

EPA NEGOTIATIONS: STATE OF PLAY AND STRATEGIC CONSIDERATIONS FOR THE WAY FORWARD

SYNOPSIS

This Analytical Note describes the process that led to the conclusion, in the last hours of 2007, of interim EPAs between the EU and 20 ACP countries as well as of a comprehensive EPA with the 15 CARIFORUM states. It overviews the contents of these agreements and comments on some elements related to their consistency with WTO rules. On each topic, the note highlights the developmental implications of the texts that have been initialled. Finally, it overviews some of the main challenges that ACP governments face now in the EPA negotiations and provides suggestions regarding strategic options for the way forward.

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EXECUTIVE SUMMARY

1. At the end of 2007, the EU and the ACP could not reach fully regional, comprehensive trade agreements as originally foreseen by the Cotonou Partnership Agreement. After 6 years of negotiations, a large number of technical and political divergences stood on the way of that objective. Only the EPA CARIFORUM region initialled a comprehensive text, covering a wide array of trade measures, while 20 other ACP countries initialled an agreement of partial scope, requiring continued negotiations with the European Commission (EC) to reach a full agreement by the end of 2008 or mid-2009. The other ACP countries which were engaged in the EPA negotiations have preferred – and accepted the risk – not to initial interim texts.
2. There has, in fact, been great criticism of the EPA texts that were initialled in the last hours of 2007. Sometimes, criticism has come from the ACP regions and countries themselves, including from the governments that now have to sign and prepare to start implementing these agreements. The economic, trade and political asymmetries opposing the ACP to the EC are so great that, in practice, few governments could reject the EC “two step” EPA approach. Moreover, the serious lack of technical and negotiating capacity which had characterised ACP participation in the EPAs has persisted until the conclusion of texts, reflecting the fact that these texts were hastily concluded more to maintain ACP conditions of market access into the EU than to discharge a mandate the rhetoric of which was heavily pro-developmental.
3. Nonetheless, the interim EPAs concluded are far from being ideal texts for at least three reasons. First, the fact that they were concluded by individual countries has resulted in divisions among ACP regions to the extent of jeopardising regional economic integration. Second, the concessions made within these agreements are greater – both in extent and scope – to those that would have been required to ensure their basic conformity with WTO norms. Third, despite the controversy over the need to negotiate and possible contents of trade-related disciplines (e.g. Singapore issues) and trade in services, the interim agreements tie ACP negotiators to a detailed and intensive negotiating agenda on these issues.
4. Moreover, the sequencing of EPA concessions is still problematic. In the Cotonou agreement, it has been decided that reciprocal agreements had to foster regional integration and to be based on current integration efforts. Not only has this commitment not been met, but it has often been negated. As a result, the current configuration of the EPA encompasses a major risk of undermining ongoing regional integration processes, particularly in Africa, where most integration processes remain weak, despite their political importance.
5. While the president of the EU Commission stated that the interim EPAs could

be subject to renegotiation on specific areas that, after assessment, are proving controversial, the EU Commissioner for Trade has shed uncertainty over the possibility of revising the terms of these texts. That uncertainty has frustrated many observers, particularly as there would indeed be provisions that would afford improvements or harmonisation.

6. Now that the 31 December 2007 deadline has lapsed, the main source of pressure for the hasty conclusion of an EPA (i.e. the expiration of the Cotonou Waiver at the WTO) has become obsolete. This opens prospects of a more balanced negotiating environment. However, it is very likely that the EU will continue to put pressure for the conclusion of comprehensive EPAs as soon as possible. ACP countries must, however, utilise the greater negotiating latitude they have as a result of having already secured a fully compatible WTO agreement with the EU. Trust relationships will have to be rebuilt, though, both between neighbouring ACP countries and between the ACP and the EC. Agreement on the remaining elements (for countries which have concluded an interim agreement, either full or interim) or on all the elements (for the other ACP) will not be an easy task.

7. The immediate priority should consist in rebuilding regional cohesion, solidarity and empowering regional negotiating machineries. This will ensure that the state of affairs is understood and that next steps can be prioritised. This is a task that lies largely in the hands of ACP governments and regions and the sooner it is completed, the better.

EPA NEGOTIATIONS: STATE OF PLAY AND STRATEGIC CONSIDERATIONS FOR THE WAY FORWARD

I. INTRODUCTION

8. Over the last days of 2007, thirty-five African, Caribbean and Pacific (ACP) countries have accepted to initial free trade deals, the Economic Partnership Agreements (EPA), with the European Union (EU). Except for the agreement concluded by Caribbean countries, which is a *comprehensive EPA*, in the sense that it covers a wide range of trade topics, all other agreements are partial, covering mostly provisions related to the liberalisation of trade in goods only¹. The latter also contain a sometimes detailed agenda for the further negotiation of other elements. For this reason, these EPAs are an *interim* step towards full EPAs². Developing countries having signed the Caribbean or the interim EPAs will face several challenges understanding, completing and preparing to implement those texts.

9. The remaining forty-one other ACP states who had decided to negotiate the EPAs took the decision – and the risk – not to sign either full or interim agreements before the end of 2007. Most are Least Developed Countries (LDCs), eligible for the EU's LDC-only Everything but Arms (EBA) preferences. Others (10) are non-LDCs for whom the Cotonou trade preferences have expired and whose trade with the European Union (EU) is now framed under less advantageous alternatives, such as the WTO compatible General System of Preferences (GSP). South Africa, who did not join other SACU members in an interim agreement, benefits of its own Trade and Development Cooperation Agreement (TDCA) with the EU. These countries also face daunting tasks ahead as they remain, officially at least, committed to completing the negotiation of full regional agreements.

10. This note provides (I) a brief overview of some of the main challenges that ACP countries faced in negotiating EPAs during the last hours of 2007 and a (II) summary of the state of play in all ACP EPA regions. It then concludes with (III) an enumeration of some of the political, legal and negotiating challenges that ACP

¹ Please refer to Table 4 below for an enumeration of ACP countries which have signed interim EPAs.

² Speech of EC Trade Commissioner, P. Mandelson, to the European Parliament Development Committee (28 January 2008). Available at: http://ec.europa.eu/commission_barroso/mandelson/speeches_articles/sppm190_en.htm

countries will face in 2008 and 2009 to conclude their EPAs.

II. CHALLENGES AND EXPECTATIONS: WHAT HAPPENED IN 2007

11. All ACP regions engaged in the EPA process with the EU noticed a sharp degradation of the negotiating environment as the end-of-2007 deadline approached and a significant number of technical and political aspects of the EPAs remained unresolved. Pressure from national interest groups was reported to increase significantly, particularly in non-LDC states which maintain significant trade flows with the EU (cut-flowers, meat, bananas, sugar, and fish³ - Table 1⁴). There were also complaints that the EC increased its pressure on ACP negotiators, to the point that some have felt “bullied” into initialling agreements⁵.

12. While the EC Trade Commissioner refuted accusations that the EC had forced the ACP to sign interim EPAs, the fact remains that the EU is an overly important export market for several individual ACP countries and the threat of losing preferential access to that market after the expiration of the ACP Waiver at the WTO was enough to talk many ACP governments into the interim EPAs option. Moreover, the reliance on EU development assistance, together with the threat, perceived or real, that European trade-related aid assistance was conditional on EPAs also added pressure for the conclusion of interim agreements.

