

# Trade Negotiations Insights

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## The dawn of a new era: Caribbean signs EPA with EU

Christopher Sinckler<sup>1</sup>

After close to four years of intense negotiations, heated arguments, studies on top of studies, impact assessments, text and redrafted text and countless hours of study and meetings - a decision was called upon to be made. We knew it was going to be tough; we knew that serious sacrifices and compromises would have to be made. Likewise we knew that the EPA would usher in a completely new era of economic and trade relations with Europe in which the Caribbean region would finally have to face the realities of a changed, changing and ultimately more unfriendly global economy.

Our signature of the EPA agreement on October 15, represents a fundamental signal to the rest of the world that Caribbean countries are maturely and decidedly breaking with a long loved past that in fact has now passed.

### Controversial decision

Of course there are those among us who prefer to look back at a life which we enjoyed and longed to continue. We can have no quarrels with that. But surely they understand that we must move on. Clearly there are those who, like Charles Dickens' Oliver Twist, will always say we have not got enough and to keep on negotiating until you get all you want. But surely they too understand that this is impractical and the reality of the agenda set for us does not allow us that luxury. No negotiated agreement is perfect, none can produce perfect results.

What can be done, however, is to set realistic objectives and to target energy towards achieving the essence, spirit and letter of our goals. This is something we have done collectively as a region and it should be lauded not degraded.

### Embrace the future

With signature of the EPA we embrace an uncertain future. As such, our attention should focus not on what could have been but on what has to be done to move forward. This is a highly complex and comprehensive agreement and the effort needed to implement it will at times be more onerous than that spent negotiating it.

The task now is to set in motion a CARIFORUM-wide process at both regional and national levels to create effective mechanisms and structures to allow each and every country in this region to take advantage of the opportunities which this EPA presents.

In Barbados, the Cabinet has agreed to the establishment of an EPA Coordination and Implementation Unit charged with the responsibility of studying the entire agreement and devising strategies and programmes to enhance the capacity of our ministries and private sectors to implement, engage and exploit this agreement. Several of our regional colleagues are doing likewise.





## Editorial

After months of high-profile negotiations, eleventh-hour confusion and delay, the Economic Partnership Agreement between the Caribbean region and Europe was signed in Barbados on October 15. This landmark deal is being billed by the European Commission as the first genuinely comprehensive north-south trade and development agreement in the global economy.

Nevertheless, it remained unclear right up to the last minute whether or not Guyana would even attend the ceremony, let alone sign the treaty. In the event, the 'will they, won't they' guessing game was decided when the Guyanese government inked the deal five days after the majority of its Caribbean counterparts. This leaves only Haiti, currently tackling the effects of four consecutive hurricanes, but which is expected to sign up in 2010.

The ink is only just dry on the CARIFORUM EPA and attention is already turning towards the challenges the region must overcome as it moves to implement the agreement. Our lead article this month is adapted from the speech given by Chris Sinckler, the Barbados Foreign Minister, at the point of signature. He forecasts stormy waters ahead as he candidly points out that the region will need to make greater efforts to implement the deal than were needed to negotiate it.

But as the Caribbean signs off on its EPA, other regions are still negotiating important issues like services and investment. Tom Westcott continues our series of GTZ-sponsored articles with a look at the investment provisions and commitments in the CARIFORUM text.

Away from the glare of the media spotlight, Zambia opted to sign an interim EPA deal at the end of September. In this edition, Judith Fessehaie walks us through some of the key aspects of Zambia's market access offer and future expectations of the EPA negotiations.

The snap hand over of the EU Trade Commissioner's hat from Mandelson to Ashton has provoked debate on the prospective EPA negotiations. Ashton, who seems willing to adopt a more flexible approach to EPAs, has inspired hope that she will stand up for development issues. "I don't think there is any single model for trade liberalisation that works everywhere and at all times," she said when quizzed by Members of the European Parliament. "There are only tailored solutions to the specific needs and the potential strengths of different countries. This would guide my approach in areas such as EPAs, where I want to listen to and learn from our African, Caribbean and Pacific partners how best to take forward final agreements."

And as the shock waves of the global financial crisis reverberate around the world, many are assessing its impact on developing countries. Tristan Hanson discusses why the effects on Africa appear - at first sight - to be limited. But has this calamity turned the world's attention away from the food crisis? Some feel that the rapid response to the financial crisis by developed countries shows how less seriously the food crisis has been taken. Falou Samb, Eloi Laourou and Mothae A. Maruping assess possibilities of utilising the WTO arrangements and rules in solving the current food crisis in the developing countries.

**We hope you enjoy the November issue of TNI!**

## Roadmap drawn up

Equally, at the regional level, the CARIFORUM Secretariat has already devised a comprehensive, though only preliminary, roadmap for implementation of the EPA for regional governments.

At the earliest opportunity CARIFORUM Ministers of Trade will sit down to refine and agree on that roadmap and the mechanisms needed to successfully implement it. Time is short and the stakes way too high for procrastination or prevarication.

## The EU must be on board

As the first region to have negotiated and signed a comprehensive EPA, the CARIFORUM region has demonstrated a level of seriousness of purpose that many thought was beyond us. We understand fully the positive and the negative repercussions likely to arise from the implementation of this agreement. But we equally realise that the level of commitment Europe has made in an effort to assist the region in implementing this agreement must now come to fruition.

In this regard, our EU partners must be reminded of their commitment to provide development support to buttress regional integration, facilitate the implementation of EPA commitments, and improve supply capacity and competitiveness - in accordance with priorities identified across the broad spectrum of negotiating subjects by CARIFORUM. The EPA text underlines the obligation of both CARIFORUM and the European Community to take all necessary measures to ensure the effective mobilisation, disbursement and utilisation of the resources which facilitate development cooperation.<sup>2</sup>

## The development dimension

Although the development dimension of the EPA is not limited to the direct transfer of resources, it must be emphasised that the timely delivery of necessary financial support will be vital if the EPA is to achieve the objectives which both sides set out in their negotiating mandates.

Equally, we expect the Commission and EU member states to become more proactive in helping the region to put in place the necessary institutions and processes to enable our exporters to become more competitive in the delivery of both goods and services.

We see the EPA as a package, incorporating Development Cooperation, Trade in Goods, Trade in Services and Trade Related Issues. In our view, the effective execution of the first of these elements is a prerequisite for the success of the other three.

## The importance of Aid for Trade

The EU Aid for Trade (Aft) facility represents an important source of additional funding for the implementation of a CARIFORUM EPA. The EU Aft commitment envisages increasing trade related development support to €2 billion per year by 2010 with half of these resources being earmarked for EPA implementation in ACP regions. The CARIFORUM EPA text includes a declaration that the region will benefit from an equitable share of the €1 billion, which represents the commitments of EU member states (not including the Commission) for EPA implementation.

But it must be pointed out that to date, the modalities governing access to the Aft resources of EU member states have not yet been properly elaborated despite the fact that these were to have been in place since the end of last year. Moreover, questions have been raised about the actual amount of net additional Aft resources, which will be available. I am optimistic these concerns will be immediately addressed.

Failure to satisfactorily do so or to meet those commitments to their fullest extent will not only compromise the implementation of this agreement but permanently damage our future relations.

## A new era begins

Signature of the EPA signals the start of a new era in our relations with the EU and even with the rest of the world. At this point, let us reflect on the poignant words of Baroness Young, who in 1996 told the University of West Indies:

"It follows that whatever happens after the year 2000 will have to be negotiated against a background of a changed world in which many EU member states question every aspect of EU development policy, let alone ask why there should be a special relationship with a limited groups of nations. The message is clear: the scenario will be bleak for any ACP nation unable to adapt to this new reality. The issues are no longer about morality. This conclusion is now almost certainly the defining truth about future ACP-EU relationships."

<sup>1</sup> Christopher Sinckler is the Minister for Foreign Affairs, Foreign Trade and International Business in Barbados. This article has been adapted from his speech on the occasion of the signature of the CARIFORUM EPA in Barbados on October 15 2008.

<sup>2</sup> See Article 7.4.



# The global financial crisis: what does it mean for developing countries?

Tristan Hanson<sup>1</sup>

It may have started with US sub-prime mortgages, but the current financial crisis is now very much global. Its ramifications - economic, political and ideological - may persist for years to come. Unlike other financial crises of recent decades, this one did not originate in emerging or developing countries; nevertheless, its effects will be felt there too with likely negative consequences for growth and poverty reduction. Economic and financial integration is greater than at any stage for over a century and the forces of globalisation, beneficial in good times, are a source of risk at present. One alarming statistic makes this clear: foreign bank claims on developing countries have almost tripled to \$3.1 trillion in just the last five years.<sup>2</sup>

The crisis is transmitted from developed to developing countries via two channels. First, slowing OECD growth means less demand for imports, a headwind to developing country growth rates that may be exacerbated by a consequential spending slowdown domestically.<sup>3</sup> Second, as risk appetite diminishes and financial institutions deleverage, capital flows to developing countries dry up (or reverse), reducing credit availability and increasing borrowing rates. This second channel is already in full force. Emerging market borrowing costs are up sharply since August to their highest level in over five years compared to US treasuries.<sup>4</sup> The MSCI Emerging Markets equity index has lost 53% from its high last year. Developing country and emerging market currencies have weakened significantly against the US dollar since July.<sup>5</sup>

Fortunately, at an aggregate level the structural macroeconomic characteristics of emerging and developing countries are greatly improved from a decade ago: many countries have sustained current account surpluses, accumulating vast international reserves in the process. Such countries are better placed to weather the storm. But in the short-term, even countries that have stockpiled reserves may suffer if their financial sector has borrowed heavily in international markets, as Russia and Kazakhstan's recent predicaments illustrate.

