms”⁹⁸ and hence had no option other than to sign the Interim EPA with the rest of the East African Community members.⁹⁹ But for LDCs such as Lesotho and Madagascar, the reason for signing could possibly rest on the desire to benefit from the more generous rules of origin in textile export and to reserve the right to incorporate Far East fabrics in selling to Europe as they have been doing to the United States.¹⁰⁰

In the EAC context, Kenya, a non-LDC country, is the principal beneficiary of the elimination of all quantitative restrictions and grant of duty free access in almost all products brought about by the Interim Agreements. They effectively exploited the elimination of residual duties and import restrictions on fruit and vegetable exports, a development that will help facilitate investment flows into those sectors.¹⁰¹ All the rest of EAC member countries already enjoy these tariff preferences under the EBA initiative given their LDC status.

Mauritius, Seychelles and Zimbabwe have also secured continued duty-free access to the EU market after concluding the Interim EPA in the ESA context. As a result, all remaining residual tariff barriers, with potential benefits for Mauritius and Zimbabwe in attracting investment in fruit and vegetables, have been effectively dismantled.¹⁰² In the case of Zimbabwe, it also sees the removal of quantitative limits on beef exports.¹⁰³

98. Kirk Haywood, Uganda’s EPA: getting the process ‘right, TNI, Volume 7. Number 2 / March 2008

www.ictsd.org/downloads/tni/tni_en_7-2.pdf Visited on Aug. 2009

99. Ibid

100. Mamo, Supra note 37, p.10

101. Agritrade, EPA Negotiations, Eastern and Southern Africa: Executive Brief (January, 2008)

<http://agritrade.cta.int/en/content/view/full/1788> Visited on Sep. 2009

102. Ibid

103. Mamo, Supra note 37, p.10

Under the EAC agreement, an additional tariff-rate quota with zero duty of 15,000 tones was opened for marketing year 2008/2009 with regard to transitional arrangements for sugar with a guarantee of prices equivalent to those paid under the Sugar Protocol.¹⁰⁴ Although it is not clear how this will be allocated at the national level, additional quota of 75,000 tones has been made available for ESA interim EPA members.¹⁰⁵

4.2 WTO Compatibility Issues of the EPAs

There are two categories of unilateral preference that are allowed in WTO without waivers which are pertinent for the current ACP-EU cooperation: the Generalized System of Preference (GSP) under the Enabling Clause of the GATT and the EBA initiative.¹⁰⁶ The Generalized System of Preference (GSP), to be applied on the basis of the WTO, must be available to all developing countries.¹⁰⁷ Product coverage under this system is limited and the preference is less generous due to the fact that it benefits those countries whose exports can compete with production in the preference granting country and hence a number of the GSP beneficiaries remained to be advance developing countries.¹⁰⁸

Concerning EBA initiative, this preference system, unlike the GSP, includes almost all products in the tariff schedule and applies only to the

104. Ibid

105. Ibid

106. Sebastian Vollmer, et al, EU-ACP ECONOMIC PARTNERSHIP AGREEMENTS EMPIRICAL EVIDENCE FOR SUB-SAHARAN AFRICA, World Development Report 2009-Development in 3D: Density, Distance, Division, Background Paper, Sep. 2008, p.2 www.siteresources.worldbank.org/INTWDR2009/Resources/.../epa_v1.pdf Visited on Aug. 2009

107. Gregory Shaffer and Yvonne Apea, Institutional Choices in the General System of Preference Case: Who decides the Conditions for Trade Preferences? The Law and Politics of Rights, Journal of World Trade, lead article, Vol. 39:5, pp. 977-1008, 2005 <http://www.worldtradelaw.net/articles/shaffergsp.pdf> Visited on Aug. 2009

108. Ibid

LDCs.¹⁰⁹ In other words, the EBA is such a program that extends immediate duty-free and quota free treatment to almost all products from LDCs and is more generous as LDCs are rarely considered competitive threats.¹¹⁰

The problem with Cotonou Partnership Agreement was that it did not fall under either category and, as a rule, any unilateral preference programs falling outside these two categories require a waiver to be consistent with WTO rules.¹¹¹ The agreement didn't qualify under GSP since the preference was not generalized and non-discriminatory as a country claiming to be the beneficiary needs to be former European dependencies and/or be located within Africa, the Caribbean or the Pacific.¹¹² It doesn't qualify to be included under the EBA initiative either, since the beneficiary status went beyond least developed countries as many of the beneficiaries were non-LDCs.¹¹³

Thus, the Cotonou Partnership Agreement concluded in 2000, taking full account of this problematic situation, has come up with the understanding that Lome - Cotonou Preference be replaced by EPAs.¹¹⁴

109. European Commission: Trade: Everything but arms, <http://ec.europa.eu/trade/wider-agenda/development/generalised-system-of-preferences/everything-but-arms/> Visited on Sep. 2009

110. Ibid

111. Developing Countries and Unilateral Trade Preferences in the New International Trading System, *Miguel Rodriguez Mendoza, Patrick Low and Barbara Kotschwar (editors), Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations. Washington, D.C., 1999* P.10

www.wto.org/French/tratop_f/devel_f/sem01_f/ongugl_e.doc Visited on October 2009

112. Ibid

113. Ibid

114. Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 - Protocols - Final Act - Declarations, Art. 37(7)

This is supposed to make ACP-EU partnership agreement consistent with GATT Article XXIV of the WTO which allows countries to maintain reciprocal “preferential” access for members of a Free Trade Agreement (FTA) provided that duties are eliminated on substantially all products traded among the members of the FTA within a reasonable period of time.¹¹⁵

This changes the traditional EU-ACP trade relations which has been governed by EU granting different forms of non-reciprocal trade schemes to a WTO-compatible reciprocal EPAs.¹¹⁶ This is, as Martenczuk states, an attempt ‘to set out objectives and principles that will guide ACP-EC development cooperation well into the 21st century and, at the same time, it represents a major overhaul of instruments and policies in all fields of ACP-EC development cooperation.¹¹⁷

On the other hand, the WTO rulings in the U.S.-European Union Banana Dispute, which has been finally settled in April 2001, where parts of the Lomé Conventions which were found to be WTO-incompatible because they favored ACP countries against other developing countries, is cited as one of the main external reasons for the movement to change the agreement making it WTO compatible.¹¹⁸ Hence the Cotonou Agreement

115. General Agreement on Tariff and Trade 1947, Art. 24

116. Martenczuk, B. “From Lomé to Cotonou: The ACP-EC Partnership Agreement in a Legal Perspective.” *European Foreign Affairs Review* 5(4), 2000:461
www.fes.de/.../ECDPM+ART.96+COMPARISON+SEPT.2005.PDF Visited on Sep. 2009

117. Id, p. 162

118. M. Meyn, *The Impact of EU Free Trade Agreements on Economic Development and Regional Integration in Southern Africa: The Example of EU-SACU Trade Relation*. Frankfurt am Main, Peter Lang, 2006
www.nepru.org.na/uploads/.../MRI2006_Ch5_Meyn_23Apr07.pdf Visited on Aug. 2009

emphasized the need for compliance with WTO rules. This orientation is also linked to concerns of avoiding previous lengthy and costly negotiations on waivers in the WTO. It is also argued that WTO compatibility would increase the legal security of the ACP-EU trade partnership as well as improve the prospects for economic actors and the investment climate in ACP countries.¹¹⁹

WTO-compatible EPAs were, therefore, supposed to enter into force as soon as the expiry of the WTO waiver obtained in 2001 which runs until December 2007.¹²⁰ During this time, EPAs are supposed to establish a Free Trade Agreement, which will progressively abolish substantially all trade restrictions between both parties.¹²¹ This is a radically new element in ACP-EU trade relations and for the first time ACP countries will have to open up, on a reciprocal basis, their own markets to EU products in order to retain their preferential access to the EU market.

So far there have been identified three main aspects of Article XXIV of the GATT that can affect ACP countries in their negotiations on EPAs: i) the neutrality to third parties, ii) the trade coverage requirement, and iii) the length of transition periods.¹²² The following parts of this paper will address them briefly.

119. Onguglo B. and Ito T. (2003), *“How to make EPAs WTO compatible”*, ECDPM discussion paper No. 40, Maastricht, ECDPM.
www.ecdpm.org/...ECDPM/.../6133074B85C2B9FAC125757C0048FC1B Visited on July 2009

120. Developments in International Trade and WTO/EPA Negotiations
Fifth Session of the Committee on Trade, Regional Cooperation and Integration, 8-10 October 2007, Addis Ababa, Ethiopia, ECA, /ECA/CTRCI/5/2
www.uneca.org/crci/5th/DevIntTrdWTOEPAsNegtiations.pdf Visited on Sep. 2009

121. Ibid

122. Rémi Lang, “Renegotiating GATT Article XXIV – a priority for African countries engaged in North-South trade agreements”, (ATPC, Economic Commission for Africa, 2006) P. 7

4.2.1 Neutrality to third parties

Paragraph four of Article XXIV of GATT sets out how regional integration and the multilateral trading system can be reconciled by stating what the basic objective of RTAs should be. It provides that the objective of RTAs should be “to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories”. This, therefore, made clear that the basic principle behind WTO rules on RTAs is that trade arrangements should be designed in such a way that maximizes trade creation and limit, as much as possible, trade diversion. This maximization of trade creation over trade diversion is believed to bring about the highest potential welfare gains at the global level.¹²³

Evidently, it would be hardly possible to limit trade diversion if RTAs result in higher barriers for exports from third parties. This is, therefore, what paragraph 5 of Article XXIV intends to regulate so that the impact of any RTA be neutral to third parties in terms of both duties and other regulations of commerce. To this end, the paragraph 5 of Article XXIV expressly states that conditions under which any RTA may be formed are: as a customs union, free trade agreements, and interim agreements necessary for the formation of a customs union or of a free trade area.

Of these three conditions, Free Trade Agreements (FTAs) stipulated in Article XXIV-5-b of GATT is the legal basis under WTO which makes the basis for negotiating EU-ACP EPAs. What this provision states is that a

123. Ibid

Free Trade Agreement (FTA) should not result in higher duties or more restrictive “other regulations of commerce” to the commerce of third parties, than the ones in application prior to the entry into force of the FTA. In other words, the changes introduced by the FTAs should not have any negative impact or at least it must be neutral in terms of market access for third parties

4.2.2 The Coverage of Regional Trade Agreements

4.2.2.1 Substantially All the Trade

Concerning this issue, Paragraph 8(a) of Article XXIV stipulates: “duties and other restrictive regulations of commerce [...] are eliminated with respect to substantially all the trade between the constituent territories [...]”. This provision, through its phrase saying “substantially all of the trade”, aims at the maximization of trade creation within the RTA through the elimination of internal trade barriers. Thus according to this paragraph, “substantially all of the trade” within RTAs shall be covered by liberalization for RTAs to contribute to world trade expansion.

The meaning of this phrase “substantially all of the trade”, however, is said to be perhaps the most contentious element in current WTO negotiations on RTAs.¹²⁴ The term “substantially”, according to some writers, implies that not the totality of the trade has to be necessarily covered and hence it is argued that there is flexibility to leave some of the trade outside of the coverage of liberalization.¹²⁵ But this also gives rise

124. Id p. 8

125. Ibid

to another question as to how much trade can be left outside of the coverage to satisfy the requirement of substantiality.¹²⁶

On the other hand, there have been identified different ways of interpreting the “substantially all of the trade” requirement.¹²⁷ On the debate on how to evaluate its coverage, there is an argument that “substantially all of the trade” should be represented by a quantitative benchmark such as the percentage of trade covered, and/or a percentage of the total number of tariff lines; while others proposed that there has to be a qualitative benchmark in addition to the quantitative one for defining the phrase.¹²⁸

To briefly discuss what each of these mean, a quantitative benchmarks basically deals with representing the trade in terms of percentage of trade covered, and/or a percentage of the total number of tariff lines.¹²⁹ A qualitative benchmark, on the other hand, is generally defined as the absence of systematic exclusion of any major sectors such as agriculture or textile.¹³⁰

The preamble of the Understanding on the Interpretation of Article XXIV of GATT 1994 seems to advocate the application of quantitative restriction and stresses on the importance of not excluding any sectors from liberalization. The underlying justification is that the commitment

126. Ibid

127. Ibid

128. Mitsuo Matsushita, *The World Trade Organization: Law, Practice, and Policy*, 2nd ed. (Oxford University Press, New York, 2006) p. 568

129. Marceau G. and Reiman C., *When and How is a regional trade agreement compatible with the WTO? Legal issues of Economic Integration*, Kluwer Law International, 2001, p.23

www.jiel.oxfordjournals.org/cgi/content/full/8/3/691 - Visited on Oct. 2009

130. Ibid

to maximize benefits from RTAs basically plays a pivotal role for the expansion of world trade in general and such the exclusion any sector from liberalization may impair the target in view.¹³¹ In other words, the preamble states that factually the elimination, between the constituent territories, of duties and other restrictive regulations of commerce, which extends to all trade, expands the world trade, the exclusion of any sector of trade, to the contrary, diminishes it.