Table 1: Importance of ACP exports to the EU, Select Countries

Country	Product	Exports as a share of (%) (2005)	
		Total Merchandise Exports	GDP

³ For examples, see “Kenyan flower exporters upbeat on new EU trade deal” (Oct.2007) <http://www.lemali.fr/news/africa-news/kenyan-flower-exporters-upbeat-on-new-eu-trade-deal-200710049694.html>, “Flower Industry May Wilt If EPA Deadline is Missed”, Rosalia Omungo, Inter Press Service (Sept.2007) http://www.bilaterals.org/article.php3?id_article=9700, “Namibia: Meat Exporters in a Panic Over EU”, Wezi Tjaronda (14 May 2007) <http://allafrica.com/stories/200705140353.html>, “Demain, sans APE, c’est la douane”, Luc Magloire Mbarga Atangana, (Dec. 2007) http://www.commodafrica.com/fr/actualites/matieres_premieres/cameroun, and « Bananes - Les producteurs ivoiriens inquiets: Anxieuse attente des Ape », (Nov 2007) http://www.bilaterals.org/article.php3?id_article=10273

⁴ For an overview of the importance of EU trade preferences for ACP economies, consult, for instance, “The Value of EU Preferences for the ACP and EPA contribution to Market Access”, EPA Fact Sheet Nb.2, South Centre (2007). Available at: <http://www.southcentre.org/TDP/newpublistothers.htm>

⁵ The President of Guyana was reported as stating that the EPAs had been initialled because of “bullying tactics” by the EC. See, for instance, “CARICOM’s divide on EPA”, The Jamaica Observer (10 February 2008). The Assembly of the African Union also noted that “political and economic pressures are being exerted by the European Commission on African countries to initial Interim Economic Partnership Agreements”, African Union Declaration on Economic Partnership Agreements (January 2008).

Mozambique	Aluminium (SH76)	57.34	1.5
Mauritius	Apparel (HS61, 62)	36.84	1.2
	Sugar (HS17)	17.49	0.6
St. Lucia	Bananas	24.33	0.2
St. Vincent & the Grenadines	Bananas	32.38	0.3
Dominica	Bananas	19.64	0.3
Cameroon	Bananas	2.78	0.0
Ivory Coast	Bananas	1.29	0.1
Ghana	Bananas	0.21	0.0
Madagascar	Fish (HS03, 16)	19.41	0.4
Seychelles	Fish (HS03, 16)	55	2.6
Guyana	Sugar (HS17)	29.06	1.7
Fiji	Sugar (HS17)	19.65	0.5
Malawi	Tea	9.98	0.2

Source: Exports figures from ITC Trade Competitiveness Map and GDP from World Bank.

13. While the political and negotiating difficulties associated with the asymmetries opposing the EU and ACP economies were known and described from the outset of negotiations⁶, the truth remained that the sheer intransigence of the EU Commission to discuss alternatives to the full EPAs sufficed to force ACP countries with significant trade with the EU to sign. In this respect, the EC offer, towards the end of 2007, to conclude only partial agreements was in fact a stark change vis à vis the positions the EC had previously held, and was perceived as a sign of positive flexibility by some ACP governments.

14. Moreover, one element that has considerably de-stabilised the negotiating process is that few regions had completed internal preparatory and technical work to sign a full or a partial EPA. Limited of human and technical capacity, including trade databases, constituted a major hurdle for all ACP regions, particularly in Africa, even more so at the very last hours of 2007. These shortcomings had been identified in several review reports completed during the negotiations⁷, but few improvements intervened to really enable African negotiators to engage in the negotiations on a more informed basis. A series of capacity-building workshops, conducted in African countries by the South Centre in 2007 with the support of OXFAM International, underscored the little information and understanding that national administrations had about the EPAs, even as the conclusion of interim agreements became eminent⁸.

⁶ See, for instance, *"Understanding the Economic Partnership Agreements"* Fact Sheet Nb.1, South Centre (2007). Available at: <http://www.southcentre.org/TDP/newpublistothers.htm>

⁷ See, for instance, *"EPA Negotiations: African Countries Continental Review"*, UNECA-ATPC (December 2006).

⁸ Capacity building workshops were held, for instance in Malawi, for East African national negotiators, and in Senegal, for West African negotiators. The conclusions, as well as presentations, of these events can be found at: http://www.southcentre.org/Events/Past_events.htm.

15. Insufficient information exchange across ACP regions about the real state of play also created the impression that adamant ACP countries were the exception, as it was thought that most regions would finalise their EPA in time. Internal discrepancies in each ACP region became more apparent and regional cohesion was compromised as suspicion mounted, particularly between LDCs, who are eligible for the EU's LDC-only EBA preferences, and the non LDCs.

16. In addition several elements remained controversial and stood in the way of an agreement with respect to the following three major areas: market access; the inclusion and content of new generation issues, including trade in services; and the development dimension.

A. Market Access

17. There was broad agreement on the core benchmarks set in the Cotonou Agreement and in the regional road maps regarding the liberalisation of goods. For instance, it was understood that the EPAs would entail a shift towards reciprocal trade, that the liberalisation would be gradual and selective (through the formulation of exclusion lists), and that the final EPA would contribute to strengthening existing regional economic integration efforts. However, the details of how to translate these commitments into concrete language remained extremely controversial.

18. For instance, the shift to reciprocity placed the bulk of the negotiation and implementation burden on ACP states, since the EU has already liberalised most of its markets to ACP imports. In addition, liberalisation to the EU generated uncertainty regarding the possible impact of increased competition with EU products, particularly on agriculture. Impacts could, indeed, be real since the agricultural sector in most ACP states operates under high production costs, lack economies of scale to compete with larger producers and, worryingly, often experience a decrease in productivity as attested by the significance of agricultural imports in total agricultural trade (table 2 for CARIFORUM countries) and by the frequency of import surges (table 3 for the ACP generally).