Aggregation, however, masks weaknesses in a number of countries. Characteristics of countries facing the greatest risk include: a large external debt position, significant gross inflows of private capital or bank credit during the boom years (especially if short-term or in foreign currency), a trend of large current account deficits, rapid domestic credit growth and low foreign-exchange reserves. From this perspective, Eastern Europe and Central Asia appear most at risk. Of the estimated \$280 billion increase in gross cross-border bank lending to developing countries from 2003-2007, almost two-thirds went to these regions. Other countries too have attracted big short-term capital inflows in recent years, most notably India, Brazil and Mexico.

The IMF's recently reduced 2009 growth forecasts of 3% and 6.1% for the world and developing countries respectively, still suggests healthy growth - but the risks must be to the downside. Middle-income countries that borrowed with ease

during the boom may suffer most from the fallout in credit markets. Indeed, the IMF forecasts that Eastern Europe, Asia and Latin America will slow appreciably in 2008-09, with African growth only modestly affected.



Nonetheless, low-income countries face material economic risks: slower global growth, reduced foreign aid assistance and declining remittances. For these countries, the direction of commodity prices - and therefore Chinese growth - may hold greater significance than direct financial market aftershocks from the US or Europe. Recent measures in China to stimulate growth are therefore encouraging for commodity exporters and global growth generally, although potentially negative for some commodity importers. The ability of policymakers to support domestic demand will partly determine how individual countries fare in a global slowdown. Those countries with low inflation rates and prudent fiscal policies are best placed in this regard.

For the US and Europe this is the most serious financial crisis since the Great Depression; that is not so for many developing countries which have faced worse before now. Despite the gloom, for the latter a brief period of slower economic growth remains a plausible best case scenario. Moreover, receding inflationary pressure is a positive development. The longer the financial crisis persists, however, the greater the risk of a deeper global recession. Such an outcome would have far more serious implications for all developing economies and might possibly threaten political and social stability in the most fragile of them. All eyes - in developed and developing countries alike - are on the world's most powerful policymakers. May they find a swift and effective solution.

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<sup>2</sup> Source: World Bank's *Global Development Finance Report*, June 2008. The figure includes cross-border bank lending and foreign-owned branches and subsidiaries based in developing countries.

<sup>3</sup> Organisation for Economic Co-operation and Development (OECD) consisting mainly of the world's richest nations.

<sup>4</sup> The JP Morgan EMBI emerging market bond spread is up 250 basis points since August to 573 basis points over US treasuries.

<sup>5</sup> The South Korean Won, Brazilian Real, Chilean Peso and Hungarian Forint have each lost more than 25% in the past six months and a number of countries have sold dollars to stem the tide of recent currency weakness.



# WTO rules and the food crisis in LDCs: challenges and the way forward

Falou Samb,<sup>1</sup> Eloi Laourou<sup>2</sup> and Mothae A. Maruping<sup>3</sup>

Developing country policymakers face several key unknown factors relating to the current food crisis and its implications for trade and development. Differing views have been expressed on how the WTO can assist in solving the food crisis in an efficient manner. In April 2008, during the International Monetary Fund (IMF) and World Bank annual spring meetings, the WTO Director General, Pascal Lamy, said that in facing the current turmoil and uncertainties around the world, the rules-based trading system of the WTO "provides a hugely important source of economic stability for governments, for business and for consumers."

Reflecting on Lamy's statement, this article seeks to explore some possibilities for utilising WTO arrangements and rules to solve the current food crisis in developing countries in general, and in least developed countries (LDCs) in particular, as well as to search for alternative arrangements to enhance food security in these countries. The latter would involve the proactive use of WTO rules. This article draws from the joint work undertaken by the LDC Group in the WTO and by experts during a conference on food crisis in Geneva on July 17 2008.<sup>4</sup>

## Challenges

Using the trade rules and arrangements to find sustainable solutions to food security for all demands clarity on two sets of questions:

First, it is important to assess what are the trade rules and WTO provisions considered most relevant to the food crisis? From a legal standpoint, WTO provisions in the following areas are most pivotal:

- a) Tariffs, including the issue of tariff escalation and safeguards;
- b) The three pillars of the Agreement on Agriculture (domestic support, market access and export competition);
- c) Export restrictions under GATT Article XI:2; and
- d) The special products along with all the special and differential treatment provisions. Re-examining these provisions could enable formulation of more sustainable solutions to the food crisis. There is little, if any, content in the text of the current draft agreement on agriculture that clearly addresses the implications of the trade rules on the current food crisis in the affected countries.

Second, one needs to look at the impact and collateral damage of national responses to the escalation of food crises in net food importing countries. During the current crisis, the responses vary among countries, especially between food exporters and importers. This crucial distinction between the net food exporters and importers led to a very precarious situation whereby governments were trying to offer localised and short-term responses, in particular, in light of the social unrest and civil disturbances that followed.

Taking these two challenges into consideration, it is even more urgent and imperative to critically examine how - and to what extent - the WTO rules could provide solutions for both the net exporting and the net importing countries. Below, we review the relevant rules and recommend corresponding actions concerning both trade related provisions and institutional mechanisms to help solve the current food crisis.

## Export restrictions and prohibitions

While recognising the right of governments to issue export restrictions and prohibitions, such actions have provoked controversy and inflicted collateral damage. They also disrupt the normal course of multilateral negotiations and cause additional uncertainty in international trade regarding regular supply and conditions. GATT Article XI, 2 states that: "The provisions of paragraph 1 of this Article shall not extend to the following: (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party." The provisions were targeted to prevent members from taking exactly such restrictive measures.

The list of exporting countries using such restrictions includes Argentina, Bolivia, Cambodia, China, Egypt, Ethiopia, India, Indonesia, Mexico, Russia, Thailand, Ukraine, Venezuela and Vietnam. These measures severely affected the ability of the other developing countries, and LDCs especially, to import food products. This also put enormous strain on the current external accounts of the affected countries and changed the patterns of food trade. The GATT Article XI is quite ambiguous - despite the existence of Article XI, 2 (a) - in tackling the food crisis, as it gives both exporters and importers leeway to address the trade restrictions but with a decisive advantage to the exporting countries.

## Recommendation: a possible waiver

In order to return to the normal flow of international trade, granting a WTO waiver or an exemption from export restrictions and prohibitions could be considered as being in favour of developing countries and/or LDCs, based on the provisions of Article IX of the Agreement establishing the WTO. Any waiver granted under the current conditions of the food crisis would certainly pass the pre-requisite test to qualify under the "exceptional circumstances justifying the decision." The current food crisis duly qualifies to pass this test!

Asking for a waiver would allow the LDCs to avoid being subject to any export restrictions and prohibitions from the exporting countries. The latter would continue to exercise their right to impose these restrictions under GATT Article XI, but would not impose them on food exported to the LDCs.

Furthermore, a restrictive interpretation of the GATT-relevant provisions would allow the importing countries to take steps to initiate a dispute settlement process at the WTO and/or to enter into consultations with the exporting countries, in particular on transparency. This implies that, from a legal perspective, the WTO is to show flexibility



of the trade rules, in order to accommodate unforeseen circumstances.

The export restrictions constitute such deviation from the core mandate and principles of the multilateral trading system that they require full attention and decisive action from the WTO membership as a whole.

In this context, there is interest in the proposal tabled by Japan and Switzerland on export prohibitions and restrictions.<sup>5</sup> One interesting element is the need for a "secured implementation of food aid toward the net food-importing developing countries."

While this proposal attracts strong interest, the operational aspect is missing and should be strengthened if it is to deliver meaningful implementation on the ground. Action and results-oriented text is needed. Elements could be drawn from the recent Decision to extend the procedure to enhance transparency of special and differential treatment in favour of developing countries on the sanitary and phytosanitary measures.<sup>6</sup> This WTO Decision establishes a systemic linkage between legal obligation, implementation and capacity building. We suggest that if the WTO builds on this momentum, real gains would be induced for developing countries without undermining the system.

### **Recommendation: a new WTO Decision for the food crisis-plagued countries**

Due consideration should be given to drafting a new Decision to assist the food crisis-plagued LDCs and DCs. Such a WTO Decision should take stock and build upon the existing Decision on the net food importing developing countries (NFIDCs). A separate, effective instrument could result from the future negotiations and could even lead to an "early harvest" of the anticipated results. Proper regard to effective special and differential treatment has not been given, contrary to the spirit of the Doha Declaration. This proposal has the potential to provide a unique opportunity to lift the current shortcoming of NFIDCs. Missing this opportunity could drastically restrict the developing countries and LDCs' sovereign right to fully implement the Doha mandate.