But African countries, on a justifiable ground, opposed to including qualitative benchmark when defining the scope of the term “substantially all the trade”.¹³² This is precisely because they have some justifiable grounds such as providing a protective measures for their infant industries of textile, agro-processing etc and hence exclude them from liberalization.¹³³

When we come back to the EU’s interpretation of “substantially all of the trade” requirement in terms of quantity, it has traditionally been that liberalization should extend to at least 90% of existing trade between the members of a RTA.¹³⁴ This 90% coverage, however, can be split unevenly between RTA members, in order to reflect development asymmetries in the interest of the ACP countries in the case of EPAs.¹³⁵

Basically the ACP countries’ objective under the EPA is stated as securing maximal market access to the EU while maintaining a large degree of flexibility with regards to opening their own trade. According to the analysis of this case made by taking three different scenarios, the

131. “Developments in International Trade”, Supra note 120

132. Ibid

133. Ibid

134. Lang, Supra note 122, p. 12

135. Ibid

larger degree of asymmetry is shown to be more desirable.¹³⁶ The three possible cases of asymmetry analyzed are: First, full liberalization by both sides, second, asymmetrical liberalization as under the classic EU interpretation which defines “substantially all trade” as liberalizing 90% of trade in which ACP liberalizes 80% of their imports and EU liberalize 100%; and the third scenario is the one called accentuated asymmetrical liberalization.¹³⁷

Many African governments strongly advocate for the third scenario by stating that 20% exclusion rate which EU proposed is not acceptable.¹³⁸ Hence if the African side wins in convincing EU on the third scenario, EU liberalizes 100% of its trade and the ACP 60% which makes the definition of “substantially all trade” liberalizing 80% of trade between the two parties.¹³⁹

A larger degree of asymmetry which is shown in the last scenario, featuring the largest degree of asymmetry, appears to be the most positive for the African ACP countries. This is due to the fact that all the indicators such as GDP growth, terms of trade, welfare, and fiscal losses show the most favorable impact under a larger degree of asymmetry, which is a flexible interpretation of the “substantially all trade” requirement.¹⁴⁰

The overall objective of African countries, which is to foster their economic development and poverty reduction, also necessitated dealing

136. Stephen N. Karingi and R. Perez, “Will the Economic Partnership Agreement foster Sub-Saharan African Development?” ECA, 2006
www.uneca.org/ATPC/Work%20in%20progress/33.pdf Visited on Jun. 2009

137. Ibid

138. Ibid

139. Ibid

140. Ibid

with the issue of determining in detail how much exemption from liberalization they will need in the context of EPAs.¹⁴¹ There will, obviously, be a difficulty in selecting the products to be excluded from liberalization as well as dealing with the diverse interest of those countries to protect different products. This can be noted from the fact that there is a great difference among countries on identifying sensitive products through the level of tariff. Hence if African Regional Economic Communities are to adopt one single tariff schedules on imports from the EU in the context of EPAs, then this will require that they first negotiate among themselves to agree on which goods they want to exclude from liberalization.¹⁴²

This, however, cannot be simply answered by the common way of designing trade policy to diversify the productive structures and support to “infant-industries” in sectors with potential growth prospect. Undeniably this could play a part through its support in diversifying, but the fiscal policy concerns might also dictate the choice of what products might be excluded from liberalization.¹⁴³ As a matter of fact, many African countries are very heavily dependent on their tariff revenue for their fiscal base.¹⁴⁴ In the long term, however, fiscal concerns should be tempered as tariff revenues losses could be compensated if reforms introducing new fiscal policies are carried out which is an option that will be long and costly and could require substantial technical and financial assistance.¹⁴⁵

141. C. Stevens (Dr) and J. Kennan, “Preparing for Economic Partnership Agreements – Trade analysis handbook”, 2005, p. 17
www.fes-tz.de/.../C%20Stevens,%20J%20Kennan%202005%20-%20Preparing%20for%20EPAs%20-... Visited on July 2009

142. Ibid

143. Lang, Supra note 122, p. 14

144. Ibid

145. Ibid

Different methodologies have been proposed to identify which tariff lines to exclude from the coverage of “substantially all trade” in the context of EPAs. Some consist in excluding those products that yield the highest tariff revenues where as others also look at other criteria in selecting the tariff lines to be liberalized, such as their sensitivity for the national producers based on previous liberalization exercises and sectors with a high growth potential.¹⁴⁶ This, therefore, leads to the conclusion that if African countries are to use trade policies as a lever for development, it is quite essential that they will have to go beyond the issue of tariff revenues in identifying exemptions to “Substantially all trade” in EPAs.¹⁴⁷ To this end, there need to be conducted a series of national as well as regional dialogues with all stake holders in order to identify the sectors where protection may be necessary for development purposes. ¹⁴⁸

4.2.2.2 “Other restrictive regulations of commerce” on “substantially all the trade”

Article XXIV Paragraph 8 of GATT provides another major issue that needs to be met to make the EPAs WTO compatible. It states that “other restrictive regulations of commerce” have also to be eliminated alongside duties for a RTA to reach WTO compatibility. This basically pertains to regulations acting as non-tariff barriers within RTAs. But the problem in relation to this particular provision in the GATT is that there is no positive definition of what “other restrictive regulations of commerce” are and no clear agreement as to which regulations are in view when it says other restrictive regulations.

146. Id p. 15

147. Ibid

148. Ibid

But Article XXIV provides in paragraph 8 some exceptions to the rule prohibiting the application of duties and other restrictive regulations of commerce by stipulating some type of restrictive regulations of commerce which may be applied within a RTA when necessary and permitted. These restrictive regulations allowed under the above mentioned grounds are basically the ones expressly stated in Article XI: “General elimination of quantitative restrictions”, Article XII: “Restrictions to safeguard the Balance of Payment”, Article XIII: “Non-discriminatory administration of quantitative restrictions” Article XIV: “Exemptions to the rule of Non-discrimination”, Article XV: “Exchange arrangements”, and Article XX: « General exceptions ». .

These articles, which stipulate restrictive regulations, constitute the cases of normal exemptions to WTO disciplines that can be utilized for example in the incidence of a trade related-threat, which might necessitate exceptions to free trade. One important message that this conveys is that “other restrictive regulations of commerce” are the regulations falling outside the ones listed in here as permitted by WTO to be applied when necessary.¹⁴⁹ Hence if there is any quantitative restriction in the RTAs, in this case the EPAs, they shall be removed unless they fall under the permitted exemptions.

Another pressing issue in relation to this discussion is whether or not “other restrictive regulations of commerce” encompass safeguards and other trade remedies and also how SPS/TBT measures are to be interpreted in this context. The largest uncertainty with regard to these

149. Id p. 16

issues, according to some writers, is whether or not they encompass safeguards and other trade remedies.¹⁵⁰

This warns the African countries negotiating EPAs to keep an eye on WTO negotiations on clarifying “other restrictive regulations of commerce”. The reason is that they are often at the wrong end of such restrictive regulations of commerce, especially when dealing with standards.¹⁵¹

It has also been argued that the issue of safeguards and other trade remedies lacks clarity in different ways. To begin with, it is unclear whether Article XXIV allows safeguards among the members of a RTA. This stems from the problem of deciding whether the list of authorized “other restrictive regulations of commerce” provided hereinabove is exhaustive or illustrative. If it is regarded as exhaustive, then safeguards and other countervailing duties are probably not allowed, but if it is only illustrative, then there could be possibilities to allow them within a RTA. This makes it, therefore, difficult to decide whether the safeguards and other trade remedies are allowed in the RTA or not.¹⁵²

Specially for African countries, this makes an issue of paramount importance with in the context of EPA in that they will face a severe problem in the case of large surge of imports that would threaten sectors

150. J. Pauwelyn, “The Puzzle of WTO Safeguards and Regional Trade Agreements” *Journal of International Economic Law* 2004, 2004, p. 19

www.jiel.oxfordjournals.org/cgi/content/abstract/7/1/109 Visited on Jun 2009

151. Supra note 122, p. 17

152. B. Onguglo and T. Ito, “How to make EPAs WTO compatible?” ECDPM discussion paper No. 40, Maastricht, ECDPM.

www.ecdpm.org/...ECDPM/.../6133074B85C2B9FAC125757C0048FC1B?... Visited on Sep. 2009

of vital importance for their development policies.¹⁵³ Hence they will have a clear interest in preserving the possibility to apply safeguards or equivalent measures. As a result, they have a fundamental interest in making safeguards compliance with RTAs rules more explicit.

But making safeguards compliance with RTAs rules more explicit *per se* cannot do any good to the African countries unless it also includes a degree of asymmetry in its application. In this case the assertion will be providing the developing members of EPAs more flexibility with the use of safeguards, for example, through eased burden of proof. In addition, there should be provided the use of specific safeguard measures for transition periods to the developing countries involved in North-South RTAs.¹⁵⁴

4.2.3 Transition periods

This directly takes us to what the WTO rules on regional trade agreements (RTAs), paragraph 8-c of Article XXIV, provide. This provision, on the part dealing with the time during which tariffs must be lifted, states that tariff has to be lifted on ‘substantially all trade’ “[...] within a reasonable length of time”. Liberalization within RTAs is commonly achieved by steps of gradual tariff reduction. The question coming in to picture in this time pertains to how long should this ‘reasonable period of time’ be.

The Understanding on the interpretation of Article XXIV, paragraph 3 specifies that “the reasonable length of time [...] should exceed 10 years

153. Lang, Supra note 122, p. 18

154. Ibid

only in exceptional cases”. This, in a way, expressly states that 10 years will be the maximum number of years, unless there happens to exist an exceptional case, to be given as a transition period for the application of tariff liberalization with full force. But if there is any state alleging that there exists such exceptional case for exceeding the 10 year period, it has to prove it to the satisfaction of the Council for Trade in Goods as has been expressly provided in the same paragraph saying such exceptional circumstances require “[...] a full explanation to the Council for Trade in Goods of the need for a longer period”.

The assertion concerning the current arrangements on RTAs is that even though it leaves some degree of flexibility for transition periods longer than 10 years, the absence of any agreed definition on “exceptional cases” leaves a high degree of uncertainty.¹⁵⁵ This can, therefore, jeopardize the legal security conferred by this flexibility on the agreement spanning on more than ten years and it needs to be addressed in a sufficiently clear manner.¹⁵⁶

Basically it is very likely that ACP countries will need long transition periods in the EPA process.¹⁵⁷ Other countries experience shows that so far there have been given different durations as a transition in existing North-South RTAs which several times exceed 10 years. To name some: the Tunisia Euro-med agreement allows Tunisia up to 12 years to

155. Ibid

156. Ibid

157. Stephen Karingi, et al, “Economic and welfare impacts of the EU-Africa Economic Partnership Agreements”, (ATPC, Economic Commission for Africa, 2005) p. 21

liberalize,¹⁵⁸ South-Africa is granted the same timeline to finalize its opening; Egypt was granted 15 years to liberalize some products under its Euro-med agreements;¹⁵⁹ and also the case of Chile in its agreement with Canada which was entitled 19.5 years to achieve its liberalization.¹⁶⁰

Likewise, the ACP countries in their submission on RTAs to the WTO have also request for a relatively long transition period, i.e. periods of atleast 18 years.¹⁶¹ The stated reason for this is that it would be vital for them in the context of EPAs, and other future RTAs, to grant enough time to their industry to adapt to radically increased competition, as well as to introduce smoothly necessary measures to compensate for heavy tariff revenue loss.¹⁶² On the top of that, long transition periods will also be necessary to enable African countries to achieve regional integration prior to opening their trade to the EU.¹⁶³ Hence, it is based on all these considerations that ACP countries in their submission on RTAs to the WTO have requested that periods of at least 18 years be allowed.¹⁶⁴

Finally, there is an issue of the legal regime that should be applied

158. Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part [OJ L 97 of 30.03.1998].

http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/mediterranean_partner_countries/r14104_en.htm, Visited on Oct. 2009

159. Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part [OJ L 304 of 30.09.2004].

http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/mediterranean_partner_countries/r14104_en.htm Visited on Oct. 2009

160. Canada-chile Free Trade Agreement

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/index.aspx>

161. Lang, Supra note 122, p. 20

162. "Compendium of issues related to Regional Trade Agreements" background survey by the Secretariat (TN/RL/W/8/Rev.1), WTO, August 1, 2002

www.unctad.org/en/docs/ditctncd20047ch1_en.pdf Visited on July 2009

163. Ibid

164. Ibid

during this transition period. This specially brings in to attention how much of the trade between the two parties should be liberalized during the transition period and what of the other restrictive regulations of commerce.¹⁶⁵ Basically there is a disagreement among WTO membership on whether liberalization can be postponed till the end of the transition, i.e. backloaded or frontloaded.¹⁶⁶ ACP countries argument is that Article XXIV disciplines relative to “substantially all trade” be applied only after the completion of the transition period, while Australia argues in favor of coverage of 70% of tariff lines at the date of entry into force of the RTA.¹⁶⁷

The sound argument from the side of Africa concerning this transition period is that if the new rules on RTA are to be conducive to development, then special and differential treatment should apply during this period.¹⁶⁸ More flexibility in the length of transition periods and the schedules of liberalization during the transition periods would allow developing states involved in North-South RTAs such as African countries to be able to spread over more time adjustment processes which would play a significant role in allowing for quick and substantial benefit from entering RTAs.¹⁶⁹

165. Lang, Supra note 122, p. 19

166. Ibid

167. Submission on Regional Trade Agreements by Australia. TN/RL/W/180

168. Lang, Supra note 122, p. 19

169. Ibid

Chapter Five

Ethiopia's Main Concerns with the Negotiation of the Economic Partnership Agreements and the way forward.

It has been repeatedly mentioned above that Ethiopia is one of the 79 ACP countries negotiating EPA with EU within the ESA region. The country is currently negotiating this agreement as introduced by the Cotonu agreement which enshrines the conclusion of a new WTO compatible trading agreement called EPA to be in force beginning from 1st January 2008 thereby putting an end to the non-reciprocal preferential trade agreements which have been governing the cooperation between the two parties for decades.

Having failed to conclude this agreement by the deadline, several countries including the African LDCs initialed and signed the interim agreement under the guise of avoiding the resulting trade disruption. But Ethiopia decided to wait and negotiate the full EPA and hence currently the country is negotiating full EPA with EU in the ESA region. The following parts of this paper are devoted to elaborating the contentious issues of the negotiation.

5.1 The MFN Provisions in the EPAs

The MFN clause in the ESA Interim Agreement Article 16(2) provides that “With respect to the subject matter covered by this Chapter, the Signatory ESA States shall accord to the EC Party any more favorable treatment applicable as a result of the Signatory ESA States becoming party to a free trade agreement with any major trading country after the signature of this Agreement”. In other words, this provision requires that any country within the group of the ESA which has concluded the

agreement, i.e. the EPA, with the European Union must automatically extend to the EU any more favorable treatment, in the form of deeper market access or another as the case may be, that the region or any of its member states grant to any other major trading economy in future free trade agreements (FTA).

The text also further goes on to define what is meant by a 'major trading economy' in paragraph 6 of Article 16 as:

... 'major trading economy' means... any country accounting for a share of world merchandise exports above 1 % in the year before the entry into force of the economic integration agreement referred to in paragraph 2, or any group of countries acting individually, collectively or through an economic integration agreement accounting collectively for a share of world merchandise exports above 1.5 percent in the year before the entry into force of the economic integration agreement referred to in paragraph 2

This will obviously create a serious impediment to additional negotiations that the EPA signatories might wish to negotiate with any other country falling under the definition of 'major trading economy' as defined by this particular provision.¹

Hence very serious oppositions have been made by some developing

1. Mamo E. Mihretu, Mamo E. Mihretu Ethiopia and EPA Negotiation, Review and Key Issues Ahead, draft Final Report, 30 April 2008 pp 14-16

countries such as Brazil² which have denounced this by alleging it as putting in place a European strategy aimed at maintaining and increasing its market position at the cost of ACP countries and their other trading partners.³ This is actually a legitimate claim based on tangible fact that the inclusion of this provision in the EPA will tie the hands of the signatory countries and works to the detriment of other countries such as China, Brazil, India and even US by discouraging them from concluding any free trade agreement with ACP since on the basis of this provision, EU will automatically jump in. In addition, it will also undermine the policy space of developing countries and curtail their negotiation rights in the future bilateral negotiations on the top of being disincentive to South-South trade as other “major trading countries” would be reluctant to make a concession in exchange for concessions that will be extended to the EU.⁴

Undeniably, the MFN clause makes the cornerstone of the principle of non-discrimination that underlies the multilateral trading system and this explains the reason why it is accepted by WTO members as one of the pillar provisions of the agreement. It, however, doesn't have a place in the regional trade agreements as defined by Article XXIV of GATT which are by definition discriminatory and hence is extraneous for the agreements like EPA.