Table 2: Agricultural imports in total agricultural trade (average for 2001-2003), CARIFORUM countries

	Imports	Exports	Imports / Total trade ratio
	(million USD)		
Antigua and Barbuda	30	1	0.97
Bahamas	249	45	0.85
Barbados	169	71	0.71
Belize	70	118	0.37

Dominica	29	15	0.66
Grenada	35	18	0.66
Guyana	90	177	0.34
Jamaica	455	289	0.61
Saint Kitts and Nevis	41	7	0.86
Saint Lucia	69	32	0.68
Saint Vincent & Grenadines	40	27	0.6
Suriname	93	28	0.77
Trinidad and Tobago	372	193	0.66
CARICOM	1.742	1.020	0.63
Dominican Republic	798	604	0.57
Haiti	419	20	0.96
CARIFORUM	2.959	1.644	0.64
LDCs	10.208	4.734	0.68
Developing countries	157.895	154.707	0.51
Source: Deep Ford, J.R., dell' Aquila, Cresenzo and Conforti, Piero. <i>Agricultural Trade Policy and Food Security in the Caribbean</i> . FAO, 2007			

Table 3: Agricultural import surges in selected ACP countries⁹

No of surges 1982-2003	ACP countries affected
70-79	Angola, Botswana, Cape Verde, Comoros, Democratic Republic of Congo, Dominican Republic, Ethiopia, Guinea, Haiti, Liberia, Mozambique, Papua New Guinea and Rwanda
80-89	Burkina Faso, Cameroon, Republic of Congo, Madagascar, Mali, Niger, Senegal, Sudan, Togo and Uganda
90-99	Benin, Central African Rep., Mauritania, Tanzania and Zambia
100-130	Ghana, Kenya, Malawi, Nigeria and Zimbabwe
120-129	Comoros, Cote d'Ivoire, Egypt, Madagascar, Saint Lucia, Swaziland and Tuvalu
130-139	Barbados, Cuba, Malawi, Mauritania, Rwanda and Senegal
140-170	Angola, Benin, Botswana, Cameroon, Cape Verde, Rep. of Congo, Gabon, Gambia, Ghana, Haiti, Liberia, Mauritius, Papua New Guinea, Togo, Trinidad and Tobago and Zimbabwe
Source: <i>Import surges: what is their frequency and which are the countries and commodities most affected</i> . FAO (2006)	

⁹ Import surges defined as a 30 percent deviation from 3-year moving average (first 4 rows) or calculated on the basis of WTO volume-based methodology for SSG (3 bottom rows).

19. Moreover, while the EU offered to eliminate export subsidies on agricultural products liberalised under EPAs, it refused to discuss domestic subsidies, which could prove equally harmful for the ACP. In the CARIFORUM EPA, nevertheless, most products heavily subsidised under the European Common Agricultural Policy (CAP) were excluded from liberalisation commitments¹⁰. An exception, for instance, is skimmed milk powder, which has been excluded from the CARICOM market access offer but which will be liberalised by the Dominican Republic¹¹.

20. Moreover, responding to the EU interpretation of WTO-compatibility proved technically challenging. The identification of agricultural and industrial sensitive products at the national level, and the subsequent consolidation of these products into common regional lists proved particularly difficult. Even when compilations were made, the EC has sought to influence the content of exclusion or sensitive product lists, hence also considering the liberalisation at a tariff line basis. The realisation that some countries could find additional manoeuvring space through national – instead of regional – market access offers accentuated divisions, contributing to an erosion of regional solidarity (see box 8 below). In the process of submitting national exclusion lists, no effort was made to harmonise the lists among neighbouring countries or to reflect the criteria being negotiated at the WTO for Special Products (SPs). As a result, the criteria or methodology used to protect certain products under the EPA could be different from work resulting from WTO negotiations. Hence, there is a possibility that products protected under EPAs will be liberalised at the multilateral level and vice versa.

¹⁰ The products subject to greatest subsidisation in Europe (Amber Box product-specific trade distorting support 2001-2002 and 2003-2004) are: Beef and white sugar followed by: butter, olive oil, apples, tomatoes, barley, skimmed milk powder and common wheat. Source: Kasteng, Jonas. *Agriculture and Development in the EPA negotiations*. Swedish Board of Agriculture, December 2006.

¹¹ Market access conditions for EU milk powder imports into the Dominican Republic were subject to a separate Appendix to Annex 2. The Appendix stipulates the liberalisation of 3 milk products through a gradual increase in tariff rate quotas over 15 years.

Box 1: WTO Agricultural Sensitive products, some indicators:

At the WTO Agricultural negotiations, developing countries will have the flexibility to self-designating an appropriate number of tariff lines as SPs (a) based on criteria related to food security, livelihood security and rural development needs and (b) guided by indicators. Indicators, such as those proposed by a number of developing countries¹², measure the contribution of each agricultural commodity towards achieving developmental objectives. Some examples of proposed indicators include:

- The product is a staple food, or is a part of the basic food basket of the developing country Member through, *inter alia*, laws and regulations, including administrative guidelines or national development plan or policy or historical usage
- The product contributes significantly to the nutritional or caloric intake of the population
- A significant proportion of the domestic consumption of the product in its natural, unprocessed or processed form, in a particular region or at a national level, is met through domestic production in the developing country Member concerned
- A significant proportion of the total agricultural population or rural labour force, in a particular region or at the national level, is employed in the production of the product.

21. On the offensive side, the major divergence remained how EPAs could improve EU-ACP trade, specifically by improving market access conditions (e.g. simplifying rules of origin or facilitating SPS¹³ and TBT¹⁴ compliance) and the terms of ACP trade (e.g. encouraging value addition and export diversification). In this respect, and having regard to the persistent divergences over the continuation or compensation for termination of the Cotonou Agricultural protocols, the announcement by the EU of its unilateral decision to denounce of the Sugar Protocol constituted a major factor of loss of trust, but, at the same time, a significant incentive to conclude an EPA and lock access into the EC in a binding reciprocal agreement (although it could be argued that this objective was only partially achieved since interim EPAs can be unilaterally denounced with a six (Cameroon, CARIFORUM, and SADC texts) or twelve (Papua New Guinea text) month notice).

¹² World Trade Organization (WTO). Document No. JOB(07)/35 "G33 contribution on the indicators guiding the designation of any agricultural product as a special product (SP) by any developing country member". 28 March 2007.

¹³ Sanitary and Phytosanitary Measures

¹⁴ Technical barriers to trade

B. Trade in Services, Trade-related disciplines and New Issues

22. Despite a growing realisation that the inclusion of provisions related to trade in services, intellectual property, and the Singapore issues¹⁵ (investment, competition, government procurement) are not required to ensure the compatibility of EPAs with WTO rules, many ACP capitals continued to be under the wrong assumption that some inclusion of these issues in the EPAs would be needed. Countries and regions that did realise that the European insistence to include these issues in the EPAs was not justified opposed vigorously their inclusion, sometimes with declarations at the highest level. The EU, nevertheless, showed a firm intransigence on the point, arguing that these issues were an essential element of the EPA developmental dimension. Divergences in this respect additionally contributed to deteriorating the EPA negotiating environment.

23. Trade in services was the object of particular controversy, and offers an illustration of ACP-EU differences on these issues. Many ACP negotiators felt that, if they were to include a chapter on trade in services in their EPA, the chapter should not focus on the liberalisation of the sector but rather on creating a cooperation framework to enhance governmental capacity to regulate and promote priority services sectors. As a matter of fact, most ACP regions, with the exception of South Africa and, perhaps, CARIFORUM, still have very underdeveloped services supplying and exporting capacity, despite the fact that services already make a major contribution to their economies. For that reason, most ACP countries have considered that the EU's request for a wide liberalisation of the sector would be premature and potentially harmful to the emergence of national and regional supplying capacity. As a matter of fact, most ACP regions have ongoing plans to consolidate their services regional markets, including through the harmonisation of regulatory frameworks, as attested in the SADC¹⁶. Threats to these efforts were all the more tangible as the EU sought National Treatment on a wide range of sectors

¹⁵ Competition, government procurement, trade facilitation and investment. During the WTO Ministerial Conference held in Singapore in 1996, a decision was made to establish study groups on these issues with a view to consider the future negotiation of WTO agreements on them. Of all four subjects, only trade facilitation became part of the WTO negotiations, the other three subjects were dropped of the WTO agenda in July 2004.