### **Recommendation: building capacity for food supply**

Furthermore, the Enhanced Integrated Framework (EIF) should be activated urgently and Aid for Trade (AFT) should be updated. These initiatives need to be clearly defined and their operations expedited. Additional resources need to be allocated in order to trigger concrete actions in the beneficiary countries. One should not forget that these initiatives must be flexible enough to mainstream the food-related infrastructure deficiencies in developing and least developed countries. EIF and AFT should envisage a shift in the allocation of their resources. The primary target should be to address the supply constraints of the eligible countries for them to sustain food production and security.

### **Institutional issues**

Trade rules could have been part of the solution, but could not address the food crisis in the absence of coherence with a variety of other pertinent measures at different levels. They should interface with the non-trade solutions in order to form a concerted approach involving all the stakeholders at the national, regional and international levels.

Guidelines are also necessary to ensure the involvement of the private sector and civil society in any concerted effort

in this food crisis and to engage governments holding critical views originating from their dialogue with all interested and affected parties. Article V of the Agreement establishing the WTO provides such collaboration: "The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organisations concerned with matters related to those of the WTO." Yet, against the stark backdrop of the current agricultural negotiations, this crisis underscores the inadequate analytical capacity of developing countries to effectively assess the implications of multilateral trade rules in providing effective solutions to the food crisis. It also highlights inadequate governance capacity to achieve domestic policy coherence to support implementation. In view of the objectives and principles that underline an effective end to the food crisis and counter the escalating consequences of the food shortages, an integrated approach consisting of both trade and non-trade policy interventions is necessary. These measures should not be perceived as 'trade-distorting' but as an integral part of any effort to ensure a smooth operation of the food market and to address structural deficiencies in the affected countries.

### **The WTO momentum**

The Doha Development Agenda should establish flexibility with regards to food security and allow developing countries and LDCs to craft appropriate food policy schemes for prospective developing and least developed countries. These measures would give real opportunity to the multilateral trading system to show its responsive and flexible nature and to deliver meaningful development and benefits to the people. This contextualised approach should be endorsed. It has happened in the past and the current circumstances call for the same commitment to use trade as an economic and a development instrument, not just as a tool *per se*!

Taking further steps and acting swiftly in this matter, the WTO would offer a meaningful approach to drive economic development. It is now time to bring about the systemic changes needed to establish alternative multilateral trade rules and to correct the trade distortion currently in play in the agricultural sector.

Freedom from hunger is a basic human right. Food-related trade should receive a different treatment in the WTO rules and multilateral negotiations. The net food importing countries must not be put in front of an unpalatable dilemma between ensuring stable food supplies to their populations or reducing other social expenditures that in the long-term would impact a country's development potential.

Let's put the Doha Development Agenda to test by offering a sustained solution to the current and - in some instances - perennial, food crisis!

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<sup>4</sup> This LDCs conference was jointly organised with the Centre for Socio-Economic Development (CSEND) - a Geneva based research and development organisation focusing on global issues ([www.csend.org](http://www.csend.org)) - and provided a good opportunity to conduct in-depth policy dialogue on the responses or lack thereof, to the food crisis from the relevant stakeholders, at the national, regional and international levels. See the presentations and papers at: [www.csend.org/KnowledgeConferences.aspx?id=38](http://www.csend.org/KnowledgeConferences.aspx?id=38)

<sup>5</sup> WTO JOB(08)/34, April 30 2008 and its revised version of July 2008.

<sup>6</sup> WTO G/SPS/33/Add.1 on February 6 2006.



# Investment provisions and commitments in the CARIFORUM–EU EPA

Thomas J. Westcott<sup>1</sup>

The CARIFORUM-EU EPA, the first of a new series of trade and investment deals between the EU and ACP regions was signed on October 15 2008. This article briefly considers the meaning and effect of the EPA's investment provisions and commitments with an emphasis on the CARIFORUM obligations towards the EU.

Investment provisions in the CARIFORUM-EU EPA must be considered in the context of the EU's constrained mandate on investment - a consequence of its organisational structure and the division of 'competence' between EU member states and the representative organ. Foreign Direct Investment (FDI) is not yet within the scope of the European Commission's common commercial policy, despite the inclusion of other trade related issues such as intellectual property.<sup>2</sup> Therefore, the European Commission currently has non-exclusive competency over investment, which means that it applies a trade concept to the negotiation of investment issues.

Currently, EU member states negotiate their own bilateral investment treaties (BITs). Economic integration agreements, such as EPAs, remain limited to including investment provisions concerning market access (a trade concept) and the objective of investment liberalisation. Two other objectives of investment treaties, investment *protection* and investment *promotion* are largely excluded from the EU's competence and therefore the EPA. These remain the domain of member state BITs.

This restriction leaves the EU open to make commitments concerning only a limited class of investment known as "commercial presence." EU member states on the other hand, negotiate BITs to cover both FDI and other forms of investment and assets. A final consequence is that EU member states still have to approve the final version of investment provisions included in the EPA.

## Investment provisions in the CARIFORUM-EU EPA

In the EPA, there are obligations for both parties relating to commercial presence investment in services and non-services sectors.<sup>3</sup> The Agreement's coverage of investment centres on the core principles of national treatment (NT), the most favoured nation (MFN) clause<sup>4</sup> and a key liberalising provision, market access.<sup>5</sup>

Despite CARIFORUM enthusiasm for broader rules regarding the treatment of foreign investment, the EU could only agree to limited use of investment *protection* provisions. For example, the EPA does not seek to guarantee investors protection against host government expropriation of their investments without fair compensation. Nor does the EPA include dispute settlement provisions and the means for investors to take claims for breach of treaty to international arbitration.<sup>6</sup> Moreover, there is no promise that host governments accord foreign investors a minimum standard of treatment. On the other hand, there is a guarantee that host governments will not restrict the free movement of capital relating to investments.<sup>7</sup>

## Market access for commercial presence investment

Both parties guarantee investors and those with commercial presence market access that is no less favourable than that set out in their schedule of commitments on investment (commercial presence).



Market access is assured in Article 6.2 by introducing limitations to the types of measures member states can use to regulate foreign investors and those with commercial presence. A framework for liberalising existing regulatory regimes is achieved by requiring all host states - where applicable - to remove measures currently in place and commit not to introduce measures in the future that:

- (a) Limit the number of commercial presences whether in the form of numerical quotas, monopolies, exclusive rights or other commercial presence requirements such as economic needs tests;
- (b) Limit the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) Limit the total number of operations or the total quantity of output expressed in the form of quotas or the requirement of an economic needs test;
- (d) Limit the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; and
- (e) Restrict or require specific types of establishment (subsidiary, branch, representative office) or joint ventures through which an investor of the other party may perform an economic activity.

However, these limitations on foreign capital do not apply to all sectors and laws. Scope is reduced in two ways:

- 1) Article 5 sets out a list of sensitive sectors that are carved out from the scope of Chapter 2; and
- 2) Liberalisation through Article 6.2 is confined to selected sectors set out by the signatory states in their schedules and excludes laws and regulations (measures) specified therein.

For CARIFORUM, the relevant schedule is Annex 4.V List of commitments on Investment (Commercial Presence) in Economic Activities other than Services Sectors. Note that commercial presence in services sectors (in GATS terminology, mode 3 supply of services) falls within the scope of the provisions of Chapter 2, but sectoral coverage and non-conforming measures are set out for CARIFORUM in the separate services schedule.

Signatory CARIFORUM states have adopted a GATS-style schedule for investment in non-services sectors. The schedule sets out those sectors, including all sub-sectors, for which the market access and NT commitments apply. The sectors include: agriculture; hunting and forestry; fishing; mining and quarrying; manufacturing; production, transmission and distribution of electricity, gas, steam and hot water. Critically, the schedule also sets out reservations for measures that do not conform to the Article 6.2 market access liberalisation commitment or the Article 7 national treatment commitment.<sup>8</sup>



Reservations are also made for sub-sectors or activities where there is currently no limitation on foreign investment, but where a CARIFORUM state seeks flexibility for possible future regulation of foreign investment in a manner inconsistent with its market access and national treatment obligations.<sup>9</sup> The schedule contains 29 reservations taken out by individual signatory states for adopting possible future measures and three further reservations taken out by all 13 CARIFORUM states for adopting possible future measures.

### Liberalisation through binding commitments on existing foreign investment regimes

The EPA contains no indication of what measures currently in place in CARIFORUM states are to be removed for the region to comply with liberalisation. The Caribbean Regional Negotiation Machinery (CRNM) has indicated there will be very little need for legislative change to give effect to EPA commitments. Some CARIFORUM states may amend laws or regulations in their fishing sector to comply with Article 6.2. No details of these changes are discernable from the EPA or its schedules. Liberalisation will therefore principally be achieved through the binding of existing regulatory practice and the resulting limitations placed on future attempts to close the door further to foreign investors. That is, both parties commit to maintaining the current level of openness and procedural ease for the establishment of commercial presences. As noted above, binding of the existing regulatory landscape is limited by open-ended reservations in some sectors taken out by some CARIFORUM states.

### Most favoured nation treatment

CARIFORUM states need not automatically pass on the same treatment to EU investors that they provide to foreign investors from small developing and least developed countries. MFN treatment is offered to EU investors under Article 9.1 with exceptions to its application established in subsequent paragraphs.