This, according to Mamo E. Mihiretu, reflects a clear offensive market

2. Tine Van Criekinge, Implications of Economic Partnership Agreements (EPA) on the EU-ACP Partnership and the possibility of ACP leverage, Paper presented at the GARNET Conference “The European Union in International Affairs”, April 2008, http://www.ies.be/files/repo/conference2008/EUinIA_I_3_VanCriekinge.pdf Visited on September 2009

3. Ibid

4. Cheikh Tidiane Dièye and Victoria Hanson, MFN provisions in EPAs: a threat to South-South trade? TNI, Volume 7. Number 2 / March 2008, p. 26 www.ictsd.org/downloads/tni/tni_en_7-2.pdf Visited on October 2009

access interest of the EU regardless of its declared objectives and said to have witnessed EU's plans to preempt the increasing dominance of big developing countries such as China, India, Brazil and Russia in Africa.⁵ This, consequently, faced a fierce resistance from both the developed and also developing countries from within and outside the ACP.⁶ Nevertheless, EU declined to make any change and expressed the same through a speech made by its trade commissioner saying he is not going to re-open what has already been negotiated.⁷

Stephen N. Karingi, Chief, Trade and International Negotiations Section in the UN Economic Commission for Africa, asserts that the inclusion of this provision in to EPA will have adverse effect to Africa.⁸ Basically Africa has to be in a solid ground in so far as competing in any emerging developing country market is concerned. This provision, however, introduces the situation where by Africa will be impaired from optimizing the South-South trade cooperation.⁹

He also further mentioned that the conventional framework of liberalization requires that there has to be achieved a regional integration in the first place and then followed by South-South trade cooperation which ultimately will lead to liberalizing the market at the global level.¹⁰ But the inclusion of this provision in EPA there by giving the right to EU to jump in to any better treatment that any ACP country grants to any

5. Mamo, Supra note 1

6. Ibid

7. Ibid

8. Interview with Stephen Karingi, Chief, Trade and International Negotiations Section in the Regional Integration, Infrastructure and Trade Division of the UN Economic Commission for Africa, Dec.4, 2004

9. Ibid

10. Ibid

‘major trading economy’ would most likely impair the conclusion of any free trade agreement between these countries. This obviously denies Africa an opportunity to take part in emerging developing country markets such as Brazil, India, China etc.¹¹

But the good news, according to Stephen N. Karingi, is that this is one of the contentious issues in the EPA negotiation and haven’t been finally settled yet and this gives an opportunity for African countries to argue for the ruling out of this provision from the EPA.¹² Developing countries such as Brazil, on their part, have taken this issue to the WTO trade negotiation alleging that including MFN in EPA undermines trade between developing countries and hence it has to be removed.¹³

Ato Lisanework, Ethiopia’s lead EPA negotiator, shares Mamo’s argument. The very fact that EPA is a free trade agreement avoids the application of the MFN principle since it is an exception to this rule.¹⁴ But concerning the position of Ethiopia on the inclusion of this issue, he asserts that it is not an issue given the current level of development of the country.¹⁵ Because, the country neither have the intention nor the capacity to conclude a free trade agreement even with neighboring countries such as Kenya let alone other major economies.¹⁶ So, he concludes his remark by saying it will be illogical to negotiate on this issue for two major reasons: first, MFN principle doesn’t have a place in the case of free trade

11. Ibid

12. Ibid

13. Ibid

14. Interview with Ato Lisanework Gorfu, Coordinator of Multilateral Trade Negotiations in Ministry of Trade and Industry of Ethiopia and Ethiopia’s lead EPA negotiator, on Dec. 1, 2009

15. Ibid

16. Ibid

agreements that are, by definition, discriminatory; and second, it is hardly likely that Ethiopia will conclude such free trade agreement with any other country at least in a foreseeable period of time.¹⁷ So it will be just wasting time and resource to negotiate on this issue for Ethiopia at this particular time.¹⁸

5.2 Development Cooperation

Since the preference is available under EBA for LDCs, development assistance under the EPA is cited as the single most important incentive for them to be interested in the negotiation.¹⁹ Being one of the LDCs in the ACP groupings and enjoying the preference with respect to trade, development cooperation makes the central objective for Ethiopia also to take part in the negotiation with the EU.²⁰

When we refer the Interim Agreements on this issue, the ESA agreement has dedicated 16 articles to address specific development cooperation aspects and includes a desire to support a matrix of regional needs, i.e. infrastructure, upgrading productive sectors, regional integration, trade policy & regulation and adjustment costs. These are intended to be implemented possibly via a regional fund.²¹ This text offers much better coverage for the development cooperation than the Interim EAC which has only one article that states broad areas of cooperation - such as sustained growth, regional integration, fostering structural

17. Ibid

18. Ibid

19. Mamo, Supra note 1, p.21

20. Ibid

21. Ibid

transformation, addressing supply capacity, etc.²² On the top of that, the ESA text takes development cooperation as one of the issues that will be negotiated under the rendezvous clause possibly because of the limited development cooperation clause.²³ For these particular reasons, the ESA text has a better coverage of what Ethiopia has as highlighted as one of the major reasons in entering in to this negotiation with EU.²⁴

This, however, doesn't mean that development cooperation issues have been addressed in the interim EPA as sufficiently as they should be. One major reason supporting this assertion is that there is no binding link made between the implementation of trade reforms and financial assistance from EU. The negotiation on the details of development cooperation instruments is suspended to a later stage and other instruments cited, such as EDF, are not linked in a binding manner to the interim agreements. As a result, development cooperation provisions, both financial and non-financial, are said to be hardly developed and often absent in the Interim EPAs.²⁵

EU, on its part, has made its position about development assistance pretty clear. Its assertion is that ACP countries will be supported and compensated by resources from the European Development Fund (EDF).²⁶ EDF fund is, up till to date, the main financial instrument for

22. Interim Agreement Establishing a Framework for an Economic Partnership Agreement between Eastern African Community on the one Part and the European Community and its Members States on the Other Part, Article 36

23. The ESA Interim EPA, Article 53 (h)

24. Mamo, Supra note 1

25. Ibid

26. ECDPM (2006b) 2nd Technical Note on EU financing for development: The 10th European Development Fund: Development Funding for EPAs, p.3 Available at www.ecdpm.org.

the deployment of EU support to ACP countries, and is financed by EU members' contributions, which are agreed at the beginning of each five-year funding cycle, known as an 'envelope'.²⁷ EU's argument is that the EPA's adjustments would be supported from the 10th EDF funding cycle which has been agreed in December 2005 to commit €22.6bn for all ACP countries to cover the period 2008-2013.²⁸ This has represented a nominal increase of €7.4bn from the 9th EDF envelope.²⁹

Other than this apparently impressive fund, EU has not committed any additional assistance for the purpose of EPAs. The reality about the increase in the total amount of the 10th EDF is that it is only marginally more than if the EU had continued to contribute aid at its average historic level of 0.38% of its GNI in development assistance and this makes this 10th EDF a 'business as usual' funding program.³⁰ Meaning, the ACP countries would have received this amount regardless of whether they were negotiating an EPA and this indicated that there is no additional EPA assistance built into the 10th EDF budget.

Despite the provisions in the Cotonou for development assistance, EU consistently argues that the EPA framework is all about trade and trade related issue and hence asserts that the sum of money for EPAs under the 10th EDF is not up for negotiation.³¹ This betrays the very fact that if

27. Ibid

28. Ibid

29. Ibid

30. R. Grynberg and A. Clarke (ed.) 'The European Development Fund and Economic Partnership Agreements', Commonwealth Secretariat, Economic Affairs Division, 2006, p.8

www.realizingrights.org/.../EPAs_between_the_EU_and_African_Countries_-_Development_Implications_for_Ghana.pdf Visited on Sep. 2009

31. Mayur Patel, Economic Partnership Agreements between the EU and African Countries: Potential Development Implications for Ghana, June 2007, p. 25 & 26)

www.realizingrights.org/.../EPAs_between_the_EU_and_African_Countries_-_Development_Implications_for_Ghana.pdf Visited on October 2009

EPA is to be beneficial to African countries, money for adjustment support ought to be provided over and above that which the EU currently provides under EDF, because reciprocal liberalization will result in new challenges relating to finding new types of tax revenue, trade facilitation, production and employment adjustment.³²

Stephen Karingi suggests that the problem in the EPA relating to development stems from the way EU defines the very concept of development.³³ He asserts that EU thinks all what Africa is questing for in the name of development is money.³⁴ But the reality is that African countries want to make sure that any commitment they undertake under this agreement doesn't undermine their own development goals and strategies; and also whenever they undertake a commitment, they need to make it in a way that ensures they go from a lower level to a higher level with out, however, relinquishing the gains that they already enjoy.³⁵ He also further stressed on the point that whatever commitment the African countries undertake should, by no means, compromise their own development and as such the EPA has to take in to account this crude fact without twisting the issue as a question of money.³⁶

He also responds to the argument of EU linking the development assistance for EPA with EDF and using this as an excuse not to provide any further development assistance. EDF has nothing to do with EPA and this can simply be found out from the fact that ACP countries could have moved from 9th EDF to 10th EDF even if there is no EPA.³⁷ On the

32. Ibid

33. Interview with Stephen Karingi, Supra note 8

34. Ibid

35. Ibid

36. Ibid

other hand, even if the ACP countries are to use this EDF fund for the EPA purpose, it is not enough to compensate even the revenue loss let alone other costs resulting from it such as adjustment costs and also the losses resulting from de-industrialization.³⁸

In addition, he replies to EU's claim that members of COMESA can use what is called the 'COMESA fund' for EPA implementation.³⁹ This fund basically comes from the contribution of EU and also many other sources such as World Bank, other developed countries like US and Japan and also contribution of the member countries themselves.⁴⁰ If COMESA members are to use the COMESA fund for EPA implementation, other developed countries will no longer be interested to contribute to this fund since the trade preferences of the agreement are exclusively given to EU and this will result in substantial diminishing of the fund even for the purpose for which it has originally been established.⁴¹

Ato Lisanework shares the explanation of Stephen Karingi on the idea that there is a difference in definition of the concept between the EU and ACP countries which is also the idea of Ato Mengesha.⁴² But on the way it has been defined, his assertion is that EU advocates that liberalizing trade, i.e. opening market access, is sufficient by itself to bring development.⁴³ But the truth is that despite the free market access Ethiopia has been granted to almost all of its products under EBA, it has been expelled from the EU markets on several occasions.⁴⁴

37. Ibid

38. Ibid

39. Ibid

40. Inid

41. Ibid

42. Interview with Ato Mengesha Tadese, Trade Expert in Trade Capacity Building division of Ministry on Trade & Industry, On October 10, 2009

43. Interview with Ato Lisanework Gorfu, Supra note 14

44. Ibid

He also further mentions what has happened following the reduction of the maximum tariff rate on import duties of Ethiopia from 230% to only 35% due to the proposal of the World Bank and IMF.⁴⁵ There has been witnessed massive loss of revenue as well as huge rate of unemployment in the history of the country.⁴⁶ So the point is, it is good that EPA has development as one of its major goals and the plan to achieve it through liberalization of trade. The argument of Ethiopia, according to Ato Lisanework, is that the idea of liberalization will be accepted only on the condition that it is connected with development benchmarks the country has put in place such as: creating better employment opportunities, addressing the supply side constraints, improving quality and quantity of production, boosting export capacity and the like.⁴⁷

Ato Lisanework has also indicated that the supply side constraint is the major problem in Ethiopia and points out that if this liberalization is going to be realized, the country essentially needs additional funds to increase production and supply capacity.⁴⁸ This essentially requires that EU has to allocate adequate fund to address the problems caused as a result of the additional commitment it has brought about with this agreement. To this end, Ethiopia has requested additional fund of 2.8 billion Euros from EU to address these supply side constraints with out, however, including funds additionally necessary to cover adjustment costs.⁴⁹

EU's answer to this request is that there will be no additional fund other than what has already been pledged under the 10th EDF and have also

45. Tadele Ferede, et al, The impact of COMESA and EPA trade liberalization on workers of Textiles and Leather Industries in Ethiopia, (Confederation of the Ethiopian Trade Unions, Ethiopia, 2007) p.2

46. Ibid

47. Ibid

48. Ibid

49. Ibid

insisted on avoiding any binding commitments in the development articles of the agreement by using phrases like ‘..agree to facilitate...’ and the like.⁵⁰ But later on, it announced that there could be a limited amount of funds other than EDF to be allocated to improve regional integration through the construction of roads, rail roads and in general infrastructure; but as to costs involved in addressing supply side, it kept on maintaining its rigid position saying we can’t fix any amount of money in advance for that purpose.⁵¹

5.3 Scope of Liberalization

Introducing a reciprocal trade between the EU and the ACP countries makes one of the core elements of the EPA negotiations specially from the side of the EU. This will have far reaching economic and fiscal implications on the ESA countries depending on the extent and asymmetry of the reciprocity and the timetable for phasing in of tariff elimination. This, therefore, urges individual ESA countries to carry out thorough studies regarding the treatment of different products in the negotiations depending on their contribution to government revenue, domestic industries, and food security. This is believed to assist the ESA Group in drawing up a defensive and offensive strategy as far as Agriculture and Market access areas are concerned and also it helps to effectively address the challenges they will be facing following the signing and implementing the agreement.⁵²

50. Ibid

51. Ibid

52. Jane S. Nalunga & Douglas Kivumbi, The Economic Partnership Agreement. Implications and the Way Forward, A Case for Uganda, October 2004, p. 27-30
www.seatini.org/.../The%20EPAS%20Implications%20and%20way%20forward.pdf
Visited on July 2009

Unlike the Doha multilateral trade negotiations which exempts LDCs from having to make any market access concessions,⁵³ in the Interim EPAs, all countries are required to allow a minimum of 80% of EU imports to enter duty free within a maximum period of 25 years.⁵⁴ This issue of reciprocity has its source in Art. XXIV of the GATT requiring liberalization of substantially all trade in regional trade agreements and has been included here under the guise of making this ACP-EU partnership a WTO compatible.