¹⁶ Article 23 of the SADC Trade Protocol requires SADC countries to adopt policies and implement measures in accordance with their WTO GATS obligations, with a view to creating a common services market and harmonizing and integrating regional policy and strategy in specific sectors. In addition, an Annex on Trade in services to the Protocol, constituting a body of law governing the progressive liberalization of trade in services amongst SADC Members, was approved in July 2007. At initial stages of the negotiations within the region, the SADC Committee on trade in services identified tourism, transport, communications, financial, construction and energy services as core to the emergence of a robust regional services market. See Section III.D of *"EPA Negotiations in Southern Africa: some issues of concern"*, South Centre (2007). Available at http://www.southcentre.org/publications/publist_issue_area_OtherIssuesTradeNegotiations_index.htm

(that is, that EU services suppliers be treated identically as other national or regional suppliers).

24. The ambition of the EU contrasted, however, with its resistance to discuss greater access for ACP natural persons (Mode 4 of GATS), particularly for unskilled professionals, which constituted the principal offensive aspect in most ACP services market access negotiating agenda.

C. Development Dimension

25. Persistent misunderstanding characterised the discussions on the development dimension of EPAs between EC and all the ACP regions. While, at the broad level, both parties coincided on the basic developmental objectives of EPAs, that is, enhancement of regional integration; economic diversification; strengthening of production; etc., this understanding eroded as soon as it had to be translated into concrete negotiating proposals.

26. All ACP regions have, more or less explicitly, defined the EPA developmental dimension as an enhancement of regional and national productive and trading capacities. This objective was generally accepted to have a normative dimension (enforcement of developmental rules), but has mostly translated in efforts to lock-in trade-related financial support. Aid to governments and regions would assist in implementing and adjusting EPA provisions as well as in fostering productive capacity through, for instance, private sector development, trading and productive infrastructure, trade promotion, and specific productive sectors. Some regions have presented costed matrices enumerating such priority projects.

27. The EC has consistently refused to discuss such proposals, arguing that financial cooperation aspects could not be incorporated to the EPA legal framework. This has disappointed many negotiators, as it introduced a sharp contrast in EPAs negotiating and implementing burden: the ACP would contract specific obligations to liberalise and reform their economies (subject to an EPA dispute settlement system) while the EU would only accept best endeavour clauses regarding its development assistance obligations.

28. To mitigate the controversy over the issue, the EU has strived to provide greater certainty regarding the availability and volumes of aid, including through adopting an Aid for Trade strategy where ACP needs were given considerable visibility. In some cases, the EC also accepted to make reference to development assistance within EPA texts, including to new instruments, such as EPA Regional

Funds. However, references are not more than “appropriate links”¹⁷ and the details regarding the source of funds, their volume, the channels through which they would be delivered (in principle the European Development Fund, EDF) and the related access conditions were not sufficiently clarified to provide comfort to many ACP negotiators.

III. INTERIM EPAs AND STATE OF PLAY

29. Having regard to the difficulties, both technical and political, related to the conclusion of full EPAs, the EC changed its position regarding the conclusion of “comprehensive EPAs” and put forward the strategy of a “two-step” approach. The ACP and EU would conclude a WTO-compatible deal covering only trade in goods, constituting a new legal framework for the continuation of EU-ACP trade after the expiry, on 31 December 2007, of the Cotonou Waiver at the WTO. Other chapters which might have been consensual would also be incorporated, as well as a roadmap for subsequent discussions on the remaining topics where further negotiations were needed. In this sense, the first set of deals would constitute a “stepping stone to a full regional EPA and not an end point to negotiations”¹⁸. Interim EPAs were presented as not very constraining texts, which would in any case be reviewed in the near future.

30. Despite the advantages of the strategy, interim EPAs required reaching a common understanding on the terms and conditions of the liberalisation of trade in goods, which remains one of the most controversial and technically complex issues related to the EPAs. Moreover, some ACP negotiators felt that by reducing the scope of discussions, interim EPAs could also exclude development cooperation, which they saw as one of the main elements of EPAs. Finally, another controversial aspect related to these agreements was that the EC insisted they should be a first step towards comprehensive EPAs, in other words, that these agreements should include a specific agenda for further negotiation on other topics, particularly on trade-related rules and trade in services.

31. As the 31 December 2007 deadline loomed, technical and political divergences among ACP states within EPA regions became harder to reconcile. When it became clear that no region, with the exception of Cariforum, would be in a position to sign a text, even on trade in goods only, the EC presented some ACP countries with the option of signing bilateral deals. Pressure on individual countries

¹⁷ The Commission agreed to “include appropriate links to development co-operation”, but not more than that. See “EU Commission Communication to the Council and the EU Parliament on EPAs”, 23 October 2007, COM (2007) 306 final. Available at: www.trade.ec.europa.eu/doclib/docs/2007/october/tradoc_136541.pdf

¹⁸ See above “EU Commission Communication”, 23 October 2007.

grew decisively at the end of November, when the East African Community (EAC), as a new EPA region, announced it had initialled a text. ACP countries, one by one, started initialling interim EPAs, often containing texts which had barely been discussed or negotiated. The Cariforum was the only region to initial a comprehensive EPA (Table 4).

Table 4: EPAs - State of play

Agreement	Region	EPA Countries (76*) which have	
		initialled (35)	NOT initialled (41)
<i>Full EPA</i>	Cariforum	all (Antigua & Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St Kitts & Nevis, St Lucia, St Vincent & Grenadines, Surinam, Trinidad & Tobago)	none
<i>Interim EPA</i>	Central Africa	Cameroon	Central African Republic, DR Congo, Chad, Equatorial Gabon, Guinea, Rep. of Congo, São Tomé
	ESA	EAC countries (Burundi, Kenya, Rwanda, Tanzania, Uganda)	
		Comoros, Madagascar, Mauritius, Seychelles, Zimbabwe	Djibouti, Eritrea, Ethiopia, Malawi, Sudan, Zambia
	Pacific	Fiji, Papua New Guinea	Cook Is., Kiribati, Marshall Is., Micronesia, Nauru, Niue, Palau, Samoa, Solomon Is., Tonga, Tuvalu, Vanuatu
	SADC	SACU countries (Botswana, Lesotho Namibia, Swaziland - with the exception of South Africa), Mozambique	Angola
West Africa	Ivory Coast, Ghana	Benin, Burkina Faso, Cape Verde, Gambia, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo	

* Cuba, Somalia and East Timor are also ACP countries but were not negotiating an EPA.