Three exceptions to MFN treatment are worth noting. First, the MFN obligation only requires CARIFORUM states to provide EU investors treatment no less favourable than they provide to investors from a "major trading economy" under an economic integration agreement. "Major trading economy" is defined to include "any industrialised country, or any country accounting for a share of world merchandise exports above one percent." The reciprocal EU commitment for CARIFORUM investors is greater and requires providing treatment no less favourable than that accorded to investors or commercial presences in the EU of *any third country*.<sup>10</sup>

Second, Article 9.2 further limits the application of the MFN rule by exempting any treatment of commercial presence within the CARICOM Single Market and Economy and the internal market created by the CARICOM-Dominican Republic Free Trade Agreement (FTA).<sup>11</sup> Whereas the "major trading economy" limitation applies for treatment by signatory CARIFORUM states to their trading partners, this limitation means CARIFORUM states need not treat EU investors as favourably as investors from other CARIFORUM states.

A third limitation set out in Article 9.5 covers the negotiation of future FTAs. Where a signatory CARIFORUM state enters an FTA with a third party including more favourable treatment accorded to such third party, CARIFORUM and the EU will enter into consultations to decide whether the signatory CARIFORUM state can deny the EU the more favourable treatment.

To summarise, the three cases where MFN treatment need not be extended to EU investors provide CARIFORUM states with considerable flexibility in formulating investment policy. In fact, it reduces the MFN commitment to almost zero.

### Other CARIFORUM investment treaties

Other investment treaties in the Caribbean region, such as the Revised Treaty of Chaguaramas and the CARICOM Investment Code, as well as the CARICOM FTAs with the Dominican Republic and Costa Rica, are rather different in scope to the EPA and primarily address investment protection, though of these only the FTA with Costa Rica is fully implemented.

BITs concluded between individual CARIFORUM states and EU member states do not impose liberalisation requirements like the EPA. Instead they indirectly liberalise investment by giving investors greater certainty. For example, BITs commonly guarantee that investors will be treated no less favourably than domestic investors, once the foreign investment has been established in the host country.

### Implications for the Caribbean states

Commitments faced by signatory CARIFORUM states appear to require no change in current policy (with the possible, unconfirmed, exception of the fishing industry in several countries). First, market access and NT obligations are reportedly in line with the existing treatment of EU investors. Second, what liberalisation there is comes from binding existing laws, noting that many activities within these sectors are unbound. And third, MFN treatment imposes negligible requirements on the current and future regulation of EU-sourced commercial presences.

The EPA investment-related provisions contain no new institutions or procedures, though further steps and future action are required. The text initialled in December 2007 required, first, that the Bahamas and Haiti were still to prepare their schedules of commitments and exceptions. These schedules were to be incorporated no later than six months after signature of the EPA.<sup>12</sup> However, Haiti did not sign the EPA on October 15. Assuming it signs on at some future point, both these countries will require technical assistance to complete their schedules. Second, parties must undertake "future liberalisation" and commence further negotiations on investment no later than five years from the date of entry into force of the EPA with the aim of adding to the overall commitments.<sup>13</sup>

A more detailed discussion of development impacts and implications for other ACP regions is included in the study published by GTZ (see endnote 1).

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2 D. Vis-Dunbar, 'European treaty may revive debate over power to conclude investment agreements', *Investment Treaty News* (IISD), October 3 2007.

3 Article 4 defines "commercial presence." This article uses the term interchangeably with "investment."

4 Articles 7 and 9 respectively.

5 Article 6.

6 Article 5, endnote 7.

7 Title III Current Payments and Capital Movements, Article 2 Capital Movements.

8 Note that the schedule does not mention that non-conforming measures listed are reservations against the provisions on market access or national treatment. However, Article 8 (List of Commitments) states: "and, by means of reservations, the market access and national treatment limitations applicable to commercial presences and investors of the other Party in those sectors are set out in lists of commitments..."

9 For example, "Forestry and Logging: DMA, VCT: The State reserves the right to adopt or maintain measures on investment in this sector."

10 Set out in the preceding paragraph of Article 9.1

11 This type of exception to MFN is known as the Regional Economic Integration Organisation (REIO) exception.

12 Title II, Chapter 1, Article 3 bis.

13 Title II, Chapter 1, Article 3.



# Zambia and the EPA

Judith Fessehaie<sup>1</sup>

Zambia initialled its market access offer in the context of the Eastern and Southern Africa (ESA) interim Economic Partnership Agreement (IEPA) with the European Commission on September 30 2008. In completing these negotiations, the provisions of the trade in goods chapter and related annexes of the ESA IEPA now apply to Zambia.

## Structure of Zambia's market access offer

The final market access offer initialled by Zambia and the European Commission at the end of September will liberalise 79.62% of Zambia's imports value from the EU in 15 years.<sup>2</sup> In this offer, the exclusion list covers 20.38% of imports from the EU. A precautionary approach was taken, protecting potential or nascent industries and sectors with minimal levels of current imports, but in areas where the EU is increasing its competitiveness. The sensitive list broadly covers: agricultural products, processed food and beverages, plastic and rubber products, clothing and footwear, engineering and wooden products.

Zambia's market access offer backloads liberalisation on products that attract 15% and 25% customs duties. The effects of trade diversion will be partly offset by the launch of the SADC Free Trade Agreement (FTA) in August 2008, which will level the playing field between the EU and Zambia's major source of imports, South Africa.

## Other market access provisions

In order to minimize the impact of reforms resulting from the implementation of the IEPA, Zambia's market access offer has taken into account several considerations. These include maintaining import prohibitions for environmental purposes, export taxes for industry development (copper concentrates, cotton seeds, scrap metal) and export restrictions on food security grounds. However, while the relevant tariff lines have been annexed to the market access offer, Zambia - and ESA - are renegotiating the provisions on export taxes and quantitative restrictions in the IEPA to ensure these measures can be applied in certain circumstances (in line with GATT flexibilities). Moreover, unforeseen events can be addressed by carefully tailored trade remedies - another area under renegotiation.

## Zambia's expectations on the way forward

The market access pillar is only one of many on which Zambia's new partnership with the EU will be based. Several issues remain under negotiation including rules of origin and the adjustment of the tariff schedule to COMESA's common external tariff. The delivery of Aid for Trade under the development component similarly remains unresolved.

ESA negotiations on development aim to complement a Development Cooperation Strategy and a costed matrix. ESA and the European Commission agreed on the importance of adopting so-called 'development benchmarks' against which to assess the EPA process. The benchmarks should be coherent with national policy objectives and avoid ambiguity in measurement or interpretation.

Equally important is how the development component will operate. Zambia is addressing this in the context of national institutional arrangements designed to implement Aid for Trade by setting priorities for intervention, stakeholder consultation, donor coordination and overall strategy formulation. The impact of additional Aid for Trade interventions on Zambia's capacity to seize new export

opportunities will ultimately determine the value of an ESA EPA.

## Challenges and opportunities

The complexity and breadth of areas to be negotiated in the coming months present challenges and opportunities for Zambia. Challenges stem from the fact that regional integration in the area of trade in services, for example, has yet to be completed. EPA-level negotiations should not undermine existing regional agendas by skewing priorities for national bodies with limited resources. Also, it is difficult to draft EPA provisions in areas, such as intellectual property rights, where regional policies have not yet been agreed. This problem is less compelling in the context of competition and investment policies since regional regulations are in place and serve as a basis for engagement with the European Commission.<sup>3</sup> Yet, only 6 out of the 15 ESA countries have national competition laws and existing regional frameworks are not necessarily a guarantee of national capacity.

Zambia's priorities are to build domestic and regional capacity to regulate sectors, enforce legislation, monitor investors and administer government procurement in a transparent manner. Zambia has a direct interest in tackling beyond the border measures at the regional level to deepen the common economic area. Sequencing between national, regional and EPA frameworks and setting adequate implementation periods and accompanying measures in an EPA are critical. The level of ambition should not be measured by the depth of WTO+ commitments undertaken by ESA, but by the EPA's potential to raise the regulatory and enforcement capacity of the region. If this objective is achieved, real economic and social benefits will trickle down to consumers, firms, farmers and the government treasury.

## Effective negotiation

The restrictive role played by sanitary and phytosanitary measures (SPS), as well as technical barriers to trade (TBT) and rules of origin on actual market access opportunities is widely acknowledged. For Zambia, EPA negotiations are expected to result in SPS and TBT provisions that respond to the country's needs. Moreover, relaxing rules of origin would increase the competitiveness of Zambian firms and boost their incentive to integrate into regional and global value chains. For this reason, regional cumulation with African countries is an important aspect of these negotiations. Finally, trade facilitation and developing Information Technology infrastructure will complement the regulatory aspects contained in goods and services provisions, by making it possible to move both across borders in a cost effective and efficient manner. To negotiate successfully, these pressing issues must be kept in mind.

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2 Import values as an average for the period 2004-2006.

3 Member States have finalised the COMESA Common Investment Area and the COMESA Competition Regulations and Rules. Work is ongoing on the draft COMESA Trade in Services Framework. No regional framework is being developed yet on IPRs, as efforts have been focused at the all-Africa level.



# Development friendliness of dispute settlement mechanisms in the EPAs

Mehmet Karli<sup>1</sup>

The analysis of the dispute settlement (DS) systems provided for in the (interim) EPAs indicates that these new mechanisms are representative of a fundamental shift in the EU's DS policies towards a judicial model largely inspired by the WTO DS mechanism.<sup>2</sup> This shift first started with the EU free trade agreements (FTAs) with Mexico and Chile.<sup>3</sup> It is thus logical to examine the EPA DS mechanisms in comparison with the WTO Dispute Settlement Understanding (DSU).