The transitional period for the ESA countries has been fixed only to be 15 years⁵⁵ whereas the EAC Interim EPA, which requires liberalization of minimum of 82% of the imports from the EU, gives 25 years. This EAC Interim also provides the percentage of the imports to be liberalized in different period of time as 62% will be liberalised within 2 years, and 80% within 15 years and only the final 2% within 25 years.⁵⁶

Something ludicrous about this scheme of liberalisation of import from EU is that it doesn't even make a distinction between LDCs and developing countries as a result of EU's one-size-fits-all approach.⁵⁷ The Cotonu Agreement gives considerable weight to differentiation and special treatment, which affirms the North-South character of the relationship in Art. 35.3 by stating that when EPAs are concluded, it will take into account the different levels of development of the contracting

53. Ibid

54. Mamo, Supra note 1, p. 18

55. Interim Agreement Establishing a Framework for an Economic Partnership Agreement between Eastern and Southern Africa on the one Part and the European Community and its Member States on the Other Part, Article 62

56. EAC EPA, Supra note 22, Article 45

57. Bilal and Kathleen Van Hove, "An overview of the ACP-EU negotiations: issues and time frame", (San European Centre for Development Policy Management (ECDPM) Onze Lieve Vrouweplein 21, 6211 HE Maastricht, November 2002), www.acp-eu-trade.org

parties. In other words, the EPA was meant to provide sufficient scope for flexibility, special and differential treatment and asymmetry specially for LDCs, small and vulnerable economies, landlocked countries and small islands on the basis of the Cottonu agreement.⁵⁸

As opposed to this, no differentiation is made between LDCs and developing countries on the level of commitment as well as the period of time given for liberalization. In addition, the market access commitments in the interim EPAs are beyond the capacity of the LDCs and there is no justification or even claim that these concessions are designed to be consistent with the countries development needs.⁵⁹

The most important question coming in to picture in this particular case would be what possible implication this rule of reciprocity would have to the Ethiopian economy and to the livelihood of the people in it and also what possible draw back it shades on the overall trade and economic environment. Clearly the rule of reciprocity in EPA demands that Ethiopia liberalize its market by making it open to imports from EU. But Ethiopia already enjoy duty free access to EU market under EBA and hence doesn't have to seek any further reduction of customs duties from the EU since there is nothing more the EU will offer for which Ethiopia would be required to reciprocate. But reciprocity would be relevant to non-least developed countries that could seek duty and quota free treatment like least developed countries which makes the application of the principle unnecessary from the side of Ethiopia.

The case of South African Customs Union (SACU) makes perhaps the

58. Ibid

59. Ibid

best practical example of how devastating consequences may result in Ethiopian economy as a result of the reciprocal trade agreement with EU. SACU is a Trade and Development Cooperation Agreement between South Africa and the EU and it provides reduction of duties from the average of 2.7 to 1.5 percent on up to 95 percent of imports from South Africa with in the transition period of 10 years and in return South Africa have had to reduce the average duty from 10 to 4.3 percent on up to 86 percent of imports from the EU in 12 years period of time.⁶⁰ The outcome was that, the key industries in SACU had been destroyed by cheap subsidized imports from the EU.⁶¹

Seen in light of the fact that SACU economies are stronger than the Ethiopian, this experience could be an alarm in determining the scope and depth of the liberalization as well as the duration of the transition period for elimination of duties and other restrictive regulations of commerce. Edward Buffie made an extensive study of the experiences in several developing countries which undertook economic liberalization and came up with large number of adverse impacts that can result from it. These include: job losses and unemployment, closure of industries, lower capacity utilization, lower wages, increasing expenditure of scarce foreign exchange on imports, surges in imports of consumer goods leading to less availability of foreign exchange for other expenditures, de-industrialization or contraction, and lower rates of economic growth.⁶²

60. The ESA-EU EPA NEGOTIATIONS: TECHNICAL ISSUES IN THE 6 NEGOTIATING, CLUSTERS, A guide for ESA countries. p.32&33, Strengthening Africa in world Trade Zimbabwe

www.seatini.org/publications/ESA-EU%20EPA%20negotiations.pdf Visited on Jun, 2009

61. Ibid

62. EPA Negotiations – issues and positions, Trade Policy in Developing Countries, Cambridge University Press, pp.190-1

www.ecdpm.org/Web_ECDPM/Web/.../InBrief%2015F_e_Update.pdf Visited on July 2009

These, in addition to loss of government revenue, are all what take place in courtiers of weaker economies like Ethiopia following eliminating custom duties for stronger economies like EU.⁶³

Stephen Karingi said that the EU's definition of "substantially all trade" as provided in Article 24 of GATT is demanding too much specially from the side African LDCs.⁶⁴ Having mentioned the fact that there is no internationally acceptable definition for the phrase, he explains that EU insists on defining it as 90% of the trade between the two parties must be liberalized which in a way requires that the ACP countries need to liberalize minimum of 80% of the trade. One important thing which EU fails to recognize is the fact that the very basic assumption underlying Article 24 is the presumption that the liberalization takes place between two equal parties. But the tangible reality in the EPA is that liberalization is being pursued to take place between countries with enormous gap between their level of development.⁶⁵

He further pointed out that GATS allows special and differential treatment for trade in service and hence there cannot be imposed a requirement such as liberalizing 90% of the trade to meet the definition of liberalizing substantially all the trade.⁶⁶ Similarly, all the controversies will get an amicable solution if this special and differential treatment is to be introduced in to the GATT for trade in goods also.⁶⁷ This will enable to achieve the desired level of flexibility in the EPA and since Doha Round of trade negotiation is not completed yet, it wouldn't be late to push for the amendment of this 'substantially all the trade'

63. Ibid

64. Interview with Stephen Karingi, Supra note 8

65. Ibid

66. Ibid

67. Ibid

requirement.⁶⁸

In addition, if this EU's definition is to be introduced in to EPA, it will be very disastrous specially to ACP LDCs such as Ethiopia, though developing countries of the region can cope with it.⁶⁹ So he indicated that there has to be, in the first place, a difference in the level of commitment between the developing countries and least developed countries and also the level of liberalization has to go below 80% specially for the LDCs which will face a serious problem if they become forced to liberalize this amount.⁷⁰

Ato Lisanework on his part indicated Ethiopia's position on this issue and stated that this issue goes back to the very definition of the phrase "substantially all the trade".⁷¹ He argues that this provision in the GATT lacks flexibility and has been made under the assumption that the deal to liberalize trade will be between two developed countries and this explains the reason why Australia defined it as 95% of the trade between the two parties must be liberalized to meet the definition of 'substantially all trade' in Article 24 of GATT.⁷²

Concerning the definition that the developing countries uphold, it is a liberalization of "substantially all the trade" if 60% of the trade has been liberalized by the ACP countries. But EU seems to be rigid on its own definition and have granted a maximum of 20% exclusion, i.e. 80% liberalization, to the countries that have already signed the agreement. Ethiopia's position on this is that the country claims 30% exclusion rate as a bottom line of the exclusion that the country needs to secure from

69. Ibid

70. Ibid

71. Interview with Ato Lisanework Gorfu, Supra note 14

72. Ibid

this deal.⁷³ Ato Lissanework has also added that it is possible to effectively protect our market from imports from EU if we can get 30% exclusion and it is unthinkable to go below that under any circumstance.⁷⁴

Ato Lissanework further explains how this exclusion works to protect the Ethiopian market from being flooded by the EU's by saying that an identification of the level of sensitivity of above 5000 products have been made using various criteria.⁷⁵ The first and the most important criterion considered for exclusion from these products is the policy and the strategy of the country that have been put in place for development of the country. The industrial policy, for example, identifies some products such as textile, leather, agro processor etc as the most sensitive ones in terms of employment, value addition and as a source of revenue. Hence, an ample regard is given for this sector when making the list of products to be excluded from the liberalization.⁷⁶

The second way the sensitivity of a product is labeled is by revenue sensitivity. Ato Lissanework points out that taxes and duties account of 35% of government's annual revenue and the main items that are identified for exclusion include vehicles, and other luxury items which are the major source of this revenue and hence will go to the exclusion list.⁷⁷

In addition, food security, value addition, contribution to the GDP, employment, increasing export and also contribution to the foreign

73. Ibid

74. Ibid

75. Ibid

76. Ibid

77. Ibid

exchange make the third way by which sensitivity of a product is labeled in Ethiopia.⁷⁸ Ato Lissanework finally concluded by clarifying the general standard that is employed when identifying the sensitivity of a product. He asserts that the whole point of exclusion doesn't just revolve around protecting domestic industries, but rather social values of that particular item are always put in play.⁷⁹ Meaning, some sectors such as health, i.e. medicine, have way more value than the interest of domestic industries and it is very likely that they may not be excluded even though it is detrimental to the domestic industries and the same is true for education.⁸⁰

The other important issue Stephen Karingi addressed in relation to the level of reciprocity is the duration of the transition period to liberalize market following signing and ratifying the agreement.⁸¹ He argues that 20 to 25 years that is being negotiated on is shorter from African point of view.⁸² The reason is that African integration must come before implementing EPA and hence there has to be granted adequate time for African integration first though this shouldn't be an excuse for not signing EPA.⁸³

Ato Lissanework, on his part, argues saying, it is not the duration of time as much as it is what can be achieved during that time that matters a lot.⁸⁴ The main concern is that it has to be connected with the development benchmarks in all cases; if this is already put in place in a feasible way, then it can be any number of years. But Ato Mengesha

78. Ibid

79. Ibid

80. Ibid

81. Interview with Stephen Karingi, Supra note 8

82. Ibid

83. Ibid

84. Interview with Ato Lisanework Gorfu, Supra note 14

claims that considering other developing countries being given up to 15 years period of time, as an LDC Ethiopia must get 20-25 years and this is what has been asked in the negotiation also.⁸⁵

5.4 Use of Quantitative Restriction

Both the ESA and EAC Interim Agreement provide for the elimination of quantitative restriction on export and import for the countries party to the agreement. Article 17 of the ESA text provides that “all prohibitions or restrictions in trade on the importation, exportation or sale for export between the parties other than customs duties, taxes, fees and other charges whether made effective through quotas, import or export licenses or other measures, shall be eliminated upon the entry into force of this Agreement.” It has also made clear that no new measures shall be introduced and also it specifies in the annex exceptions to this particular provision. The EAC text, on the other hand, offers a better coverage of the exceptions as it includes a paragraph stipulating that the prohibitions on quantitative restrictions shall not extend to export restrictions in place to address food shortages.⁸⁶

As we take this stipulation to what takes place on the ground in Ethiopia, the government maintains a number of restrictions both on import and export trade. To mention some examples, export of cereals is prohibited to prevent shortage of foodstuff and to fight inflation.⁸⁷ With regard to the restriction on imports, importation of a number of items such used clothing, denatured alcohol, organic fertilizers, and seeds with terminator gene technology are prohibited.⁸⁸

85. Interview with Ato Mengesha Tadese, Supra note 42

86. EAC EPA, Supra note 22, Article 8

87. Mamo, Supra note 1, p. 18

88. Ibid

One important message that this practical case conveys is that the government has a strong interest in regulating imports and exports and might also want to maintain this policy flexibility to introduce measures of similar nature in the future. This, therefore, makes the exception that Article 17 of the ESA text lists down inadequate to accommodate the measures Ethiopia have to take on various grounds on the amount of imports and exports.

Stephen Karingi, speaking on this issue, asserts that the deeper the commitments a country makes, the higher the risks of de-industrialization are.⁸⁹ Hence it is legitimate to impose some measures such as quantitative restriction to rescue the domestic markets and also industries from indulging into an unbearable loss which will finally destroy them.⁹⁰ In addition, he also pointed out that allowing a quantitative restriction to be applied on justifiable grounds can be taken as part of the solution to the problem likely to be caused by the level of liberalization the ACP countries are required to implement and hence they have to be allowed to take such measures on justifiable grounds.⁹¹

What Ato Lisanework says about quantitative restriction is that EPA requires elimination of quantitative restriction just like WTO rules do.⁹² But Ethiopia's position is that EPA has to provide adequate exceptions as have been stipulated in the WTO and all other conditions justifying the application of restriction in terms of quantity in Ethiopia need to be clearly and sufficiently articulated in the EPA.⁹³

89. Interview with Stephen Karingi, Supra note 8

90. Ibid

91. Ibid

92. Interview with Ato Lisanework Gorfu, Supra note 14

93. Ibid

5.5 Export Tax

The issue of export tax also makes one of the matters of top priority for LDCs in the EPA negotiation.⁹⁴ As was the case in other issues, there is a disparity between the EU's and the ACP countries' positions on this particular issue. EU argues that export taxes have to be eliminated altogether and the same has to be reflected in the Interim Agreement by allowing its application only in certain exceptional cases.⁹⁵

Both the ESA and EAC Interim Agreement entertained the EU's concern and have provided for the elimination of taxes imposed on exports in excess of those imposed on like products destined for internal use.⁹⁶ In the ESA Interim Agreement, Article 15 states that "for the duration of the Agreement, the parties shall not institute any new duties or taxes on or in connection with the exportation of goods to the other party in excess of those imposed on like products destined for internal sale."

Both Interim Agreements also provide for the exceptions, i.e. products that are to be exempt, to this rule in their respective annexes. But the EAC Interim Agreement is praised for coming up with broad caveats for exemption due to its provisions allowing their application on the grounds of fostering development of domestic industries and maintaining currency stability.⁹⁷

Indisputably, it is generally accepted that export taxes are the preferred instrument among the various policy options to restrict exports as they

94. Mamo, Supra note 1, p. 17

95. Ibid

96. Ibid

97. EAC EPA, Supra note 22, Annex I

are transparent and simple to administer.⁹⁸ But even setting aside the argument on the policy freedom of such particular country, the prohibition of use of export tax can be a cause for a serious problem in Ethiopia from practical point of view. With the objective of value addition, there are various percentages of export taxes imposed in different export products. So far, there has been imposed 150% export tax on raw hides and skins, 20% export tax on the export of wet blue cow hides, 10% export tax on pickled sheep skins and 5% on export of wet blue goat skins.⁹⁹

Evidently, all the tanneries in Ethiopia are currently working below their full capacity mainly because of the critical shortage of raw hides and skins.¹⁰⁰ Lifting the export tax in this situation will undoubtedly lead to closure of most of these tanneries. The immediate consequence of this would be reflected in exacerbating the already existing unemployment problem apart from crippling the efforts of transition to export of value added products.¹⁰¹

Stephen Karingi explains that just like the case with quantitative restrictions, deeper commitments a country makes are very likely to bring risks of de-industrialization.¹⁰² The application of the export taxes, therefore, will have a very crucial role to protect the domestic markets and also industries from suffering a great loss leading to their devastation.¹⁰³ In addition, applying export taxes can be part of the solution to the problem likely to be caused by the level of liberalization which the ACP countries are required to implement and hence they have

98. Mamo, Supra note 1, p. 17

99. Ibid

100. Ibid

101. Ibid

102. Interview with Stephen Karingi, Supra note 8

103. Ibid

to be allowed to impose such taxes whenever the interest of protecting domestic industries makes it essential.¹⁰⁴

Ato Lisanework briefly clarified EU's argument during the negotiation saying, it asserts that the reason Ethiopia or another ACP country is imposing this tax is just for the purpose of raw material monopoly and this works ultimately to prevent raw materials from being exported to EU.¹⁰⁵ It also condemns Ethiopia and the rest of ACP countries that impose export tax for impeding a comparative advantage principle from working.¹⁰⁶

But Ethiopia's position is that the major reason behind maintaining such taxes is not just for the sake of revenue or for raw material monopoly as EU argues.¹⁰⁷ But it is for value addition which ultimately works to bring industrialization which is set as the single most important goal to be achieved on the basis of the government's policy put in a place.¹⁰⁸ Ato Lisanework therefore affirms that lately preparations are being made to levy this in coffee export also, which has been lifted before, to increase value addition there by encouraging industrialization.¹⁰⁹

5.6 Customs Valuation Agreement

The ESA Interim Agreement in Article 24 provides that the Agreement on the implementation of Article VII of GATT 1994 shall govern customs valuation rules applied to reciprocal trade between the Parties. It also

104. Ibid

105. Ibid

106. Ibid

107. Ibid

108. Ibid

109. Ibid

further provides in Paragraph 2 that “the Parties shall cooperate with a view to reaching a common approach to issues relating to customs valuation”. The Customs Valuation Agreement, on its part, provides that customs value is deemed to be the price actually paid for the goods with the invoice value considered as a true representation of this value except when it is deemed that the invoice value does not reflect the actual value of the goods.