A. Interim EPAs: general overview

32. The specificity of interim agreements is that they should reflect agreement on the minimum requirements of a GATT Article XXIV compatible agreement, while leaving the other areas to be negotiated in view of a comprehensive EPA.

i. Objectives and general structure

33. Interim agreements are Regional Trade Agreements (RTAs) in the sense of GATT art. XXIV. Despite the much broader developmental rhetoric contained in the texts initialled, their conclusion was mostly expected to:

- ensure full legality of EU-ACP trade relations vis-à-vis multilateral trade (WTO) rules, thereby dissipating or at least reducing the likelihood of a legal dispute within the WTO by non-ACP countries;
- guarantee a continuation of trade flows from the ACP to the EU, avoiding disruptions due to the absence of a favourable trade regime as from 1 January 2008;
- guarantee a continuation of the EU-ACP conditions of trade, that is, a continuation of the market access conditions established by the Conotou/Lomé conventions; and,
- lock in both EPA parties into a road map for the continuation of negotiations on areas of mutual interest ("*built-in agenda*" or "*rendez-vous clause*").

34. In so far as those were the operational objectives of interim agreements, they constituted a noticeable drawback vis-à-vis the ambitious sustainable development objectives originally imputed to EPAs. The EC recognised and argued that the continuation of negotiations in 2008 on a number of additional elements would deliver the full development potential.

35. Despite the minimalist objective of interim EPAs, their scope is actually quite large and covers many more issues than would be strictly needed to ensure their conformity with WTO norms. While the twelve interim agreements concluded differ in significant aspects, they follow, generally, the same structure:

- Core provisions, related to the conditions for the elimination of tariffs applied to trade in goods. The detailed enumeration of the products that must be liberalised and the timeframe for their liberalisation is contained in annexes. They include trade remedies (safeguards) and provisions regarding the origin of products (rules of origin). Some agreements also include provisions regarding non-tariff measures (e.g. TBT and SPS).
- A rendezvous clause stipulating the pending issues on which further negotiations are needed, including often parameters regarding the specific objectives or contents of these negotiations. Common items under this *built-in agenda* include:
 - trade in services (or cooperation related thereto);
 - investment (or cooperation related thereto);

- competition;
 - government procurement (or transparency related thereto)
 - intellectual property rights
 - other outstanding areas not covered in the interim agreement (e.g. agriculture, fisheries, cooperation on environment and sustainable development, rules of origin, development cooperation, etc.).
- A development cooperation section, where parties recognise that development cooperation, both financial and non financial, is a crucial element of the agreement and that “adequate resources” are needed to support the realization of EPA objectives. The section typically commits the EC to support the implementation of Interim EPAs as a matter of priority through the European Development Fund (EDF).
- Dispute avoidance and settlement provisions, laying down the procedures to settle divergences between the parties arising from the interpretation and application of the interim EPA. Procedures instruct parties to a dispute to use consultations, mediation and eventually arbitration to settle divergences. Sometimes, some fundamental aspects of the agreements, such as development cooperation¹⁹, were excluded from the scope of these provisions.

36. It is clear, therefore, that several provisions, unnecessary from the point of view of WTO compatibility were included in interim EPAs, sometimes attracting considerable criticism:

- Standstill: requesting ACP parties not to increase tariff rates;
- Export taxes: Obligation to eliminate existing export taxes, or to refrain from imposing additional taxes;
- Third Party MFN Clause: provisions obliging ACP countries to extend to the EU, on a tariff line basis, any more favourable treatment conceded to any other developed or major developing country within a new FTA;
- Standards: the texts reaffirm the concepts and principles of WTO TBT and SPS agreements only, often not adding any value and, worse, sometimes creating additional obligations for the ACP parties (e.g. to harmonise TBT and SPS requirements at the regional level);
- Other areas: such as dispute settlement procedures, personal data protection, important legal and institutional conditions, etc., are also unnecessary from the view point of conformity with WTO rules.

¹⁹ See, for instance, articles 46 in the agreements initialed by Ghana and by Ivory Coast.

37. Finally, an aspect of the built-in agenda worth noting is that not always does it simply enumerate areas for further negotiations, but it often dispose of a set of pre-determined objectives or parameters, which could considerably preclude the outcome of future discussions (for instance, negotiation of trade in services with a view to liberalising the sector (e.g. SADC text) as opposed to negotiations to establish a cooperation framework on trade in services (e.g. two stages in the Ghanaian text)).

ii. Market access commitments

38. In accordance with its offer of market access, the EC committed to provide ACP imports full access to its market under interim Agreements (as well as under the Caribbean comprehensive EPA). Duty-free and quota-free access is to be implemented on a provisional basis (pending signature and ratification) as from the entry into force of the agreement (1 January 2008). Nonetheless, transitional measures (basically a longer liberalisation period, an import surveillance mechanism and specific safeguards) apply to sugar and rice.

39. On the ACP side, liberalisation to EU imports is progressive, that is, tariff rates applicable to a growing number of tariff lines will be reduced gradually and eventually eliminated over time. There are, however major variations regarding the timeframe for the completion of the tariff elimination process. While most regions will eliminate tariffs on products covered by the EPA within 15 years, the Cariforum and EAC countries will complete the process in 25 years. Papua New Guinea seems to have chosen to complete tariff elimination by the entry into force of the agreement (2008) (Table 5).

Table 5: Market access commitments

EPA Agreement	Volume of EU imports liberalised	Tariff elimination implementation period
Cariforum	87%	25 years
East Africa Community	82%	25 years
Cameroon	80%	15 years
Comoros	80%	15 years
Madagascar	80%	15 years
Mauritius	96%	15 years
Seychelles	98%	15 years
Zimbabwe	80%	15 years
Fiji	81%	15 years
SACU countries	86%	15 years

Mozambique	81%	15 years
Ghana	81%	15 years
Ivory Coast	81%	15 years
Papua New Guinea*	88%	First day of implementation

Source: "EU-ACP EPAs: state of play and key issues for 2008", EC Staff Working Paper (2008). * Information for Papua New Guinea from "EPA negotiations: where do we stand?" ECDPM (2008)

40. Liberalisation (over a limited number of products) in some regions starts as early as 2009 (e.g. Ghana) while in others, market opening starts 2 years after entry into force (2010, e.g. EAC).

Table 6: Timelines for tariff liberalisation, example EAC

Group 1 (<i>least sensitive lines</i>)	Complete elimination process by:	2010
Group 2 (<i>moderately sensitive lines</i>)	Reduce duties from	2015
	Complete elimination process by	2023
Group 3 (<i>most sensitive lines</i>)	Reduce duties from	2020
	Complete elimination	2023

41. Most regions have defined groups of tariffs, ranging from least to most sensitive and have adapted their tariff reduction schedule accordingly (example for the EAC, Table 6).

Differentiated timelines to start and complete the tariff reduction process reflect the perception ACP negotiators had of the sensitiveness of specific products. Agricultural and processed agricultural products were generally treated as sensitive. A delay in and dilution of the duty elimination process is intended to provide ACP producers with sufficient time to prepare for conditions of greater competition.

42. Given the time pressure weighting on negotiators, however, the rationale for gradual liberalisation of sensitive products was not always based on dynamic policy objectives, such as economic diversification and establishment of new industries. Priority was given typically to static considerations, such as the need to protect fiscal revenues or specific (existing) vulnerable sectors, particularly agricultural (Table 7).