The ACP proposals put forth during the negotiations for the review of the WTO DSU could be used to define the criteria against which to assess the development friendliness of a DS system. Considering that ACP countries face similar difficulties with respect to DS activity, proposals that carry the signature of one or more ACP country are deemed to represent global ACP views. Since the EPA DS mechanisms are similar to the WTO DS system, the problems that the ACP countries face at the WTO and the proposals they put forth to cure these problems become highly relevant for this analysis.

As such, detailed examination of the ACP proposals reveals that these countries have five main political demands with regard to DS activity:<sup>4</sup>

- 1) The DS system should address the ACP's human and financial resource constraints in the form of legal aid;
- 2) The remedies and retaliatory measures should be strengthened;
- 3) The multilateral character of the DS mechanism should be strengthened;
- 4) The special and differential treatment (SDT) provisions of the system should be made mandatory, precise and operational, and there should be more SDT especially with regard to the DS timeframes;
- 5) The inter-governmental character of the DSU should be preserved.

An examination of the (interim) EPA's DS provisions in light of these policy demands would help assess the development friendliness of these mechanisms and would also provide guidance for the follow-up negotiations between the ACP and the EU.

## Human and financial resource constraints and the EPAs<sup>5</sup>

The EPAs do not provide for any sort of legal aid. No mechanism is established to replace even the much criticised and minor assistance that the Secretariat gives to the developing countries under the WTO. Bearing in mind that the scarce resources of NGOs, academia, pro bono lawyers etc. will most probably focus on the multilateral level, ACPs will lack this type of assistance as well. Therefore, in terms of legal aid matters, the EPAs seem to aggravate the situation compared with the WTO. The ACP-EU parties should consider the possibility of setting up regional trade law centres that would assist the ACP countries. These centres would have positive spill-over effects for the ACP's representation and participation at the WTO as well.

## Remedies and retaliatory measures under the EPAs

Moreover, the agreements do nothing to address the long criticised 'lack of effective remedy' problem.<sup>6</sup> Most of the agreements reproduce the WTO remedy of 'bringing the measure into compliance', although with slightly different language. While the differences in language between the WTO and EPA texts may be used to push for some ACP friendly remedies, it may be preferable for the ACP countries not to have any provision on remedies at all. This is the case, for instance, under the Pacific EPA. Not having an explicit remedy clause may open the door for future developments and negotiations on this matter.

The system of retaliation provided for in the EPAs, while taking some positive steps, nevertheless falls short of meeting the ACP's demands. As a positive development, some EPAs recognise the possibility of 'financial compensation'. However, as the financial compensation is made subject to the agreement of parties, in effect, it does not go substantially beyond the WTO. That said, such an explicit reference to financial recompense would provide the ACP countries with a better hand in compensation negotiations. Hence, they must be preserved and, if possible, strengthened. In that regard, the SADC interim EPA includes a more permissive financial compensation clause that may be drawn upon by the others.

Another positive development under the EPAs with respect to retaliatory measures is that the agreements provide for 'appropriate measures' in addition to compensation. 'Appropriate measures' under the EPAs replace the 'suspension of concessions and other obligations' under the WTO. As this new term provides the ACP countries with a larger array of measures it may be considered as a positive step. However, given that the same measure is also available for the EU and that there are no proper judicial checks to control its use, this positive change carries a large risk as well.

In terms of necessary disciplines to control the use of these measures by the EU, the relationship between 'appropriate measures' and development assistance is of crucial importance, even though development assistance is not provided for as part of an EPA. Other ACP countries should draw upon the Ghana interim EPA clause, which explicitly proscribes the appropriate measures from affecting the development assistance. In fact, a more general provision stating that the ACP's use of the EPA DS mechanisms will not affect the development assistance to be given to them would also be an important guarantee for the ACP.



## The case for an all ACP approach

Another important shortcoming of the EPA retaliation system, which has long been a subject of complaint for ACP countries under the WTO, is its bilateral nature. That is to say, the DS mechanisms allow only the winning party to retaliate, not any other country. The demand for the right to retaliate collectively has long been aired under the WTO by developing countries, including the ACP. Although it may be maintained that the bilateral character of the EPAs, as opposed to the multilateral WTO, necessitates such a structure, the possibility of making use of quasi-multilateral Cotonou institutions should not be discarded.

## Strengthening multilateralism and the EPAs

The possibility of using and benefiting from the quasi-multilateral institutions and character of the Cotonou Agreement should also be considered for stages such as the surveillance of the implementation of arbitral awards. In the same vein, there is also a good case to allow EPA signatory states to become third parties in other EPA disputes. Considering the similarities between the substantive obligations of different EPAs, ACP countries have a systemic interest in participating in each other's cases.

## SDT provisions in the EPAs

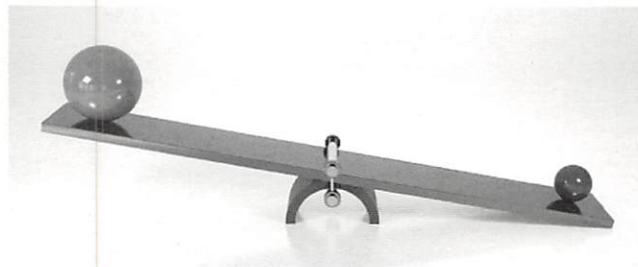
Most of the requirements of a development friendly DS system necessitate the special and differential treatment of ACP countries. Not only should the DS provisions include SDT, but also the SDT provisions should be mandatory, precise and operational. While the (interim) EPAs provide for some SDT clauses, they are very few and - in particular - they do not meet preciseness and operability criteria. One of the prime examples of the lack of SDT is seen in the regulation of timeframes. Although the capacity differences between the ACP countries and the EU are well known, the treaty text does not entail any reference to SDT with respect to panel timeframes. While some flexibility and SDT may be injected with the Rules of Procedures to be adopted once the agreements start functioning, without amending the text of the treaty the flexibilities would be limited.

With regard to timeframes, the EPAs contain an implicit SDT in respect of the reasonable period of time that the losing party would be allowed to implement the arbitral award. However, this SDT provision also fails to meet the preciseness criterion. Moreover, the SDT provision only regulates the situation where an ACP country is a defendant. The situation where the EU is the losing party is also, if not more, important for the ACP countries. It would be worth considering an SDT provision stating that the EU must make use of expedited legislative and administrative means to implement arbitral decisions, in cases where a delay in implementation may have serious effects for ACP economies.

## Preserving the inter-governmentality: amicus curiae and the government officials as panellists

The agreements reflect the EU's positions with regard to the amicus curiae briefs and the selection of government officials as panellists.<sup>7</sup> Contrary to the position they have taken in the WTO, the ACP countries accepted the admission of amicus curiae briefs by the EPA arbitral panels. In order to attenuate the risks of such a position, ACP countries should insist on imposition of strict criteria on the submission of amicus briefs. The conditions laid out in the Chile FTA may be inspirational in that regard.

In the same vein as the amicus briefs, the EU's position with regard to the selection of panellists seems to have prevailed over the ACP's. The EPAs require the panellists not to be government officials. This provision should be clarified to the effect that the condition must only be met during the time the person actually serves as a panellist; not during the whole time while he/she is on the roster of panellists. Otherwise, the ACP countries may find it difficult to come up with nominations.



## Failing the development test

In conclusion, analysis of the (interim) EPA DS provisions indicates that the deal reached in ACP-EU negotiations has serious shortcomings in terms of its developmental credentials. It seems to be difficult to give a pass mark to the EPA DS mechanisms with respect to their performance on development friendliness. EPA DS mechanisms are a modified version of the WTO DS. The important point is that most of the modifications are reflections of the proposals that the EU put forth for the reform of the WTO DSU. Things like the establishment of a post-retaliation compliance review panel, acceleration of panel timeframes and admission of amicus briefs all point to the fact that the (interim) EPA DS mechanisms are formed under the EU's vision. Very few ACP demands seem to have been accommodated. Even those that are accommodated lack the necessary preciseness and operability. If the EPA DS systems remain in their current form, it may be plausible to say that the incentives for the ACP countries to use them would be even less than the incentives that these countries have to use the WTO DS mechanism. Therefore, it would not be wrong to conclude that, unless some serious changes are introduced, only the EU could make use of the new EPA DS mechanisms. For the ACP they will remain inaccessible and represent just another pompous legalese with no real word effect.

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- 2 This article is based on a larger report prepared for the Global Trade Ethics Programme of the European Studies Centre and the Centre for International Studies of the University of Oxford. The research has been made possible thanks to the financial support of OXFAM. The main report could be found at: <http://ssrn.com/author=822083> and [www.sant.ox.ac.uk/esc/pwtor.html](http://www.sant.ox.ac.uk/esc/pwtor.html)
- 3 The agreements examined in this study are the EPA signed with the CARIFORUM states and the interim EPAs concluded with, SADC, Pacific States, Côte d'Ivoire, Ghana and Cameroon.
- 4 IG Bercero 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in L Bartels, F Ortino (eds) *Regional Trade Agreements and the WTO Legal System* (OUP 2006) 383; see also Szepesi, S. (2004), *Comparing EU free trade agreements: Dispute Settlement*, ECDPM InBrief 6G, [www.ecdpm.org/inbrief6g](http://www.ecdpm.org/inbrief6g)
- 5 A detailed comparative summary of the ACP and the EU positions with respect to the reform of the WTO DS mechanism can be found in Appendix B of the main report (see endnote 1).
- 6 Detailed comparative and analytical tables of the DS provisions of the EPAs can be found in Appendix D of the main report. These tables are designed to help ACP negotiators make comparisons as between different EPAs, WTO DS mechanism and the FTAs with Chile and Mexico.
- 7 Literally translated as "friend of the court," the amicus curiae briefs are unsolicited submissions that an arbitral panel receives from someone not a party or third party to the dispute to assist it in deciding the matter in hand.