In addition, the Customs Valuation Agreement has also expressly prohibited various valuation methods on different grounds.¹¹⁰ These include: the selling price in the country of importation of goods produced in such country; a system which provides for the acceptance for customs purposes of the higher of two alternative values; the price of goods on the domestic market of the country of exportation; the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of Article 6; the price of the goods for export to a country other than the country of importation; minimum customs values; or arbitrary or fictitious values.

In addition, developing countries are allowed under WTO to delay the full implementation of Customs Valuation Agreement for the period up to 5 years on the basis of Article (1). Paragraph 2 of the same provision allows a further 3 years delay to implement the computed method of valuation under Article 6. It also further goes on to allow these countries, which are using officially established minimum values, to continue using these values on a limited and transitional basis by way of reservation. This in a way indicated that the special and differential treatments have been

110. The General Agreement on Tariffs and Trade (GATT), 1947, Article 7

made available under the Customs Valuation in terms of longer timeframe for the implementation of the agreement.¹¹¹

Despite these particular provisions that can procure a great deal of advantage for the developing and least developed countries in the region, the ESA text seems to require the automatic application of the Customs Valuation Agreement.¹¹² When we bring this to the underlying reality in Ethiopia, it can pose a very great challenge considering the fact that the country has a long way to go towards the implementation of Customs Value Agreement.

However helpful implementing the Customs Valuation Agreement might be in bringing about a fair, uniform, and neutral system for the valuation of goods for customs purposes, it cannot be realized without accompanying reforms in customs regulations, procedures, better compliance, trade facilitation, modernized customs authority and enhanced human resource capacity both in the government and private sector. As a result, lots of works are required to be done on it over some period of time so as to avoid the problems of lowered protection levels for domestic producers and reduction in customs revenues due to under invoicing following the immediate implementation of the agreement.

5.7 Loss of government revenue and the resulting dwindling of governments' ability

This ACP-EU partnership agreement is fundamentally about liberalizing

111. Mamo, Supra note 1, p.19

112. ESA EPA, Supra note 55, Article 24

trade by dismantling tariffs on reciprocal basis in the regions party to the agreement. The truth is, this substantial revenue loss from tariff collection has the potential to cripple the government's major source of revenue to finance health, education, infrastructure and so many other government's expenditures. This threatens the fiscal stability of the country and most likely will lead to a great chaos in the whole system if there is no other alternative way taking its place to cover all these. The problem will also be further aggravated when it is added to the already existing weakness and administrative difficulty in collecting and administration of internal taxes in the country.¹¹³

As is the case with so many other ACP LDCs, Ethiopia also relies heavily on import taxes for its fiscal income necessary to finance various government expenditures. The UNECA research on assessing the consequences of the Economic Partnership Agreement on the Ethiopian Economy has reflected on the revenue loss that will occur as a result of this liberalization. The research indicates that following the liberalization with EU, import prices will go down and consumers will be able to consume more goods such as vehicles or furniture, bedding etc for the same income making the country gain with the amount of \$19 million in terms of consumer welfare.¹¹⁴ But this, according to the research, will come along with a huge amount of the tariff revenue losses, which are estimated to be more than \$55 million, that the country will suffer.¹¹⁵

The researchers have also made an assessment by taking tariff cuts on the agricultural sector only in order to differentiate and assess the

113. Hakim Ben Hamouda, et al, Assessing the sequences of the Economic Partnership Agreement on the Ethiopian Economy, (ATPC, UNECA) p.17

114. Ibid

115. Ibid

impacts in terms of revenue loss of the EPA on the Ethiopian agricultural sector, leaving the industrial import tariffs unchanged.¹¹⁶ The growth of the EU trade is less significant due to the fact that the EU mainly exports industrial goods to Ethiopia.¹¹⁷ The total trade increase of EU exports less trade diversion from the rest of the world, i.e. trade effect, amounts to \$6.18 million, which may be seen as limited in volume but is still sensitive due to the fact that agriculture employs 85 % of the active population in Ethiopia, which will result in massive losses in terms of employment. Concerning the tax loss that will occur, given the net trade flow generated (\$6.18 million) and the welfare gain (\$1.15 million), the cost for Ethiopia in terms of tax loss is very significant in comparative terms. This loss, according to the assessment, would increase the dependency of Ethiopia on international aid and raise questions about the solvency of its economy, for very limited gains.¹¹⁸

The other scenario in the UNECA impact assessment was done by focusing on the tariff cuts on the industrial sector only, leaving the agricultural import tariff unchanged.¹¹⁹ The final result offers that the trade gain resulting from liberalization would be concentrated on industrial products. With regard to tax revenue losses, the finding was that they are significant as they represent around 3.5% of the public resources, which is all very detrimental given the fact that Ethiopia has not been able to balance its public budget over the last ten years by the time when this assessment was made in 2006.¹²⁰

The other case entertained by this assessment is made by taking the full

116. Id p. 19

117. Ibid

118. Ibid

119. Id p.23

120. Ibid

picture liberalization. This scenario, which is one of the EPAs principles, will implement deepening regional integration in addition to the FTA with EU. The resulting fiscal shock is estimated at \$65.7 million.¹²¹ This amount actually is the maximum revenues shortfall that can occur if Ethiopia removes all the tariffs in one shot.¹²² Even though the reality of the EPA indicates that some products are going to be excluded from the liberalization and also the process will be progressive, the figure shows how much disastrous loss can result from liberalization in terms of tariff loss and is a warning signal to the country to make all the necessary preparations and safeguards before getting in to any binding commitment for the implementation of the agreement.¹²³

The most important message that this conveys is that eliminating this government's major source of revenue will dramatically reduce the country's spending ability and institutional capacity and if the government is unable to offset these losses, it could lead to severe cuts in public expenditure in key social sectors such as health and education. Alternative solutions to limit the public deficits induced by EPAs such as reducing expenditures, increasing rates of other taxes and improved tax administration could be considered, but will not be easy to achieve. In addition, it would be difficult for Ethiopia to accept such a situation, especially in the cases where some of these European products benefit from subsidies that render the competition on this market particularly unfair.¹²⁴

The EU on its part claims that it recognizes the fact that African countries are likely to face revenue losses from tariff elimination, but also

121. Id p. 19

122. Ibid

123. Ibid

124. Ibid

argues that these ought to be considered ‘short-term adjustment costs’ which can be overcome through re-structuring and broadening domestic tax bases.¹²⁵ It also suggests that the favored EU prescription for specially African countries is to switch from trade taxes to levying a VAT.¹²⁶

Obviously what EU suggests as an option to offset the revenue loss Ethiopia will be facing from tariff elimination is not something which is to be newly adopted to remedy the loss; but it is already recognized and implemented as one of the revenues of the country. This leaves the country with no other option than seeking additional financial resources for the sustained support of fiscal restructuring processes by the time when the country joins and begins to implement this tariff elimination program. Hence evidently Ethiopia will need assistance to adopt fiscal adjustment measures by way of direct financial support measures from EU to offset the loss.¹²⁷

According to Stephen Karingi, EU argues that the amount of revenue loss is exaggerated and alleges that the revenue loss to be caused by the elimination of import duty will be compensated by the increase in the internal taxes as a result of a high volume of trade following the elimination of tariff.¹²⁸ But he argues that even if the net trade flow increases, there will still be a net loss showing negative and only a quarter of the loss can be recovered as has been witnessed in various revenue liberalizations.¹²⁹ Hence the only solution to this problem, if the

125. Patel, Supra note 31, p.20

126. Ibid

127. Bilal and Hove, Supra note 57

128. Interview with Stephen Karingi, Supra note 8

129. Ibid

liberalization is to materialize, will be providing adequate compensation for the loss suffered and also providing technical cooperation and assistance to reform and modernize tax administration. These, therefore, have to be guaranteed by EU to the ACP before getting into any binding commitment for tariff elimination.¹³⁰

Ato Lissanework points out that if Ethiopia accepts the EU's proposal of liberalizing 80%, the resulting revenue loss from tax and duties is estimated to be 50 million Euros, which is a very enormous sum of money for a poor country like Ethiopia.¹³¹ He also added that not only will this liberalization affect other kinds of taxes, but it also affects even VAT, which EU proposes as an alternative to offset the loss that occurred following the elimination of the import duty. This is due to the fact that VAT is calculated as CIF (Cost, Insurance & Freight) plus import duty and in this case import duty will be zero as a result of liberalization and hence the value of VAT will also proportionally go down with, of course, some chance that the increase in import may partly cover the loss because of the increase in domestic tax.¹³²

Ato Mengesha, on his part, reminded that there will be given a 10 year period of moratorium during which all the necessary adjustments and preparations are to be made and it will be a big mess if nothing is done during this time. This period is particularly essential to make the entire domestic environment ready to welcome the liberalization and hence lots of things need to be worked out with utmost care during this time so that the country can survive all the challenges that are coming together.¹³³

130. Ibid

131. Interview with Ato Lisanework Gofu, Supra note 14

132. Ibid

133. Interview with Ato Mengesha Tadese, Supra note 42

5.8 Competitiveness of Ethiopian products following liberalization

Under the WTO Agreement, one condition under which least developed countries (LDCs) will be obliged to reciprocate and also commit to maximize the elimination of their trade barriers is when they accept to join a Free Trade Area as currently defined by Art. XXIV of GATT.¹³⁴ This, in effect, compels the ACP countries to open their market to the EU as a result of the EPA thereby making the market of ACP face a tough competition from highly advanced as well as subsidized imports from EU.

Undeniably there is a theoretical argument advocating a greater exposure to competition from imports with an underlying justification that it can lead to greater innovation and efficiency gains.¹³⁵ This, however, assumes the fact that local firms are able to adapt the prevailing situation and will be able to compete with imports from outside.¹³⁶

But if local firms are not in a position to adapt the situation, great deal of works have to be done first to make the products of good quality, priced well, and are delivered in a timely manner in the required quantities so as to ensure predictability or reliability. Hence, if enterprises in the ESA countries are to effectively compete in the market envisaged after the EPA negotiations, they essentially need to fulfill these preconditions. Thus the issue of enhancing the competitiveness of the ESA economies in general and Ethiopia in particular becomes very important precondition for accepting the liberalization.¹³⁷

134. Brief on Duty free Quota Free Market Access (DFQFMA), LDC Briefing Book, <http://www.unohrrls.org/UserFiles/File/LDC%20Documents/Lesotho/5%20DFQF%20market%20access.pdf> Visited on October 2009

135. Nalunga and Kivumbi, Supra note 52

136. Ibid

137. Mamo, Supra note 1, p.18

In addition, for enterprises to be this competitive, the countries in which they undertake production or supply from should have in place conditions of production that minimizes production costs and in all other respects promote efficiency.¹³⁸ Such conditions include a suitable macroeconomic environment, well functioning public institutions, supportive technological innovation and dissemination within the economy, and good infrastructure in terms for instance of low cost and reliable utilities, good transport system, and a prevalence of information and communications technologies. In the absence of these conditions, it is very likely that competition from imports will wipe out all the domestic industries from the market leading to enormous disaster to the domestic environment in terms of employment, revenue loss, macroeconomic instability and the like. Viewing this from Ethiopian point of view, there has to be done adequate works of developing and strengthening the competitiveness of the domestic producers and companies since this liberalization can cause a big chaos when added to the already existing problems of poverty of the country.¹³⁹

This has been in the Cotonu agreement in what can be said a fairly adequate provisions. Specially Article 35.1 stating the principles of economic and trade cooperation enshrined that economic and trade cooperation shall be based on a true, strengthened and strategic partnership. This is required to be based on a comprehensive approach which builds on the strengths and achievements of the previous ACP-EC Conventions and will be employed using all the means available to achieve the objectives set out in the agreement by addressing supply and demand side constraints. The provision further goes on to explicitly state that particular regard shall be had to trade development measures as a

138. Ibid

139. Ibid

means of enhancing ACP States' competitiveness by giving an appropriate weight to trade development within the ACP States' development strategies, which the Community shall support.

Article 21.1 of the same agreement also provides that cooperation shall support the necessary economic and institutional reforms and policies at national and/or regional level. These reforms have been aiming at creating a favorable environment for private investment, and the development of a dynamic, viable and competitive private sector.

One basic idea these convey is that enhancing a competitiveness of a given country essentially requires addressing supply side constraints associated with production in the country and demand side constraints associated with access to the EC market. As it has been indicated before, there have been identified so many areas which can be a cause for the supply side constraints. These include: high cost of utilities translating into high and uncompetitive production costs; inadequate infrastructure including transportation by road rail and air; inadequate spread of information and communication technologies, and low level of high skills; lack of market information relating to opportunities and market trends in export markets and limited supply of necessary technological products and technological innovation and diffusion within the country.¹⁴⁰

In addition, it also includes, poor quality of public institutions including unstable and inappropriate legal and regulatory framework, and corruption; low linkages between exporting entities and domestic productive entities, or limited use of domestic components in export production, limiting the potential multiplier effects such as job creation

140. "The ESA-EU EPA Negotiations" Supra note 60, p. 17

and also low labor productivity and structural limitations such as poor educational and health service systems. These are all accountable to supply side constraints that have the potential to make the economy of that particular country collapse following liberalization.¹⁴¹

Besides, there are also constraints in the demand side which can hamper the Ethiopian products from competing in the EU market even if the supply constraints have been effectively dealt with. The constraints from the demand side include rigorous health and technical standards that keep changing or that are technologically and financially difficult to meet; tariff peaks and escalation that raise the price of exports on the export market; subsidies that render exports uncompetitive on export markets, complicated and unsupportive rules of origin that have narrowed the base for inputs for qualifying imports into the EU, complicated customs procedures for exporters to comply with and inadequacy of information and support for compliance.¹⁴²

The negotiations, therefore, essentially need to squarely address these constraints by including binding commitments in the EPA on resolving them. It specially threatens the very existence of Ethiopian producers who are in their much lower levels of industrial productivity and competitiveness, compared, if after all it is comparable, to the EU if the liberalization is to take place while still these problems persist. This is basically because domestic firms of Ethiopia are still hindered by the lack of infrastructure and weak institutions, low levels of value-addition and the small-scale nature of production. So if Ethiopia have to cope with this competition, which leaves the country with no other option if

141. Ibid

142. Ibid

once the agreement is signed, the country will need significant funds for investments in their production and supply capacities, and for social and other accompanying or compensatory measures. On the EU side, however, no such efforts will be required since it has already been advanced in almost all areas making them fit to compete in the market from any corner of the globe.