Table 7: Examples of products excluded and rationale

EPA Region	Exclusions	Rationale
Cariforum	<ul style="list-style-type: none"> - Raw meat and processed meat products, fresh and processed fish products, dairy products, fresh vegetables, tropical fruits and fruit juices, coffee, rice, olive oil, sugar, chocolate, processed cereal products, beverages (soft drinks and spirits) - Some chemical products (paints and varnishes, essential oils, cosmetic products, soaps, shampoos, dentifrice) 	

	<ul style="list-style-type: none"> - Articles of paper - Articles of apparel and clothing and some textile products - Iron and still products - Furniture 	
Central Africa - Cameroon	<ul style="list-style-type: none"> - agricultural goods - non agricultural processed goods 	<ul style="list-style-type: none"> - existing or infant industry - maintenance of fiscal revenues
EAC	<ul style="list-style-type: none"> - agricultural products - wines and spirits - wood based paper - textiles and clothing, footwear, chemicals, plastics, glassware 	<ul style="list-style-type: none"> - infant industry
ESA - Seychelles	<ul style="list-style-type: none"> - meat, fisheries, beverages, tobacco, leather articles, - glass and ceramics, - vehicles 	<ul style="list-style-type: none"> - sensitive products - infant industries
ESA - Zimbabwe	<ul style="list-style-type: none"> - products of animal origin, cereals, beverages - paper, plastics and rubber, - textiles and clothing, footwear, - glass and ceramics, - consumer electronic goods - vehicles 	
ESA - Mauritius	<ul style="list-style-type: none"> - live animals and meat, edible products of animal origin, fats, edible preparations and beverages, - chemicals, plastics and rubber, - articles of leather and fur skins, - iron and steel, - consumer electronic goods 	
ESA - Comoros	<ul style="list-style-type: none"> - goods of animal origin, fish, beverages, - chemicals and vehicles 	
ESA - Madagascar	<ul style="list-style-type: none"> - meat, fish, products of animal origin, vegetables, cereals, beverages - plastics and rubber, articles of leather and fur-skins, paper and metals 	
PACIFIC - Papua New Guinea	<ul style="list-style-type: none"> - agricultural and forestry products - non agricultural processed goods 	<ul style="list-style-type: none"> - infant industry - maintenance of fiscal revenues
PACIFIC - Fiji	<ul style="list-style-type: none"> - agricultural and forestry products - non agricultural processed goods 	<ul style="list-style-type: none"> - infant industry - maintenance of fiscal revenues
SACU countries and Mozambique	<ul style="list-style-type: none"> - agricultural goods - some processed agricultural goods 	<ul style="list-style-type: none"> - infant industries - sensitive products
West Africa - Ivory Coast	<ul style="list-style-type: none"> - agricultural goods - non agricultural processed goods 	<ul style="list-style-type: none"> - existing or infant industry
West Africa - Ghana	<ul style="list-style-type: none"> - agricultural goods - non agricultural processed goods 	<ul style="list-style-type: none"> - maintenance of fiscal revenues

Source: Agreements initialled (CARIFORUM) and EC update on EPAs (Dec 2007)

43. However, it should also be noted that longer implementation periods are not useful unless governments are able to support vulnerable sectors in order to level-up their competitiveness. In this sense, it could have been useful to link the progressive liberalisation of specific sectors to a review according to agreed benchmarks, as ESA countries had proposed. Interim EPAs, however, contain very few and weak provisions regarding support to vulnerable sectors.

44. As far as the scope of liberalisation is concerned (Table 6), it is clear that all interim Agreements follow the EC's interpretation of art.XXIV of GATT, whereby parties to a RTA have to liberalise 90% on average of their mutual trade. Since the EU has granted ACP producers full access to its market, that is, has liberalised 100% of imports from the ACP (with transitional arrangements for sugar and rice), ACP countries could liberalise roughly 80% of their imports from the EU, so that the resulting average of mutual trade is approximately 90%. In this sense, it is worth noting two points. First that the ACP Group had submitted a proposal to the WTO negotiations on rules asking for a more flexible reading of WTO rules related to RTAs. Some negotiators had, in fact, mentioned that not more than 60 or 70% of imports should be liberalised under the EPAs and that the tariff implementation period should extend beyond 20 years²⁰. Second, one of the motivations for signing interim EPAs at the country - not region - level was that individual market access offers offered greater flexibility (Table 8)²¹. Countries do not seem, however, to have utilised either of these flexibilities.

Table 8: Regional vs. National market access offers, Select Countries

Country	Value of imports that needed to be liberalised to meet a 80% average		EPA initialled
	Regional list	National list	

²⁰ See, for instance, "EPA Negotiations: African Countries Continental Review", UNECA-ATPC (December 2006).

²¹ In the study "ACP Tariff policy space in EPAs", Stevens and Kennan have shown that the degree of liberalisation from the ACP needed to meet an average of 90% of trade liberalised under EPAs varied from one ACP country or region to another. This is so because it depends on the terms of trade between the EU and ACP regions or countries. Since the benchmark for liberalisation is an average of value of trade to be opened up, the greater the trade surplus a region or country has with the EU the smaller the share of its imports it must liberalise to reach 90% of trade liberalised (and conversely, the greater the trade deficit the higher the share of imports that must be liberalised). The study showed that countries generally had more leeway in establishing their exclusion lists when they submitted national - not regional - lists. The methodology assumed that the most sensitive tariff lines were those which presented the highest applied rates. In practice, nonetheless, governments may have chosen to exclude other tariff lines, explaining some of the differences shown in Table 8. Given the magnitude of the differences, nevertheless, it is clear that individual ACP countries have not fully utilised the flexibility they had under national exclusion lists.

Cameroon	60.9	39.1	80%
Comoros	84.6	15.4	80%
Madagascar	74.3	25.7	80%
Mauritius	78.2	21.8	96%
Seychelles	79.5	20.5	98%
Zimbabwe	63.8	36.2	80%
Fiji	66.3	33.7	81%
Mozambique	38.9	61.1	81%
Ghana	82.4	17.6	81%
Ivory Coast	69	31	81%
Papua New Guinea	68.4	31.6	88%

Source: *ACP Tariff policy space in EPAs*, ODI (2007). Products excluded from liberalisation were those presenting tariff peaks and highest applied tariff rates

B. Some considerations regarding interim EPAs

45. In spite of successfully achieving a major objective, that of providing a platform for continued ACP-EU preferential trade, these agreements come at a high cost. Several provisions will have lasting restraining consequences on the capacity of ACP governments to implement development policies. In addition, the structure and some conditions contained in these agreements actually undermine some of the original objectives of EPAs and, in this sense, empty EPAs from their developmental promise. A case in point is the stated objective of supporting regional integration.

46. While the EC has portrayed the interim agreements as soft, not very binding and flexible agreements, the provisions detailed in these agreements create a large number of binding obligations for ACP governments and require important reforms. The implementation of reforms or disciplines is often tied to specific deadlines and non compliance with the terms of the agreements could be sanctioned through a dispute settlement mechanism. Specific obligations include, for instance, the elimination of restrictions on imports (tariffs) and exports (quotas, licences, taxes), the harmonisation at the regional level of all technical norms, standards, and quality conformity requirements and procedures.