# Nigeria and the challenge of the EPA

Chibuzo N. Nwoke<sup>1</sup>

The Economic Partnership Agreements are supposed to strengthen regional cooperation and integration, reduce - and eventually eradicate - poverty, and attain sustainable development in ACP countries. A key principle is that the agreements should be concluded between the EU and ACP regions, rather than with single ACP countries. This implies that regional integration should be enhanced before the conclusion of the EPAs.

## Assumed benefits

The champions of the EPA profess free trade, claiming that an underdeveloped country like Nigeria could benefit from its developmental priorities, paving the way for sustainable development and facilitating the country's integration into the global economy (whatever that means). By allowing duty-free imports of 'substantially all' EU goods before 2025, the EPA will reduce the cost of imports from the EU, stimulate the structure of competitive production and thus improve access to EU markets.

More concretely, the assumption is that Nigeria would benefit from (a) the removal of duties on imported inputs - such as machinery, vehicles, chemicals - which would lower manufacturing costs and boost the competitiveness of the Nigerian companies using them, and (b) improved access to EU markets, through the elimination of all duties, which includes better rules of origin on items such as textiles, agricultural and fisheries products.

## Unfair trade rules

The most critical constraint preventing Nigeria from attaining such benefits is the assumption that the EPA is about fair trade. As Oxfam rightly observes "if the rules are fair, international trade and investment can be a source of shared prosperity and development. If not, they can be a source of increasing poverty and exclusion."<sup>2</sup> The rules of the EPA are far from being fair. A 2002 Oxfam report, aptly titled *Rigged Rules and Double Standards*, points out that the rules of international trade are manipulated in favour of EU countries. Oxfam devised an index to quantify which countries did most damage to ACP countries in international trade. This measured EU protectionism based on its average tariffs, the size of its tariffs in agriculture and textiles and its restrictions on imports from the poorest ACP countries. The measure is called the Double Standard Index (DSI) because "it measures the gap between the free-trade principles espoused by EU countries and their actual protectionist policies." In this measure, the EU "emerges as the worst offender." Moreover, "the double standards of [EU] governments are most apparent in agriculture."<sup>3</sup>

Although the EPA is a legal agreement, it must be understood and analysed in a political context. The EPA negotiations exist within a framework of two distinct political groups of vastly unequal power. It is a 'partnership' between donors and debtors, between benefactors and consistent dependencies and between former colonial empires and their former colonies. It pits a group of the world's most advanced economies against a group of the world's least developed, monocultural and raw material-exporting economies. In such a skewed relationship, it is clear who would drive the negotiations, dictate the rules, enforce them and dole out punishment to partners who breach them.<sup>4</sup>

Certain political conditions present in the Cotonou Agreement will - and are - being used against ACP countries during the EPA negotiation process. These include: respect for human rights, democratic principles, rule of law, good governance and anti-corruption. Beyond the ACP's relative lack of economic and financial resources, these conditions constitute their softest underbelly and greatest source of weakness. Under the provisions of the Cotonou Agreement's political dialogue mechanism, the EU will certainly use them against a recalcitrant partner.

## Implications for Nigeria

In fact, the EU is already using the big stick in the EPA negotiations, assuming the amazing double role of partner and umpire. For example, in November 2007, Nigeria submitted an official request to the European Commission to enable immediate admission for itself and other non-LDC ACP countries to the preferential GSP plus scheme, in the event that no EPA agreement was reached by December 31. That request was, of course, immediately rejected. As a result, come January 1, 2008, 'recalcitrant' Nigeria, which, unlike Ghana and Côte d'Ivoire, did not sign the EPA interim agreement, faced higher tariffs under standard GSP, than it did under the Lomé-Cotonou provisions. Consequently, Nigeria's cocoa butter and cocoa liquor exports to the EU now attract additional 4.3% and 6.3% respectively.<sup>5</sup> About 95% of Nigeria's cocoa products are exported to the EU alone, because of the higher freight charges to the US and Asian markets. Estimates by the Cocoa Processors Association of Nigeria (COPAN) show that some \$5 million had been lost by the end of March 2008. Since December 2007, when Ghana signed the interim EPA, Nigerian beverage factories using cocoa are now relocating their plants to Ghana.<sup>6</sup> Thus, the interim EPA that Ghana and Côte d'Ivoire were made to sign in December 2007 will likely destroy the existing process of regional cooperation and integration.

The results of an impact assessment showed that implementation of the EPA in its present form will represent major challenges for Nigeria. These include massive loss of government revenue, emasculation of the manufacturing industry, devastating employment losses, increase in poverty levels and erosion of policy space. More specifically, the study envisaged an average import tariff revenue loss of around \$478 million in 2008, if Nigeria implemented the 'substantially all' import liberalisation called for. This implies an average 42% loss of total tariff revenue. The impact of this alone would be significant given that it constitutes about 39% of the country's total non-oil revenue. Expected implications of such a development include drastic reduction in public sector spending or an increase in the level of taxation - two policy options which would damage social and economic infrastructures in the country.<sup>7</sup>

Furthermore, the urgent and substantial import liberalisation promoted by the EPA will reduce capacity in the manufacturing sector as a result of the influx of



imported products. Nigeria's existing unemployment crisis will be exacerbated as firms lay off workers or shut down operations due to poor sales and lack of competitiveness of local products. Small and medium scale enterprises, which mostly constitute the greater proportion of ACP economies, would be asphyxiated. The net effect of the EPA will, therefore, deepen the process of de-industrialisation in Nigeria, with serious consequences for labour and entrenched



poverty. Nigeria's agricultural sector will also be at major risk, due to EU tariff hikes, higher EU tariffs for processed agricultural products. European support and subsidies to its own farmers will frustrate Nigeria's trade capacity.

One study found that Nigeria alone will account for over 21% of an estimated aggregate revenue loss of over \$2 billion that will be incurred by the four African EPA regions in the first year of the EPA's implementation. Similarly, the country will absorb over 22% of an estimated aggregate EPA-induced trade diversion of \$770 million.<sup>8</sup>

In other words, EPA implementation is unlikely to impose any significant costs on the EU. Rather, the EU will gain significantly in terms of its share of ACP imports and in terms of increasing imports by participating EPA countries. In fact, with respect to Nigeria, it was estimated that the EU's aggregate trade gains would have been worth about \$791 million in 2008. This represents about 20% of the EU's total aggregate trade gain of about \$4.1 billion from all four African regional groups. Thus, in relative terms, Nigeria may bear virtually all the burden of adjustment while the EU will capture virtually all the gains of Nigeria's participation in the proposed West Africa-EU EPA initiative.

### EPA strategy undermines ACP development priorities

The critical fault with the EPA strategy is that it runs counter to the interests of participating ACP countries, which are prioritising their own supply response by building capacity and enhancing market access. Thus, the EPA strategy, which imposes urgent and substantial import liberalisation on participating countries before their supply response capacity has been built or sufficiently strengthened, will be harmful to them. From the standpoint of African countries, the more appropriate EPA strategy - if the rules of trade were fair - would clearly have preserved their market access but also enhanced their export supply response capacity prior to embarking on rapid import liberalisation schemes.

An appropriate strategy would have prioritised a unilateral, intra-African, regional and multilateral import liberalisation scheme above the opening of

African domestic markets to the EU on a bilateral and preferential basis. But the (EU's) EPA strategy contradicts this approach by pushing African countries to open up their markets to EU goods and services faster and more substantially than to goods and services from other African EPA regions and the rest of the world. As noted above, this offensive strategy implies that higher adjustment costs must be borne out over a much shorter time period by African countries (especially Nigeria).

### The way forward

As the EPA negotiation process unfolds, African countries should uncompromisingly seek improved market access while vigorously pursuing the enhancement of their supply response capacity. Their specific demands should include: duty and quota-free access for all products, elimination of all domestic support and export subsidies on all products of export interest, exemptions for all exports from EU contingent protection measures, African involvement in setting EU product standards and sanitary and phytosanitary measures, simplified and practical rules of origin. Provision, by the EU, of technical and financial assistance is also needed to establish the infrastructures to meet the established standards, and full EU market access is needed with respect to trade in services, particularly for movement of natural persons of all skill levels.