Evidently, the Ethiopian market has already been seriously weakened by the inflation, debt, drought etc and this makes the situation more appalling for the economy of the country.¹⁴³ Despite all these, EU hesitates to make sufficient commitments for the additional resources that will be needed during the preparation, establishment and the operation of the EU-ESA Free Trade Areas and just keep pressurizing the country to make immense commitments without any assurance of being able to pay for them.¹⁴⁴

Ato Lissanework explains that EU has already introduced much more advanced technologies to its production systems and they most often subsidize producers on various grounds and this has a fatal effect to the domestic producers in the ACP.¹⁴⁵ To give a practical example, West African countries, which are known for their chicken and tomato production, have been destroyed by being flooded by cheap exports from EU following liberalization of their markets to the EU.¹⁴⁶ Apart from these, there is also what is called underground industries in Europe that use cheaper imputes and bring even much more cheaper products to the market.¹⁴⁷ These products, following liberalization, will wipe out all the

143. Nalunga and Kivumbi, Supra note 52

144. Ibid

145. Interview with Ato Lisanework Gorfu, Supra note 14

146. Ibid

147. Ibid

domestic producers which cannot compete and evidently this is what will happen to the domestic producers in Ethiopia who are known for using backward technologies both in the industrial sector and also agricultural sector.¹⁴⁸

He further states that, the fact that the country is landlocked may procure some advantage since there will also be a big cost of transportation on the imports from EU.¹⁴⁹ The port the country currently uses for imports being Djibouti, there will be costs of unloading, the period it stays in Djibouti and then transportation of all the way from Djibouti to Ethiopia. For agricultural products such as tomato, there will be additional costs of preservation specially in the very hostile weather condition of Djibouti and also there will be needed a chain of cooling trucks when transporting to Ethiopia. This partly explains the reason why EU doesn't export wheat to Ethiopia which has been almost liberalized already since its tariff is fixed at only 5%. So these costs will probably mitigate the degree of competition by increasing the price of the imports for there are great deal of costs involved though it may not have the power to save so many industries such as textile from crisis.¹⁵⁰

5.9 Substantial adjustment costs Ethiopia will face when opening for EU exports

As a matter of fact, things will change interims of revenue, employment, economic stability and the like following liberalization.¹⁵¹ To cope up with these changes, the country needs to make some necessary adjustments

148. Ibid

149. Ibid

150. Ibid

151. Hamouda, et al, Supra note 113, pp.39-40

before the liberalization takes place causing the whole system to be disrupted. The severe revenue shortfalls to be caused by the liberalization make it essential that there has to be made a fiscal restructuring process. This, however, is not something which a country like Ethiopia can simply implement. Rather it poses a big challenge in relation to the adjustment costs associated with tax policy and administration reforms due to the fact that fiscal reforms are long and complicated and have lots of dimensions.¹⁵²

Stephen Karingi, when addressing this issue in the interview made with him, upholds that severe adverse effects will result from liberalization in the economy of the ACP such as de-industrialization, unemployment, fiscal restructuring etc.¹⁵³ Specially in relation to workers in industries, there isn't any re-skilling program in Africa where by the worker who loses a job in one sector being trained to work in another. There isn't skill building program either to make the workers competent to work in the new sectors emerging as a result of the liberalization.¹⁵⁴ These adjustments, therefore, need to have allocated sufficient support from EU so as to control the resulting serious crisis in the economy of Africa.¹⁵⁵

The reforms in the restructuring, by nature, are not only financial, but also involve human resources. Because administration of income taxes and consumption taxes such as VAT are more human capital demanding than the administration of import duties and also it requires several years to implement such a reform. This, therefore, leaves the country

152. Ibid

153. Interview with Stephen Karingi, Supra note 8

154. Ibid

155. Ibid

with no other option than demanding a huge reform program that will be designed and implemented by a financial support from the EU in order to absorb this fiscal shock.¹⁵⁶

Generally the adjustment costs the ACP countries will face from signing an EPA include tariff revenue losses and the costs of fiscal reform; the creation of safety nets to address employment loss; adjustment measures for losses in competitiveness; and the restructuring of domestic production. A study by the Commonwealth Secretariat estimates that for all ACP countries these adjustment costs will require €9.2bn in assistance.¹⁵⁷

The UNECA impact assessment indicates that tax and fiscal reforms are particular areas where the EU could provide support for the effectiveness of structural adjustment in Ethiopia.¹⁵⁸ The major problem in this regard relates to the problem of tax evasion and avoidance which are serious problems in collecting taxes. This being the case, the costs of tax administration is one of the things that have to be taken in to account due to the limited ability of the country to collect domestic taxes for public expenditure. This is in line with what the Cotonou Agreement provides, which requires to give special consideration for the purpose of transitional support in the form of budgetary support and technical assistance for countries that face budgetary adjustments due to regional integration and EPAs.¹⁵⁹

The other important issue the UNECA impact assessment pinpoints on the adjustment costs that Ethiopia and its domestic companies should

156. Hamouda, et al, Supra note 113, pp.39-40

157. Patel, Supra note 31, pp. 25 - 26

158. Hamouda, et al, Supra note 113, pp.39-40

159. Ibid

suffer by this liberalization process pertains to the balance of trade.¹⁶⁰ Following the liberalization, there will be a massive increase of imports from EU that will destabilize the balance of trade and it is deemed one of the major problems necessitating to manage the liberalization process more properly by, for example, designing a suitable timing and sequencing and identifying and implementing complementary measures.¹⁶¹

The research has also indicated that apart from identifying the sectors that are going to suffer the most from this agreement, the Ethiopian Government should strengthen the production capacities of the vulnerable sectors in such a way that they could be modernized and therefore contribute fully to the industrial diversification.¹⁶² There will also be a need to establish social safety nets that compensate displaced workers and provide the poor with a minimal standard of living below which they should not fall.¹⁶³

The UNECA's argument concerning the macroeconomic instability that will be created by a trade balance destabilization following liberalization is that it is something that can be tackled at the balance of payment level. Meaning, new investment flows from the EU can compensate the increase of imports from the EU and the orientation of these investment flows to the sectors that need to improve their capacity will allegedly render the EPA mutually profitable. But the core issue that has to be raised with liberalization remains to be the assistance that has to be provided as an incentive. One of the important things that the UNECA

160. Ibid

161. Ibid

162. Ibid

163. Ibid

has underscored in its research is that the EU should assist Ethiopia for a longer period of time in order to provide the latter with an incentive to ensure that the country benefit as much as possible from the EPAs.¹⁶⁴

The assessment has also stressed that the EU support should also cover additional trade-related Measures such as: modernizing customs administration in Ethiopia, ensuring smooth cross-border transport of goods and to reducing/eliminating delays and unnecessary additional transport costs, capacity building dedicated to allowing Ethiopian exporters to be able to fulfill the conditions required to access European markets.¹⁶⁵ It has also been indicated that this support can be useful at different levels, i.e. at the public level and private level. At the public level, there is a need to strengthen institutions like the Ethiopian Investment Authority, the Quality and Standards Authority of Ethiopia or several sartorial authorities that are major players in exports capacity buildings. There is also a particular need for improving the sanitary and phyto-sanitary measures. On the other hand, at the private level, enhancing competitiveness at different levels, dedicating funds to increase productivity, quality, and response time delivery are necessary.¹⁶⁶

5.10 Issues of the Regional Integration

The Council of the European Union reiterates in so many incidents that EPAs should primarily build upon, foster and support ACP regional integration processes and has consistently justified EPAs on the basis

164. Ibid

165. Ibid

166. Ibid

that it will improve regional integration.¹⁶⁷ This is also meant to promote the development objectives and strategies of the individual countries of the regions recognizing the existing political and economic realities and existing regional integration processes, thus providing flexibility.¹⁶⁸

There are also arguments supporting the idea that EPA could indeed act as a catalyst for the streamlining and rationalizing of existing regional initiatives through trade facilitation, capacity-building and technical assistance.¹⁶⁹ It could also serve to 'lock in' regional integration processes and policy reforms due to the presence of the EU and the WTO-compatibility of an EPA.¹⁷⁰ The Cotonou Agreement has enshrined this in a plain language saying: "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".¹⁷¹

ACP Ministers, on their part, have stressed on the need to focus on attaining a full EPA with the EU that addresses two key objectives: fostering the structural transformation of the ESA Economies and their diversification; and support to regional integration initiatives in the ESA region.¹⁷² But they have also expressed their fear that the EPA might

167. Economic Partnership Agreements (EPAs) - Conclusions of the Council and the Representatives of the Governments of the Member States meeting within the Council , COUNCIL OF THE EUROPEAN UNION, Brussels, 15 May 2007, 9560/07, ACP 95 PTOM 32, WTO 117, DEVGEN 90 RELEX 348, General Secretariat, Dated : 15 May 2007 www.register.consilium.europa.eu/pdf/en/07/st09/st09560.en07.pdf Visited on September 2009

168. Ibid

169. Mamo, Supra note 1, p. 24

170. Ibid

171. Partnership Agreement between the Members of the African Caribbean and Pacific Group of States of the one part and the European Community and its Member States of the other part, Signed in Cotonu, Article 5

172. CONCLUSIONS ESA MINISTERIAL SUB COMMITTEE ON EPAS, CS/EPA/CTA/MIN/2, 10th February 2008, Lusaka Zambia) www.ntb.africonnect.com/media/joint_meeting_final_report.pdf Visited on Oct. 2009

disrupt integration efforts if regional markets are opened up to the EU before they are consolidated internally and have called for internal harmonization before they jump in to sign the EPA.¹⁷³

But opposed to all these commitments made to anchor regional integration, EU has been concerned the least on the issue of regional integration and have abandoned it altogether in the interim agreement.¹⁷⁴ Taking the case of the ESA region, it has been split in to two and the East African Community (EAC) concluded an agreement independently of the region Eastern and Southern Africa (ESA) group. From the remaining members of the ESA group, only five countries signed EPA as ESA where as most of the Horn LDCs within the ESA including Ethiopia chose not to sign the Interim EPA.¹⁷⁵

Following this, separate deals with EAC and some individual members of the ESA region were taken as an option by EU to pursue its goal of negotiation.¹⁷⁶ These have effectively split the already fragile region and is said to have caused much tension between neighbors.¹⁷⁷ Consequently, with the exception of the EAC group which concluded the agreement on behalf of its members, the ESA signatories and other ACP countries were forced to submit separate and un-harmonized tariff liberalization schedule and exclusion list, not agreed as a region.¹⁷⁸ This will inevitably make them to liberalize to the EU before they have decided what to liberalize with each other.

Stephen Karingi looks at this from a different point of view. Having

173. Ibid

174. Mamo, Supra note 1, p.16

175. Ibid

176. Ibid

177. Ibid

178. Ibid

mentioned what the activists promote on this issue saying EU cause disintegration in Africa mainly because the ACP courtiers lack the power to negotiate with it, he argues that EPA can have a positive impact in harmonizing Africa.¹⁷⁹ The logic is that when countries sign EPA from a different economic community or FTA, it may make them to come together as they all have signed EPA in common. So Mr. Karingi's argument is that, this will make African countries to look at their regional configurations afresh and can make them be harmonized.¹⁸⁰

He supports his assertion by also giving an example of the case of Rule of Origin. There are different rules of origin in different economic communities in the continent.¹⁸¹ COMESA and SADC, for example, have different rules of origin and it is not harmonized in the rest of the regions either.¹⁸² EPA, which all of these countries negotiate, would make them address this agenda since it hasn't been addressed before due to lack of a common forum. In addition, the aspiration to achieve the original vision of African integration also necessitate that Africa has to use this opportunity to harmonize its rule of origin.¹⁸³ Hence there will be harmonization in the rules of origin in all the regions party to EPA and the same formula can also be used in other issues also and this ultimately will push towards African integration.¹⁸⁴

Despite this positive contribution that EPA is likely to make for African integration, it has practically de-stabilized the integration agenda of the region altogether.¹⁸⁵ Africa has already put in a place its own regional

179. Interview with Stephen Karingi, Supra note 8

180. Ibid

181. Ibid

182. Ibid

183. Ibid

184. Ibid

185. Ibid

integration agenda but EPA came and took the high road alleging that the regional integration plan already in place is not optimal and hence they want to make it optimal.¹⁸⁶ The point that Stephen Karingi makes out of this is that EPA should fit in to the regional integration goal of Africa but should, by no means, be allowed to take the lead.¹⁸⁷

Ato Mengesha's view on this issue is that from the very beginning, EU has weakened the power of the ACP countries.¹⁸⁸ In the beginning, ACP as one group had much more stronger power and then it has been divided in to six groups, four in Africa and Pacific and Caribbean, which ultimately substantially reduced the power of the ACP altogether.¹⁸⁹ He also suggest that it would have been much more better if at least Africa has been given the chance to negotiate as one group, but they were not given that chance either.¹⁹⁰

Ato Lisanework explains EU's position saying it divides the ACP in to several groups because it wants the group to be smaller and then grow from that level just like what happened in Europe before the formation of Union.¹⁹¹ There is a greater chance that the smaller groups will merge and come to form one large and strong economic community in due course, but the irony is that the configuration that is currently made is just for the purpose of negotiation and it will vanish right after the signing of the agreement. He also takes ESA region as an example and says it is just a configuration for the sake of negotiation which doesn't have even its own secretariat. So EU's argument to bring integration in a

186. Ibid

187. Ibid

188. Interview with Ato Lisanework Gorfu, Supra note 14

189. Ibid

190. Interview with Ato Mengesha Tadese, Supra note 42

191. Ibid

higher level growing from the lower seems to be unforeseeable given the fact that there will not be any ESA after the signing of the agreement.¹⁹²

Besides, Ato Lisanetwork has also indicated that the weak psychological, economic and political position that the ACP countries have got due to the fact that they were former colonies of EU made them negotiate under an enormous influence from EU.¹⁹³ On the top of that, the vast majority of domestic companies are still run by Europeans in the countries like Zambia and Mauritius and this made them to be under increased influence from both outside and inside. This absence of policy freedom made the whole negotiation to be under a pressure in the whole regions since they tend to accept EU's proposal even though they don't believe in it or even being fully aware of the fact that it is dreadful to their domestic economy.¹⁹⁴

Finally, Stephen Karingi raises something very crucial in relation to the definition to parties to the agreement.¹⁹⁵ From the whole agreement of EPA, it is not clear whether parties to the agreement are regional economic communities such as COMESA, EAC, etc or just the individual members of the ACP.¹⁹⁶ This is basically difficult to decide since there is no economic community or free trade agreement called ESA if we are going to say it is the regions; and it is not possible to say it is the individual members either, since negotiations are made exclusively with the regions except for the case of Egypt and South Africa which have made the agreement individually.¹⁹⁷ Hence it is quite essential to define

192. Interview with Ato Lisanetwork Gorfu, Supra note 14

193. Ibid

194. Ibid

195. Interview with Stephen Karingi, Supra note 8

196. Ibid

197. Ibid

who the parties to the agreement will be when the agreement is finally signed. Unless, it will create a serious problem specially in the cases where there is a failure to meet the commitments undertaken and there is to be a sanction imposed where the whole region might be punished for a single country's failure.¹⁹⁸