47. In this sense, it is unfortunate that development cooperation provisions, both financial and non-financial, to support the implementation of the texts agreed to are barely developed or often absent from the EPA. No binding link was made between the implementation of the reforms required under the interim EPAs and financial assistance from the EU. The details of development cooperation instruments (e.g. Regional EPA Funds) remain to be negotiated at a later stage. Other instruments cited (e.g. EDF) are not linked in a binding manner to the costs of implementing or adjusting to interim agreements. Sometimes, development assistance was explicitly

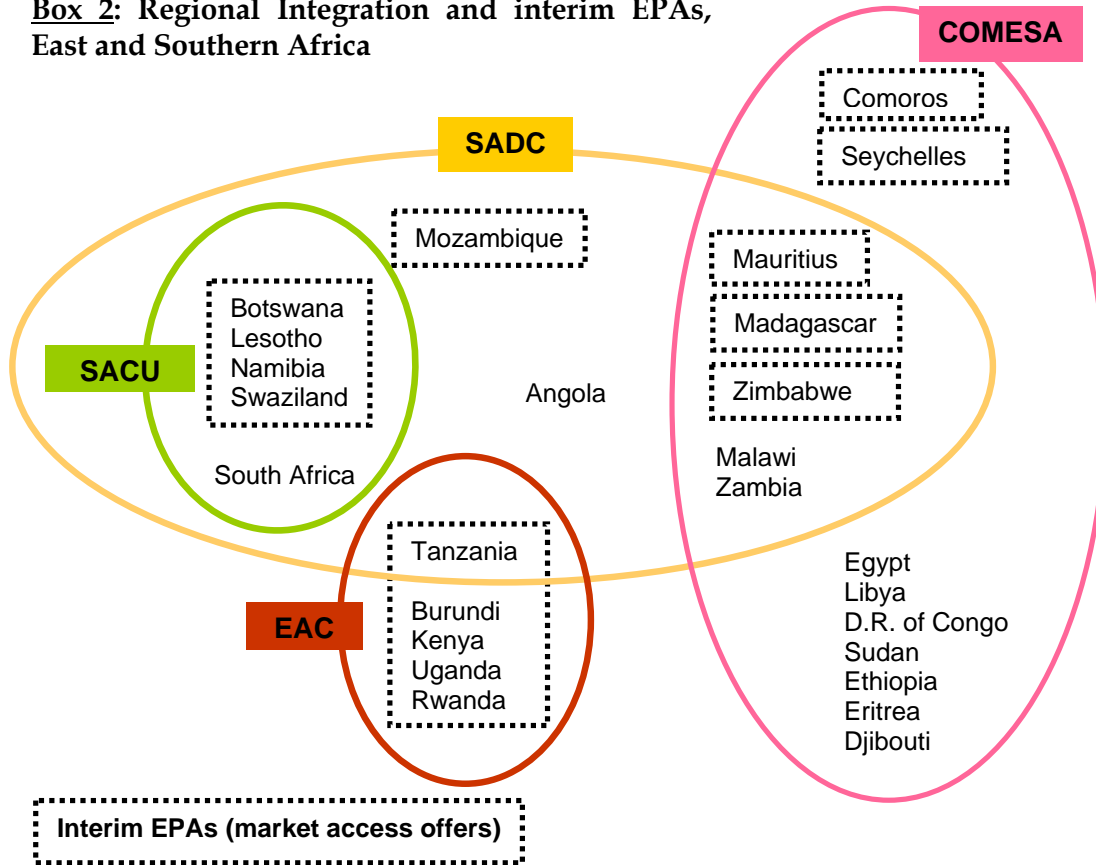
excluded from the remit of the interim EPA dispute settlement mechanism (e.g. Ghana and Ivory Coast).

i. Interim EPAs and regional integration

48. Notwithstanding the intention to use the EPA process as a catalysing instrument to strengthen regional economic integration processes, the conclusion of interim EPAs by individual ACP states could have the opposite effect, particularly in Africa.

49. As a matter of fact, only the EAC and CARIFORUM have maintained a coherent configuration, corresponding to ongoing integration efforts. In the case of the EAC, however, the impact of a separate interim EPA are harder to evaluate since some EAC Member States are also party to other regional integration processes, as is the case of Tanzania, who is a member of SADC, and of Burundi, Kenya, Rwanda and Uganda, who are also members of COMESA. Hence, the plans for the establishment of a common market and custom union amidst COMESA countries have been put in particular jeopardy by the finalisation of a separate agreement by EAC countries as well as by individual COMESA Member States (Box 2).

**Box 2: Regional Integration and interim EPAs,
East and Southern Africa**



50. A related consequence is that there are real chances that initialled agreements will have a direct impact on countries which have taken the decision not to initial an interim EPA with the EC. This is of course the case when regional integration plans have been affected, but also where a common market or a custom union is already in place and one member to the grouping initialled an agreement individually. This was particularly the case of West and Central Africa. In West Africa, Ivory Coast initialled an interim EPA despite being a member of WAEMU (a customs union). In Central Africa, Cameroon initialled an agreement despite being a member of CEMAC. This means that, unless border controls are reinstated between members of WAEMU or CEMAC, the liberalisation schemes agreed under interim EPAs are likely to have a direct impact on neighbour countries who have decided not to initial a deal. In other words, once duties on European imports to Ivory Coast or Cameroon are reduced, European products would be able to circulate without restrictions within WAEMU or CEMAC respectively, unless other parties to these agreements are able to control imported goods at the border and collect relevant duties on goods originating in the EU. Given the porosity of borders due to smuggling, lack of personnel and poor customs administration, there are real chances that EU goods

will circulate freely in countries who have not signed an interim EPA.

51. An additional consequence of the present situation is that the continuation of EPA negotiations, both at the regional and national levels, has been made considerably more complex and laborious. The agreements that have already been initialled by individual countries – and particularly the market access offers therein – have de facto become the negotiating floor for the regions concerned (e.g. CEMAC). Alternatively, these texts or liberalisation schedules will necessarily need to be revised to accommodate the concerns of other countries within each region. Where more than one country within a region initialled a deal (e.g. COMESA, ECOWAS), there will need to be some level of harmonisation between normative elements and market access conditions between these texts so that they can be merged to a comprehensive regional agreement (Table 8).

52. Finally, the current configuration of agreements has increased the prospects that countries will not be able to properly implement the EPAs. Normative requirements resulting from national texts may differ from those from an eventual regional EPA and both could differ from existing regional frameworks. This danger is accentuated by the continuation of EPA negotiations at several parallel levels (e.g. rendezvous clauses with countries who have initialled an interim deal *and* under road-maps previously agreed at the regional level. For example, the rendezvous clause contained in the Ghanaian interim EPA is significantly different from that contained in the agreement initialled by Ivory Coast (Table 9).