Furthermore, EPA negotiations must be guided by the principle of sovereign autonomy and consistency with national interest. Nigeria must be wary of Europe's Aid for Trade strategy. No matter how attractive it may appear, such 'aid' cannot replace a truly pro-development EPA, and should, therefore, never be accepted. It may turn out to be a gag on Nigeria to agree to an EPA that is inconsistent with its own national development priorities and strategy. The Aid for Trade option cannot compensate for poorly conceived and hastily drafted provisions of EPAs, which inhibit the ability of ACP countries to promote economic transformation.<sup>9</sup> As such, there is a need to meticulously review contentious EPA issues and clauses to ensure their consistency with national and regional development plans and aspirations. Finally, the time frame for the EPA should be tied to the achievement of basic development thresholds in Nigeria and ECOWAS countries, with the principle of reciprocity only commencing after these thresholds have been reached. Obviously, all of these would constitute a serious challenge to the neo-liberal orientation of the policy making class in Nigeria and the rest of Africa.

- 1 Prof. Chibuzo N. Nwoke is the Head of the Division of International Economic Relations, Nigerian Institute of International Affairs, Lagos, Nigeria.
- 2 Oxfam, *Rigged Rules and Double Standards: Trade, Globalisation, and the Fight Against Poverty*, (Oxford: Oxfam, 2002), [www.make-tradefair.com](http://www.make-tradefair.com)
- 3 Ibid
- 4 The Relevant Intellectual Orientation for Assessing Impact of EPA on Nigeria, Chibuzo N. Nwoke, Mimeo, Lagos, April 2005.
- 5 Impact of EPA on Agriculture (Cocoa Processing Industry), Felix Oladunjoye, paper presented at MAN/ NSEG Workshop on Economic Partnership Agreements, Lagos, May 15-16, 2008. Nigeria's fish/ tuna exports will also face similar punitive measures in Europe. petroleum, tuna fish is the only important export item from Nigeria to the EU today.
- 6 Oladunjoye, op. cit.
- 7 Enterplan, *Impact Assessment Final Report: Government of Nigeria, Capacity Building in Support of Preparation of Economic Partnership Agreement* (Reading: Enterplan, 2005). [www.acp-eu-trade.org/library](http://www.acp-eu-trade.org/library)
- 8 Economic and Welfare Impacts of the EU-African Economic Partnership Agreement, S. Karingi, et al, ATPC Work in Progress, No. 10, ECA, Addis Ababa, 2005. <http://www.uneca.org/atpc/Work%20in%20progress/10.pdf>
- 9 Nigeria in the West Africa-European Union Economic Partnership Agreement: To Be or Not to Be? T. Ademola Oyejide, Mimeo, Abuja, 2006.



# WTO Roundup

Victoria Hanson, ICTSD

## Falconer pushes WTO farm talks as end of his term approaches

Attempts to reach an agreement on agriculture in the Doha Round resumed in October, as senior officials met with the chair of the WTO's farm committee to exchange ideas. The chair, Ambassador Crawford Falconer, put a wide variety of issues on the table in a bid to revive the Round, stalemated since the collapse of the ministerial-level talks in July. Falconer conducted a series of discussions known as "walks in the woods," designed to allow members to informally air their ideas and concerns on the most sensitive issues. So far, discussions have focused on tariff rate quota creation, tariff simplification, sensitive products, cotton, green box subsidies and tropical products.

Following two weeks of behind-the-scenes talks, Falconer told negotiators that a draft agreement on 'modalities' would need to be finalised by the end of November if an accord is to be reached by the close of 2008. Falconer said that modalities need to be tied up by the time the WTO's General Council meets on December 19, or risk being dragged on into next year. However, very little concrete progress has been reported. Although talks will continue, time is tight if Falconer is to find a solution before he returns to Wellington at the end of the year.

## New text 'desirable but unlikely'

Many delegates want to preserve the progress made during Falconer's tenure as chair of the farm talks with the release of a new text. Such a document could "put things in perspective" and capture "what has been agreed so far."<sup>1</sup> But Falconer has downplayed the likelihood of issuing a new modalities text unless Members make significant, swift, progress.

Falconer's replacement will most likely face significantly different circumstances in which to work. In light of the credit crisis and falling commodity prices, some countries will probably veer towards protectionism. But given the changing financial climate, together with the upcoming elections in the US, India and the EU, the negotiating positions of many countries in all areas of the negotiations stand to be significantly changed next year.

## Ashton upbeat on prospects for Doha deal

But despite the number of issues left to be resolved in Geneva, world leaders have continued to voice optimism and call for a prompt conclusion to the talks. According to Catherine Ashton, the newly appointed EU Trade Commissioner replacing Peter Mandelson, the Doha Round is still "very much alive."<sup>2</sup>

Following meetings in Geneva with WTO Director General Pascal Lamy and other trade chiefs to discuss Doha prospects on October 23, Ashton was upbeat about the chances of success. "My meetings in Geneva have confirmed to me that

Doha is still very much alive," she said. "If this deal is to be concluded soon we all need to tackle the outstanding issues with urgency and determination. Europe will continue to play a central role in pushing these talks forward."

## World leaders continue to push for deal

Similarly, Brazilian President Luiz Inácio Lula Silva said in a radio address that he was confident that a deal to liberalise world trade could still be reached. "During this moment of international crisis it's important to conclude the Doha accord so we can show the world something positive, something to restore optimism in humanity," Lula said on October 21.<sup>3</sup>

US President George W. Bush echoed that call at a White House summit on international development two days later. "The recent impasse in the Doha Round of trade talks is disappointing, but that doesn't have to be the final word. And so before I leave office I'm going to press hard to make sure we have a successful Doha Round," Bush said.<sup>4</sup> "In the midst of this crisis, I believe the world ought to send a clear signal that we remain committed to open markets by reducing barriers to trade across the globe," he added.

## Lamy calls for summit to tackle global financial crisis

Indeed, financial woes have renewed calls for progress in the trade liberalisation talks as a means to boost the world's economy and imbue much needed confidence. WTO chief Pascal Lamy went one step further by inviting the heads of international financial institutions, regional development banks and major commercial banks to meet at WTO headquarters in Geneva in November to discuss how the global financial crisis is affecting developing countries' ability to participate in international trade.

"The purpose of our next meeting will be to review how the international market for trade financing is fairing in view of the current very difficult conditions on international financial markets," Lamy said in a letter to the invitees, which was dated October 10. The meeting will also consider "how to maintain and improve the availability and accessibility of trade finance facilities at affordable rates for developing countries, especially low-income countries," the Director General said.

Meanwhile, the process for appointing a new Director General of the WTO is set to commence on December 1. Lamy has so far refused to disclose his intentions on reappointment. But speculation is rife that he is not yet ready to throw in the towel on the struggling Round, and may seek re-selection.

1 See: WTO farm talks sputter into action, Bridges Weekly Trade Digest, Volume 12, number 35, October 23 2008.

2 See: European Commission press release; Catherine Ashton determined on prospects for Doha success, October 23 2008 [www.ec.europa.eu](http://www.ec.europa.eu)

3 See: Brazil's Lula: crisis makes Doha deal more urgent, Reuters, October 21 2008.

4 See: Bush vows big push for Doha deal before leaving, Reuters, October 22 2008.



# EPA Negotiations Update

Melissa Julian, ECDPM

## Ashton confirmed as EU Trade Commissioner as Mandelson resigns

Peter Mandelson stepped down as EU Trade Commissioner on October 3, after being invited to join the UK government as Secretary of State for Business. Baroness Catherine Ashton was subsequently confirmed as his replacement and will remain in office until November 2009 when a new Commission executive is appointed.<sup>1</sup> In her confirmation hearing by the EU Parliament on October 22, Ashton convinced MEPs she has the analytical skills and negotiating experience to successfully execute her responsibilities.<sup>2</sup> Though EU trade policy remains unchanged, the new Commissioner raises hope in the ACP and the European Parliament that she will be more transparent, inclusive and receptive to their views than her predecessor. Ashton said her priority is to engage in dialogue and negotiation with the ACP, including on controversial issues, and agree to necessary changes that will ensure EPAs are the best possible agreements and are supported by ACP countries.

## EU Commission concerned by IEPA signature delays

European Commission procedures, which require interim EPAs be translated into 23 EU languages are delaying notification of the final texts to increasingly impatient WTO members, the Director General of the European Commission's Trade Directorate, David O'Sullivan admitted to International Trade Committee MEPs on October 13. Translation is needed before the EU Council will authorise the Commission to sign and then notify them to the WTO. The Commission aims to sign and notify the IEPAs with Ghana, Côte d'Ivoire and Cameroon in November or December and with the Southern Africa Development Community (SADC), Eastern and Southern Africa (ESA) and the Pacific in early-mid 2009. Ratification by Parliaments can then begin, though some IEPAs may only be ready for approval after the new EU Parliament is elected in June 2009.

## ACP to meet key EU member states on EPAs

The ACP Secretary General and President of the ACP Council are to work on agreeing modalities by the end of October to allow ACP leaders to engage in high-level consultations on EPAs with certain EU member states. This was agreed by ACP Heads of State and Government at their summit in Accra on October 2-3.<sup>3</sup> The summit also instructed its Council of Ministers to further consider the creation of an ACP Free Trade Area.

In a separate declaration, ACP leaders reiterated that further progress in the EPA process must be based on adequately addressing the ACP's legitimate concerns.<sup>4</sup>

## Progress made on African EPA template

A template to guide African groups towards negotiating comprehensive pro-development EPAs, was the subject of a workshop organised by the African Trade Policy Centre (ATPC) and the Economic Commission for Africa (ECA) on October 8-10 in Addis Ababa. The template incorporates common African positions on EPAs and WTO negotiations.