5.11 WTO+ Issues in the EPA Negotiations

Basically the WTO+ issues refer to two types of matters: firstly, those issues that are not addressed in the WTO, most importantly the four Singapore issues raised by the EU in 1996 in the first WTO Ministerial in Singapore which include Trade Facilitation, Government Procurement, Competition and Investment; and second, those issues that are covered by the WTO, but which negotiating parties in regional trade agreements decide to address in deeper or broader terms, such as TRIPs.¹⁹⁹

Evidently, during multilateral trade negotiations, the four Singapore issues have lost their importance mainly because of the resistance from the developing countries.²⁰⁰ During the Doha Round, the EU has been the most prominent advocate of the inclusion of these issues in the WTO and, as a result, mandate of the negotiations on these issues expressed in Paragraphs 20-27 of the Doha Declaration that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on

198. Ibid

199. Amin Alavi, Peter Gibbon and Niels Jon Mortensen, EU-ACP Economic Partnership Agreements (EPAs), Institutional and Substantive Issues, DIIS · DANISH INSTITUTE FOR INTERNATIONAL STUDIES, STRANDGADE 56 · 1401, COPENHAGEN K · DENMARK, Copenhagen 2007 P. 60-62, www.diiis.dk,

www.diiis.dk/graphics/Publications/Andet2007/pgi_EPAs.pdf Visited on August 2009

200. Ibid

modalities of negotiations.²⁰¹ But during the Fifth Session in Cancún, many developing countries objected to starting negotiations on three of the four Singapore issues and the required explicit consensus was only achieved on Trade Facilitation, which is now part of the Doha negotiations.²⁰²

Having failed in the Doha trade negotiation, EU brings these issues in to attention in the EPA negotiation and stroke a debate on the inclusion of them in the EPA.²⁰³ Developing countries in the EPA negotiation maintained the same position and have also objected to the inclusion of these issues in the EPA negotiations by stating that the WTO does not require regional trade agreements to include these issues.²⁰⁴

Later on, substance of the debate has been narrowed down to focus on the EU's assertion that at least investment has to be included in the EPA negotiation.²⁰⁵ The underlying justification presented being investment rules are necessary for establishing the development-friendly EPAs, mainly in the sense that they will attract foreign direct investment (FDI) to the ACP countries.²⁰⁶ But others' counter argument is that business-friendly investment rules are not necessarily followed by actual FDI. A practical example for this can be the fact that although Africa has joined the rush to sign bilateral investment treaties, levels of FDI have generally declined.²⁰⁷

201. Ibid

202. Ibid

203. Understanding the WTO: Cross-Cutting and New Issues, Investment, Competition, Procurement, Simpler Procedures
http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm Visited on Sep. 2009

204. Alavi, Gibbon and Mortensen, Supra note 199

205. Ibid

206. Ibid

207. Christian Aid, 'The EU-ACP trade negotiations – why EPAs need a rethink', 2004, at http://www.epawatch.net/documents/doc260_1.pdf

Moreover, not only do some ACP countries lack the necessary resources to engage in serious negotiations on this issue, but also if investment rules are included in EPAs, administering them requires a great deal of resources beyond what many ACP countries are able to provide.²⁰⁸ This problem of lack of resources also explains why those African countries that actually have established investment-friendly regimes cannot attract FDI. This indicates that FDI follows growth and countries' economic fundamentals²⁰⁹ and hence the EU must assist ACP countries with capacity building, promote domestic investment, and permit ACP countries to regulate their investment policies according to their needs.²¹⁰

Parallel to this, there has been an ongoing internal debate among the ACP countries concerning whether EPAs should include investment rules in the first place, and if so of what type.²¹¹ ACP countries seem to hold a divided position regarding the issue of whether EPA should include investment.²¹² The SADC region, for example, resists any investment rules, where as the Caribbean region favors such rules.²¹³ But all of them seem to share, with different degree, the idea that the main problems in analyzing the impact of investment rules in EPAs is its lack of clarity on what type of investment rules the EPAs will introduce and what possible

208. SOMO, EPA Negotiations do not Promote the right Investment Policies in Africa. Amsterdam, Centre for Research on Multilateral Cooperation, 2006
www.fanrpan.net/documents/d00416/Capacity_building_ACBF_Jun2007.pdf Visited on Oct. 2009

209. Te Velde, D. W. and S. Bilal (2005). Foreign Direct Investment in the Cotonou Partnership Agreement: Building on Private Sector Initiatives. The European Union and the Developing Countries: The Cotonou greement. O. Babarinde and G. Faber. Leiden, Martinus Nijhoff Publishers: 197-218.
www.ecdpm.org/.../Velde%20and%20Bilal%202004%20-%20FDI%20in%20Cotonou_published.pdf Visited on Oct. 2009

210. Alavi, Gibbon and Mortensen, Supra note 199

211. Ibid

212. Ibid

213. Ibid

impact each option will have in the economy of the ACP.²¹⁴

Stephen Karingi puts forward that one of the for ‘Singapore issues’, Trade Facilitation, is to be addressed in the WTO multilateral trade negotiation in Doha and is no longer a major issue for EPA also.²¹⁵ For the remaining three, i.e. Government Procurement, Competition and Investment, EU still pushes to have an agreement concluded.²¹⁶ But Africa’s position is that there has to be just a regional framework on these and have expressed that they are not in a position to make a binding commitment on any of these beyond a framework agreement.²¹⁷

Ato Lisanework’s also addressed the Ethiopia’s position on these issues saying there is uncertainty in the part of developing countries as a whole about the implications of these “Singapore issues” on their economy and this is the major reason why they didn’t want these issues in the WTO agreement.²¹⁸ These issues are now already included in the ESA despite the uncertainty of their impact that still persists. The Ethiopia’s position on those issues is that; not only on the ‘Singapore issues’ but the country is not ready to undertake commitment even in Service and also TRIPS agreements.²¹⁹ So what the country brings to the negotiation table is that Ethiopia accepts them in EPA only on condition that it is a cooperation agreement and not a binding commitment.²²⁰

The problem the country faces in relation to capacity of negotiation and coordination is not just on these highly controversial matters, but there

214. Ibid

215. Interview with Stephen Karingi, Supra note 8

216. Ibid

217. Ibid

218. Interview with Ato Lisanework Gorfu, Supra note 14

219. Ibid

220. Ibid

are problems in relation to the negotiation of other issues too.²²¹ The National Development and Trade Policy Forum, which is composed of 25 members from different government officials, is an organ entrusted to undertake this negotiation.²²² But the truth is, to ones dismay, the forum doesn't know this negotiation at all and apparently it is not concerned about it at all. As a result, Ministry of Trade and Industry became the only organ carrying the whole burden of the negotiation with its own very serious problems of capacity and shortage of skilled man power.²²³ Ato Lisanework underscores that negotiation, for example, in the agricultural matters essentially needs a great deal of expertise in the issue, so does negotiation in investment, tariff elimination etc. Hence, considering the gravity of the commitment and also the duration of time for which this agreement will govern trade between Ethiopia and EU, it is very essential that all the members of the forum actively involve in the negotiation and government has to find some mechanism to make sure that all of the members of the forum follow up the negotiation on a mandatory basis.²²⁴

221. Ibid

222. Ibid

223. Ibid

224. Ibid

Conclusion and the way forward

I. Conclusion

EU shows a particular interest in bringing the MFN clause in to the EPA in order to benefit from any better favorable treatment the ACP states may provide to any major trading country on the basis of future FTA which they may establish. But the truth is the very fact that regional trade agreements, on the basis of Article XXIV of GATT, are by definition discriminatory, makes the principle of MFN extraneous to EPA.

On the top of that, there have been made legitimate oppositions both from the ACP group and also other developing countries outside the ACP group such as China, Brazil, India etc to the inclusion of this principle in to EPA. The stated ground of opposition of these developing countries is that this arrangement will discourage them from concluding any free trade agreement with ACP countries since none of them will be willing to make a concession in exchange of concessions that will be extended to the EU. This, in effect, will undermine the policy space of developing countries by curtailing their negotiating rights on the top of being distinctive to South-South trade.

Seen from the side of the African ACP countries also the inclusion of this principle in the EPA is indicated to have an adverse effect in so far as competing in emerging developing country markets is concerned. As a result, the continent will be in a situation whereby it is impaired from optimizing the South-South trade cooperation as a result of this principle in EPA that makes the conclusion of any free trade agreement with any of the 'major trading economies' practically impossible. This means,

Africa will no longer be in a position to take part in emerging developing country markets such as Brazil, India, China etc.

Both the non-member developing countries and also African ACP countries raise very legitimate concern. But the Ethiopian negotiators chose silence on this issue considering the current development level of the country which makes the conclusion of a free trade agreement unforeseeable with any other country in the world. However, the fact that the country has neither the capacity, nor the interest at this moment doesn't mean that this will last for indefinite period of time. Even though the country cannot imagine the time when it will be ready for such kinds of agreements, it is really essential to seriously involve in the negotiation once the issue is in the negotiation table so as to come up with the best possible outcome to the country.

On the other hand, being eligible for preferences under EBA, since the country is LDC, development assistance under the EPA makes the single most important incentive for Ethiopia be interested in the EPA negotiation. But the review of the interim agreements, including the ESA text, which is praised for providing much more better coverage of the issue, fail to make a binding link between the implementation of trade reforms and financial assistance from EU.

EU evades the question by pointing to the already existing EDF fund and asserts that the ACP states will be both supported and compensated from this fund. But the truth is that the ACP countries would have received the amount pledged for the 10th EDF regardless of whether they were negotiating an EPA. This, therefore, indicated that there is no additional EPA assistance built into the 10th EDF budget. EU also declines to recognize the provisions in the Cotonou agreement for development assistance by arguing that the EPA framework is all about

trade and trade related issues. In addition, EU also tends to argue that what is called the 'COMESA fund' can be used for EPA implementation

Generally EU became pessimist altogether by looking at all the points of Africa as a question of money in the name of development. They, therefore, define development for Africa saying it is something that essentially comes following liberalization. In other words, opening market access is sufficient to bring development. But the truth is even though there has been opened a market access for the LDCs on the basis of EBA initiative, these countries are still under a severe poverty.

So the point the African countries make on this issue is that they want to make sure that any commitment they undertake under the EPA doesn't undermine their own development goals and strategies. The bottom line is, whatever commitment the African countries undertake should, by no means, compromise their own development and as such the EPA has to take in to account this crude fact without twisting the issue as a question of money.

Ethiopia has made its position on this issue pretty clear by saying that the idea of liberalization will be accepted only on condition that it is connected with development benchmarks the country has put in place such as: creating better employment opportunities, addressing the supply side constraints, improving quality and quantity of production, boosting export capacity and the like. Unless, the debate in market access alone doesn't make any sense since this already exists under EBA without, however, bringing any development. As a result, the EU has to allocate adequate fund to address the problems caused as a result of the additional commitment it has brought about with this agreement.

The other crucial issues in the negotiation relates to the scope of liberalization and the transition period for the liberalization. EU takes the liberty of defining ‘substantially all the trade’ requirement of liberalization of the trade in regional trade agreements and set it to be 90% of the trade between the parties has to be liberalized to meet this definition. This definition exclusively belongs to EU given the fact that there is no internationally accepted definition for the phrase. This EU’s one-size-fits-all approach doesn’t even distinguish between the developing countries and the LDCs and the same level of liberalization is being required from all.

One important thing which EU fails to recognize is the fact that the very basic assumption underlying Article 24 is the presumption that the liberalization takes place between two equal parties. But clearly in the case of EPA, the level of development of the two parties is hardly comparable and hence this fundamental fact should be taken in to account for defining the phrase. Besides, the Cotonou Agreement gives considerable weight to differentiation and special treatment in Art. 35.3 by stating that: “when EPAs is concluded, it will take into account the different levels of development of the contracting parties.” In other words, the EPA was meant to provide sufficient scope for flexibility, special and differential treatment and asymmetry specially for LDCs, small and vulnerable economies, landlocked countries and small islands on the basis of the Cotonou agreement.

Despite all the destructions that may result in the ACP economy, EU maintains its rigid position by insisting on 90% of the trade has to be liberalized between the two negotiators. The developing countries’ argument is that that, considering there is no binding internationally accepted definition for the phrase, it is a liberalization of “substantially all the trade” if 60% of the trade has been liberalized by the ACP

countries. Ethiopia's position on this is that the country claims the minimum of 30% exclusion rate as a bottom line of the exclusion that the country needs to secure from this deal and this will enable the country to effectively protect its market from imports from EU and it is unthinkable to go below that under any circumstance.

But the important thing that has to be taken in to account in this case is that there can not be any reason why Ethiopia cannot go for the 40% exclusion. Because, the 100% opening of its market, which EU is offering in this negotiation, is already available to Ethiopia under EBA. As a result, there cannot be any better market access this agreement will open for Ethiopia except the controversial development assistance and also relatively better rules of origin. Hence there isn't any reason good enough to make the country adhere to the EU's definition of 'substantially all the trade' in order to make this agreement WTO compatible. Meaning, the agreement will be WTO compatible if liberalization of 'substantially all the trade' is made between the two parties and this can be achieved by providing Ethiopia 40% exclusion rate there by liberalizing 80% of the trade between two parties.

In relation to this, the duration of the transition period also makes another issue of the negotiation. The argument from the African side is that African integration has to come first, and then African countries will be ready to liberalize to the EU. As a result, the 20-25 years currently being negotiated is indicated to be short. Ethiopia, on the other hand, underlines that the transition period has to be connected with the development benchmarks in all cases; if this is already met in a feasible way, then it can be any number of years.

But since this period has to be fixed in the negotiation side by side with the negotiation on the percentage of liberalization, it is of great importance

that there has to be granted 25 years period of time for transition to Ethiopia so that the country would make all the necessary adjustments to protect its domestic market from disruption. When fixing this period, something which should never be forgotten is how to distribute the percentage of the liberalization across the over all period given for liberalization. If the country is to liberalize about 60% with in two years leaving, for example, only 2% with in 25 years, like was the case in EAC, it will not have any meaning. Hence the percentage of the imports to be liberalized in different periods is as important as the total number of years for the liberalization. On the top of that, great deal of works have to be done specially in the moratorium period, i.e. the period before the phasing in of any liberalization, making the necessary adjustments in the domestic economy.

With regard to use of quantitative restriction, EPA provides that all prohibitions or restrictions in trade on the importation, exportation or sale for export between the parties other than customs duties, taxes, fees and other charges whether made effective through quotas, import or export licenses or other measures, shall be eliminated upon the entry into force of this Agreement. There hasn't been much controversy in this provision in the EPA since WTO is also against these kinds of restrictions. But the real problem was on the exceptions that would allow a country to take such measure on some justifiable ground.

Basically, the deeper the commitments a country like Ethiopia makes, the higher the risks of de-industrialization are and this makes providing adequate exception to this rule essential. In addition, it can be taken as part of the solution to the problem likely to be caused by the level of liberalization the ACP countries are required to implement if there are provided adequate exceptions allowing the application of this restriction.

In Ethiopia, the government maintains a number of restrictions both on import and export trade. In the case of export, export of cereals is prohibited to prevent shortage of foodstuff and to fight inflation; and with regard to the restriction on imports, importation of a number of items such as used clothing, denatured alcohol, organic fertilizers, and seeds with terminator gene technology are prohibited. This indicates that the government has a strong interest in regulating imports and exports and might also want to maintain this policy flexibility to introduce measures of similar nature in the future.

The issue of export tax also makes another issue of negotiation between the two parties. EU's argument concerning this is that export taxes have to be eliminated altogether and the same has to be reflected in the Interim Agreement by allowing its application only in certain exceptional cases.

EU tries to provide a justification for its assertion of the elimination of export tax during the negotiation saying the reason Ethiopia or another ACP country is imposing this tax is just for the purpose of raw material monopoly and this works ultimately to prevent raw materials from being exported to EU. This, in effect, will impede a comparative advantage principle from working.

But the reality is that the prohibition of use of export tax has been shown to cause a serious problem in Ethiopia from a practical point of view. There have been various percentages of export taxes imposed in different export products so far with the objective of value addition and these include 150% export tax on raw hides and skins, 20% export tax on the export of wet blue cow hides, 10% export tax on pickled sheep skins and 5% on export of wet blue goat skins. Even when this is the case, all the tanneries in Ethiopia are currently working below their full capacity

mainly because of the critical shortage of raw hides and skins and lifting the export tax in this situation will undoubtedly lead to closure of most of these tanneries.

Clearly the major reason behind maintaining such taxes in Ethiopia is for value addition which ultimately works to bring industrialization but it is not just for the sake of revenue or for raw material monopoly as EU argues.

EPA is also interested in regulating the customs valuation systems of the ACP countries by making a reference to the Agreement on the implementation of Article VII of GATT 1994 to govern customs valuation rules applied to reciprocal trade between the Parties. But the problem in the ESA text is that it seems to require an automatic application of the Customs Valuation Agreement. Factually, however helpful implementing the Customs Valuation Agreement might be in bringing about a fair, uniform, and neutral system for the valuation of goods for customs purposes, it cannot be realized without accompanying reforms in customs regulations, procedures, better compliance, trade facilitation, modernized customs authority and enhanced human resource capacity both in the government and private sector.

Hence, lots of works are required to be done on it over some period of time so as to avoid the problems of lowered protection levels for domestic producers and reduction in customs revenues due to under invoicing following the immediate implementation of the agreement.

The other important issue in this negotiation pertains to loss of government's revenue. Basically, liberalizing trade by dismantling tariffs on reciprocal basis in the regions party to the agreement introduced by the EPA will result in a substantial revenue loss from tariff collection and

this has the potential to cripple the government's major source of revenue to finance health, education, infrastructure and so many other government's expenditures. It also threatens the fiscal stability of the country and most likely will lead to a great chaos in the whole system if there is no other alternative way taking its place to cover all these.

As is the case with so many other ACP LDCs, Ethiopia also relies heavily on import taxes for its fiscal income necessary to finance various government expenditures. Hence eliminating this government's major source of revenue will dramatically reduce the country's spending ability and institutional capacity and if the government is unable to offset these losses, it could lead to severe cuts in public expenditure even in key social sectors.

EU on its part claims that it recognizes the fact that African countries are likely to face revenue losses from tariff elimination, but also argues that, in the first place, the amount of revenue loss is exaggerated and; second, even if there is the loss, it ought to be considered 'short-term adjustment costs' which can be overcome through re-structuring and broadening domestic tax bases. It also suggests that the revenue loss to be caused by the elimination of import duty will be compensated by the increase in the internal taxes as a result of a high volume of trade following the elimination of tariff and specially the African countries can switch from trade taxes to levying a VAT so as to cover the resulting loss.

Evidently seen from African point of view, alternative solutions to limit the public deficits induced by EPAs such as reducing expenditures, increasing rates of other taxes and improved tax administration could be considered, but will not be easy to achieve. In addition, even if the net trade flow increases, there will still be a net loss showing negative and

only a quarter of the loss can be recovered as has been witnessed in various revenue liberalizations undertaken by other developing countries.

Besides, not only will this liberalization affect other kinds of taxes, but it also affects even VAT, which EU proposes as an alternative to offset the loss that occurred following the elimination of the import duty. This is due to the fact that VAT is calculated as CIF (Cost, Insurance & Freight) plus import duty and in this case import duty will be zero as a result of liberalization and hence the value of VAT will also proportionally go down with, of course, some chance that the increase in import may partly cover the loss because of the increase in domestic tax

Generally, following liberalization, Ethiopia will suffer a very great revenue loss from import duty and this inevitably calls for making some fiscal restructuring processes by the time when the country joins and begins to implement this tariff elimination program. This, however, cannot be done without additional financial resources for the sustained support. Hence EU has to provide adequate compensation for the loss suffered and also provide technical cooperation and assistance to reform and modernize tax administration.

Apart from these, there are also issues relating to the tough competition the ACP countries are likely to face from highly advanced as well as subsidized imports from EU. As a matter of fact, EU has already introduced much more advanced technologies to its production systems and, most often, subsidize producers on various grounds. These products, following liberalization, will wipe out all the domestic producers which cannot compete and evidently this is what will happen to the domestic producers in Ethiopia who are known for using backward technologies both in the industrial sector and also agricultural sector.

One very important message this conveys is that the competitiveness of the ACP countries needs to be enhanced so as to survive the tough competition that is coming together with the signing of the EPA. As a result, the constraints both in the supply side which are associated with production in the country; and demand side, which are associated with access to the EU market have to be effectively addressed.

The tangible reality in Ethiopia shows that domestic firms are still hindered by the lack of infrastructure and weak institutions, low levels of value-addition and the small-scale nature of production. Hence it is impossible to imagine that the Ethiopian products will remain competitive with the EU's products, which have already been advanced in almost all areas making them fit to compete in the market from any corner of the globe. This precisely leads us to conclude that if the Ethiopian products have to be competitive, then all the supply side constraints need to be effectively dealt with.

In addition, the issue of substantial adjustment costs countries will face also makes one of important areas to be addressed in the negotiation of EPA. As a matter of fact, severe adverse effects will result in the economy of the ACP from the liberalization which include: de-industrialization, unemployment, fiscal restructuring etc. In addition, there isn't any re-skilling program in Africa where by the worker who loses a job in one sector being trained to work in another. There isn't skill building program either, to make the workers competent to work in the new sectors emerging as a result of the liberalization

There have already been identified some specific areas which essentially need to be provided with some kind of support to undergo a structural adjustments for creating a viable economy after the liberalization in Ethiopia. These include: tax and fiscal reforms which is particularly

important for the effectiveness of the over all structural adjustment in the country; and the balance of trade, since there will be a massive increase of imports from EU that will destabilize it. In addition, the strengthening of the production capacities of the vulnerable sectors in such a way that they could be modernized and therefore contribute fully to the industrial diversification also requires a structural adjustment be made on these particular sectors.

On the other hand, there will also be a need to establish social safety nets that compensate displaced workers and provide the poor with a minimal standard of living below which they should not fall. There are also additional trade-related measures that need some kind of structural adjustments such as: ensuring smooth cross-border transport of goods and reducing/eliminating delays and unnecessary additional transport costs, and capacity building dedicated to allowing exporters to be able to fulfill the conditions required to access European markets.

The Cotonou Agreement has also addressed this issue by requiring giving special consideration for the purpose of transitional support in the form of budgetary support and technical assistance for countries that face budgetary adjustments due to regional integration and EPAs.

The other important issue coming in to picture in relation to this negotiation is the issue of regional integration. Concerning this, the Council of the European Union reiterated in so many incidents that EPAs should primarily build upon, foster and support ACP regional integration processes and has consistently justified EPAs on the basis that it will improve regional integration. The Cotonou Agreement, on the other hand, has enshrined that: "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". ACP Ministers, on their part, have also underlined support to regional integration initiatives in the ESA region as one of the major objectives of EPA.

But opposed to all these commitments made to anchor regional integration, EU has been concerned the least on the issue of regional integration and has abandoned it altogether in the interim agreement. Taking the case of the ESA region, it has been split in to two and the East African Community (EAC) concluded an agreement independently of the region Eastern and Southern Africa (ESA) group. Following this, separate deals with EAC and some individual members of the ESA region were taken as an option by EU to pursue its goal of negotiation. Consequently, with the exception of the EAC group which concluded the agreement on behalf of its members, the ESA signatories and other ACP countries were forced to submit separate and un-harmonized tariff liberalization schedule and exclusion list, not agreed as a region.

In the beginning, ACP as one group had much more stronger power and then it has been divided in to six groups, four in Africa, and Pacific & Caribbean, which ultimately substantially reduced the power of the ACP altogether. Even it would have been much more better if at least Africa has been given the chance to negotiate as one group, but they were not given that chance either. This clearly indicated EU's hidden agenda of weakening the power of the ACP so as to get what it wants from the negotiation much more easily.

On the top of that, there is lack of clarity on the definition of the parties to the agreement. Despite the fact that it is one of the most fundamental issues of the agreement, the EPA neglected to define who will be parties to this agreement, i.e. whether it is the regional economic communities

such as COMESA, EAC etc or just the individual countries. This is specially important because there will be cases of accountability whenever the terms of the agreement are violated and it may entail penalty for the whole region for the acts of a single country. So there has to be included a clear provision in the agreement defining who the parties to the agreement will be when the agreement is finally signed.

Apart from these unresolved issues of regional integration, there are certain areas commonly referred to as the “Singapore Issues” brought by EU in to the EPA negotiation. Initially they were four as raised by the EU in 1996 in the first WTO Ministerial in Singapore which include Trade Facilitation, Government Procurement, Competition and Investment. But later on they were reduced in to three as the required explicit consensus was achieved on Trade Facilitation, which is now part of the Doha negotiations, and, on the rest three, developing countries objected to starting negotiations and hence they were left out from WTO agreement.

Having failed in the Doha trade negotiation, EU brings these issues in to attention in the EPA negotiation and stroke a debate on the inclusion of them in the EPA. Developing countries in the EPA negotiation maintained the same position and have also objected to the inclusion of these issues in the EPA negotiations by stating that the WTO does not require regional trade agreements to include these issues. They have also indicated that there is lack of clarity on what type of measures are going to be introduced and also what possible impact each option will have in the economy of the ACP.

Hence Africa’s position is that there has to be just a framework agreement on these and have expressed that they are not in a position to make a binding commitment on any of these beyond a framework agreement.

Because there is a great deal of uncertainty in the part of developing countries as a whole about the implications of these “Singapore issues” on their economy and this is the major reason why they didn’t want these issues in the WTO agreement from the beginning.

Ethiopia maintains that let alone these ‘Singapore issues’ which are proved to be complicated, the country is not ready to undertake commitment even in Service and also TRIPS agreements. So what the country brings to the negotiation table is that Ethiopia accepts them in EPA only on condition that it is a cooperation agreement and not a binding commitment.

Finally, at this time when the country is faced with these series of important and also complicated issues in relation to EPA, the National Development and Trade Policy Forum of Ethiopia, an organ entrusted to undertake this negotiation, acted in totally irresponsible manner. While it is supposed to follow up and also fully participate in the negotiation by representing the country until the agreement is finally signed, it is not concerned about it even the least. Hence Ministry of Trade and Industry became the only organ carrying the whole burden of the negotiation with its own very serious problems of capacity and shortage of skilled man power.

II. The Way Forward

- Even though Ethiopia doesn’t have the capacity to conclude a free trade agreement given the fact that the development status of the country is at very low stage, it is really essential that Ethiopian negotiators take the MFN issue very seriously and express their opposition to the inclusion of this provision in to EPA. Because if once commitments are entered on the issue by the ESA group, it will be

binding all its members and if there is any possible case in which Ethiopia will intend to take part in any FTA in the future, this provision will make the situation impossible and hence this provision has to be excluded from the EPA.

- EPA has to provide development assistance over and above that which the EU currently provides under EDF and also there has to be a binding link between the implementation of trade reforms and financial assistance from EU.
- EPA will be WTO compatible if liberalization of ‘substantially all the trade’ is made between the two parties and this can be achieved by providing Ethiopia 40% exclusion rate there by liberalizing 80% of the trade between two parties. Hence Ethiopia has to go for 40% exclusion.
- It is of great importance that there has to be granted 25 years period of time for transition to Ethiopia so that the country would make all the necessary adjustments to protect the domestic market from disruption.
- The percentage of the imports to be liberalized in different periods with in this 25 year period of time has to be distributed in such a way that at least 50% has to be liberalized in the final 5-10 years
- The negotiators representing Ethiopia need to take a great initiative by coordinating government and various stake holders to do great deal of works in the moratorium period for making the country ready for the up coming liberalization.
- The ESA text, which Ethiopia is negotiating on, has to provide in its part dealing with quantitative restriction the exceptions such as export

restriction to address food shortage and also other all possible cases that may make the application of such restriction essential.

- In the case of export tax, some exceptions such as fostering development of domestic industries and maintaining currency stability, which have been stated as exceptions in the EAC text, and also other possible circumstances justifying imposing these tax need to be introduced in to the ESA text also since the ultimate goal is to bring industrialization in this country.
- For the case of Customs Valuation Agreement, it is very important that Ethiopia has to be given sufficient period of time to make the necessary preparation before the application of this agreement takes place and hence this element of the agreement requiring an automatic application of the agreement needs to be dealt with.
- The EPA has to necessarily come up with some binding provision on the technical cooperation and assistance for the financial reform to be undertaken in Ethiopia. In addition, EU has to also grant adequate compensation for covering the loss to be suffered by the country following dismantling of import duty.
- EU has to make sufficient commitments for the additional resources that will be needed during the preparation, establishment and the operation of the EU-ESA Free Trade Areas. Meaning, rather than pushing the country to make immense commitments without any assurance of being able to pay for them, EU has to take some positive steps by providing additional resources that will effectively address the supply side constraints of the country as well as make sufficient commitments to respond to the constraints affecting the demand side.

- EU has to provide the support needed for structural adjustments so that the overall economy can withstand the challenges of the liberalization. In other words, the Ethiopian negotiators essentially need to make sure that the adjustment costs of reform programs in view have been covered by EU.
- All the ACP negotiators need to call for EU to stop pursuing its goal of negotiation at the expense of destroying the regional integration altogether.
- Concerning the Singapore Issues, Ethiopia accepts them in EPA only on condition that it is a cooperation agreement and not a binding commitment. This is very recommendable position and it is really important that the country maintain this argument until the agreement is finally signed.
- It is very essential that the Ethiopian government find some mechanism to make sure that all of the members of the National Development and Trade Policy Forum, an organ entrusted to undertake this negotiation by representing Ethiopia, participate in the negotiation on a mandatory basis until they fully discharge their duty.

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