During the meeting, it was agreed to focus attention on overcoming shortfalls in the EPA implementation process and seeking ways to ensure that all stakeholders, notably those involved in infrastructure development and productive capacity issues, are involved in EPA activities. It was also acknowledged that while the different negotiating groups should aim for common positions on key aspects of the negotiations, inevitably they would adopt different positions on other aspects. It was therefore stressed that the template should capture elements where the regional negotiating groups have the same positions vis-à-vis the EU.

## Central Africa refuses to discuss market access offer

Central African EPA negotiators maintained their proposal for market

access liberalisation of 71% over 20 years, with a 5 year preparatory period, at the EU-Central Africa Technical and Senior Official EPA negotiations on September 30-October 7 in Brussels. They called on the European Commission to interpret WTO provisions on this issue flexibly. The Commission maintains that trade liberalisation under 80% is not WTO compatible. Without a revised EU proposal, Central Africa refused the Commission's request to jointly examine its market access offer and try to improve it.

Central Africa called for the priorities of the Joint Orientation Document (JOD) on reinforcing production capacities and increasing economic competitiveness to be adopted by both parties for inclusion in the EPA text. The Commission said the JOD can be referred to and annexed in the EPA. After much debate, important differences of opinion continue on this issue.

## West Africa in difficult process to agree regional market access offer

Discussions to define the list of sensitive products to be included in West Africa's market access offer to the EU were difficult, during an ECOWAS-UEMOA validation workshop in Ouagadougou on October 15-16. While member states thought the proposal had been improved, they still proposed further changes. Several major questions need consultation and internal negotiation in order to reach regional compromises. These include the definition of rules of origin and trade defence instruments, the treatment of inputs produced in the region, pharmaceutical products, basic food products for food security, ocean resources and textile products.

## East African Community raises concerns on EPAs

Regional integration is not well respected in EPA negotiations because EAC countries are forced to negotiate issues that they are not able to properly study, according to EAC representatives at a workshop organised by ATPC and EAC on October 8-10 in Addis Ababa. One of the main areas to be negotiated is development that reflects regional integration ambitions. The EAC is not yet ready to negotiate on services and although partner states are interested in trade related issues, capacity building is required in this area before an offer can be made to the EU.

EAC governments were asked to scrap the IEPAs by regional parliamentarians at the Inter-Parliamentary Relations Seminar in Kigali, Rwanda on October 1-3.<sup>5</sup> However the IEPA has to be ratified by national, not regional, parliaments.

## ESA region prepares for difficult negotiations with the EU

The EAC's split from ESA in the EPA negotiations is making it difficult to finalise the COMESA Customs Union by 2010, according to ESA representatives at the same ATPC-ECA workshop. They also said that the issue of export taxes is impacting on regional integration. Divergent views remain among the Europeans on the contentious standstill clause to raise tariffs for infant industries and there is still no agreement on substantially all trade, timeframe, flexibilities or bilateral safeguards. The development component is still empty. The European Commission wants to include investment in the services negotiations, whereas ESA does not want to go beyond TRIPs on intellectual property rights.

Zambia concluded negotiations with the EU on its market access offer for the ESA IEPA on October 1.<sup>6</sup>

## SADC also preparing for EPA negotiations with the EU

Botswana, Lesotho, Mozambique and Swaziland are ready to sign the IEPA according to SADC EPA representatives at the joint ATPC-ECA workshop in Addis. However, Namibia has concerns it seeks to redress ahead of signing. These countries now fear that if they do not sign they will lose their trade preferences from the EU. South



Africa and Angola have not yet even initialled the IEPA and worry that early signature by the others would have implications on how their concerns will be addressed. There is also apprehension about subjecting Parliament to two ratification processes, i.e. for the IEPA and the final EPA. These countries seek assurances that there will be no loss of market access while their issues are being addressed and that they will sign and ratify one single agreement that accommodates all parties and addresses every outstanding concern.

## EAC-ESA-SADC agree to merge into a single REC with an FTA

The first ever Tripartite Summit of the Heads of State and Government of the Common Market for East and Southern Africa (COMESA), East African Community (EAC) and the Southern Africa Development Community (SADC) met in Kampala on October 22.<sup>7</sup>

The summit agreed on a programme for harmonising trade arrangements, the free movement of business persons and the joint implementation of inter-regional infrastructure programmes, as well as institutional arrangements that the RECs would use to foster cooperation. The summit directed a Task Force to develop a roadmap for the implementation of this merger to be considered at its next meeting.

## Caribbean signs comprehensive EPA with the EU

Thirteen of the fifteen CARIFORUM countries and the EU signed an EPA on October 15.<sup>8</sup> Guyana signed the EPA five days later<sup>9</sup> following intense discussion and eventual agreement on a joint declaration between the European Commission and CARIFORUM.<sup>10</sup> In a media release the government stated that due to "the imminent threat of GSP sanctions, Guyana will be signing the EPA."<sup>11</sup> As we go to print, Haiti has not signed the EPA.

Some African governments were watching closely to see if the EU would increase tariffs for Guyana. However, given that Guyana has signed, EU member states did not have to vote by qualified majority on whether to remove the country from EU Council Regulation 1528/2007, which would have resulted in Guyana being subject to the EU's standard GSP system. African countries will now have to test the EU's will themselves should they choose not to sign an EPA.

## Pacific

Pacific ACP (PACP) trade ministers met in Nadi, Fiji on October 20-21. Ministers reaffirmed their commitment to continue to negotiate the EPA as a single region. Ministers recognised that while progress had been made on various technical issues at an earlier meeting of PACP and European Commission officials in September, a significant number of EPA issues remained outstanding and required time to work through. Ministers directed their officials to continue efforts on these issues and to meet directly with the European Commission as soon as possible to make significant progress.<sup>12</sup> Ministers also agreed that a comprehensive EPA might include provisions relating to intellectual property rights with obligations not going beyond those contained in the Cotonou Agreement.<sup>13</sup>

For more EPA news please visit: [www.acp-eu-trade.org/epa](http://www.acp-eu-trade.org/epa)

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# Trade Negotiations Insights

## Calendar and resources

### ACP-EU EVENTS

#### NOVEMBER

- 27 Oct. EU-Central Africa Technical and Senior Official negotiations, Libreville.  
-1  
3-4 OECD Policy Dialogue on Aid for Trade, Paris.  
3-7 SADC - European Commission Technical and Senior Officials negotiations, Brussels.  
4-6 AU experts workshop on a template for comprehensive EPAs  
6-7 Informal meeting of the Article 133 Committee, EU Council, Bordeaux.  
6-8 CTA/ECDPM Workshop on "Strengthening Agricultural Trade Strategies: towards a Caribbean agenda," Belize City.  
10 Week of EAC-European Commission Technical and Senior Officials negotiations.  
10-11 EU General Affairs and External Relations Council meeting with development ministers, Brussels.  
11 SADC - EU Ministerial Troika, Brussels.  
12-13 ACP Finance Ministers meeting, Brussels.  
17-21 CEMAC Ministerial meeting.  
18-19 COMESA Investor Conference, Brussels.  
20-21 AU - EU Ministerial Troika, Dar es Salaam.  
24-26 CARIFORUM-EU Business Summit, Trinidad.  
24-28 16<sup>th</sup> session of the ACP - EU Joint Parliamentary Assembly, preceded by the 14<sup>th</sup> session of the ACP Parliamentary Assembly, Port Moresby.  
25-26 SAIIA/ECDPM conference on "Regional Economic Integration in Southern Africa: Beyond EPAs; Surviving Internal Fragmentation," Johannesburg.  
25- COMESA Policy Organs Meetings meeting preceding the COMESA Summit, Victoria Falls.  
5 Dec  
26-27 ITC Public-Private Dialogue on Business Implications of EPA Negotiations for Central Africa, Douala.

#### DECEMBER

- 4-5 ECOWAS Validation Meeting of the Diagnostic Study on Regional Integration, Ouagadougou.  
7-8 13<sup>th</sup> COMESA Heads of State and Government Summit, Victoria Falls.  
8-12 SADC-European Commission Senior Officials and Ministerial negotiations, Brussels.  
11-12 88<sup>th</sup> session of the ACP Council of Ministers, Brussels.  
11-12 Central Africa - European Commission Chief Negotiators meeting.

### WTO EVENTS

#### NOVEMBER

- 3 Committee on Trade and Environment.  
4 - 5 Panel DS322 (Measures relating to Zeroing and Sunset Reviews) Public Viewing.  
5 - 6 Committee on Technical Barriers to Trade.  
10 - 14 Geneva Week.  
10 - 14 Geneva Week (Non-resident Members and Observers).  
10 + 12 Trade Policy Review Body, Jordan.  
17 Dispute Settlement Body.  
18 Council for Trade in Goods.  
24 + 26 Trade Policy Review Body, Dominican Republic.  
27 - 28 Committee on Regional Trade Agreements.  
28 Working Group on Trade and Transfer of Technology.

#### DECEMBER

- 1 Committee on Trade in Financial Services.  
4 Committee on Agriculture.  
5 + 8 Council for Trade in Services.  
15 + 17 Trade Policy Review Body, Switzerland/Liechtenstein.  
18 - 19 General Council.  
22 Dispute Settlement Body.

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