Table 9: Discrepancies among interim EPAs, continuation of negotiations in West Africa

Ivory Coast Interim EPA – art. 26	Ghana Interim EPA – art. 26	EC-West Africa’s roadmap Architecture (Accra, 2007)
Building on the Cotonou Agreement, conclude a fully regional EPA, covering:	Building on the Cotonou Agreement, conclude a fully regional EPA. Build on the EC-West African Road Map Welcome a two step approach: 1. formulate and implement regional policies and build regional capacity 2. in a second step, deepen commitments on:	continue negotiations on:
a) trade in services and electronic commerce; b) investments; c) current payments and capitals flows; d) competition;	a) trade in services and electronic commerce; b) investments; c) competition; d) intellectual property;	a) liberalisation of trade in service; b) cooperation regarding investments; c) electronic commerce; d) current payments and

e) intellectual property; f) government procurement; g) sustainable development; h) protection of personal data		movement of capital flows e) cooperation regarding competition; f) intellectual property g) transfer of technology; h) protection of genetic resources and traditional knowledge; i) public health j) cooperation regarding consumer protection
by the end of 2008	by the end of 2008	within 18 months, by June 2009

53. To avoid the danger of a negotiating process that moves national and regional EPAs further apart, it will be crucial to establish formal mechanisms of coordination and information sharing, as well as negotiating roadmaps and frameworks which are followed by all stakeholders in each region.

ii. Different terms for the same issue under different interim EPA texts

54. Despite using a general common template for the negotiation of EPAs, and particularly interim EPAs, the texts that have been initialled at the end of 2007 differ, sometimes, in significant ways. Some of these differences have already been pointed out, for instance, regarding the implementation period, the volume of trade (or tariff lines) excluded from EPA tariff schedules, and the rationale for the identification of sensitive products. Most of the differences that have been pointed out reflect the different priorities identified in each ACP region or country.

55. In addition to these, however, the EC has negotiated different terms, more or less favourably, with different countries and regions. Some agreements contain, indeed, more beneficial terms for the exact same provision than others. Such more favourable elements should arguably be extended to all other regions wishing to benefit from similar terms. A non exhaustive list of such elements include:

- Third Party MFN Clause: These clauses are not necessary and could in fact be inconsistent with the spirit of certain WTO flexibilities. If included, their scope should exclude other ACP or African countries (e.g. EAC text) or could be amended to require not automatic extension of benefits, but simply consultations about whether or not to extend more favourable treatment to each other (only for the South Africa-EC parties in the SADC text);
- Food security was generally granted specific attention as a justification for the adoption of temporary trade-restrictive measures (i.e. trade remedies,

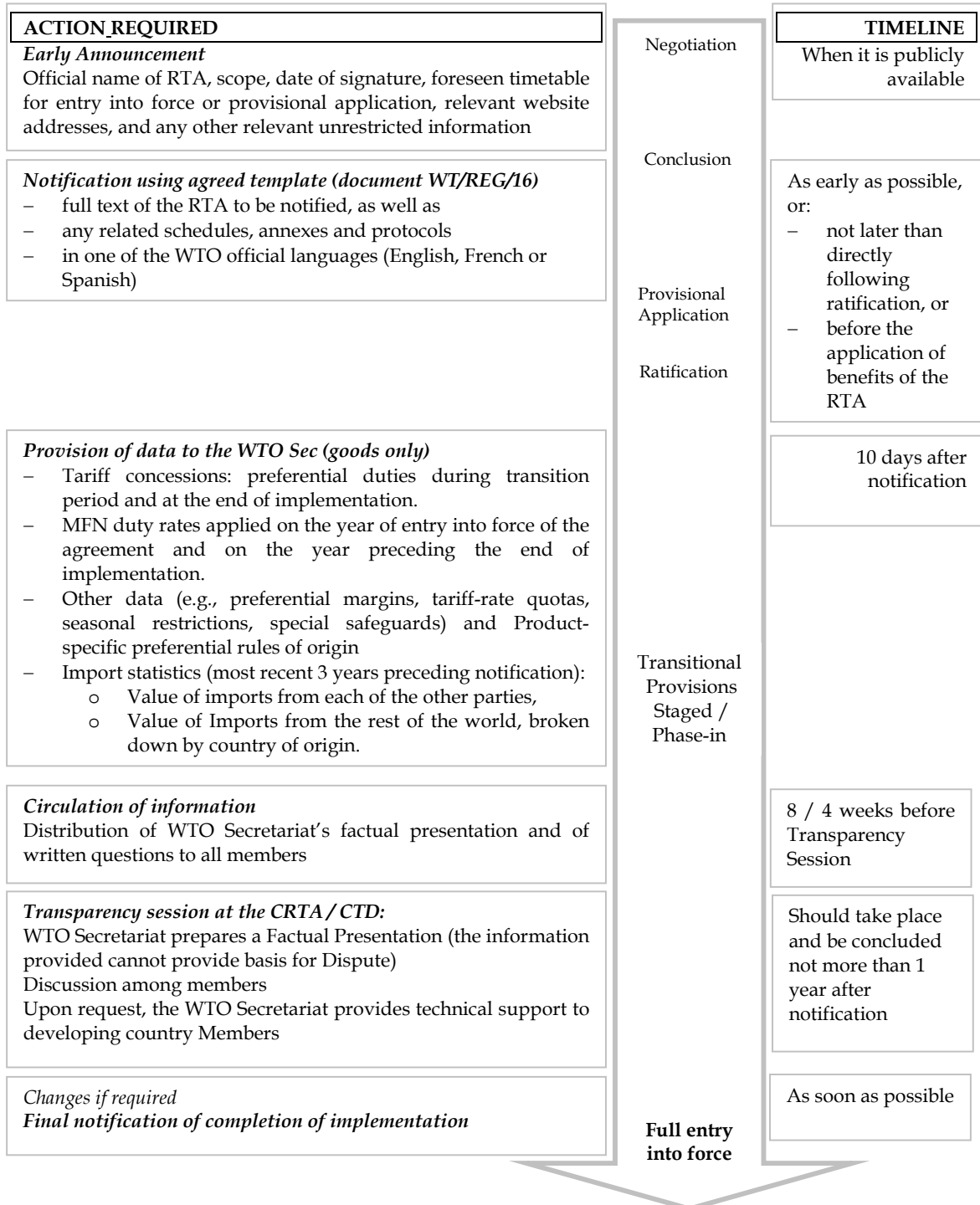
- such as safeguards);
- Revision of tariff schedules: while agreement stipulate that no new customs duties on imports shall be applied, some include the possibility of revising tariff schedule commitments to account for specific circumstances, such as the needs of least or less developed ACP states (Cariforum EPA text) or the implementation of the Common External Tariff regime in a Customs Union (Ivory Coast and Ghana, Political Declaration of the Negotiators during the initialling of stepping stone EPA);
 - Implementation periods: in line with the ACP WTO proposal regarding flexibilities for developing countries in the application of art. XXIV of GATT, implementation periods should extend beyond fifteen years for all regions or countries that so wish. The twenty-five year period granted to the EAC and CARIFORUM governments prove that longer periods may be useful and that the EU would defend their conformity vis-à-vis WTO rules.

iii. WTO notification and the transparency mechanism

56. At the general level, the most conspicuous advantage of the two-step EPA option was to allow for a continuation of Cotonou trade preferences. Nonetheless, it is worthwhile noting that, while the EC argued that WTO compatibility justified hastily concluding interim agreements before the end of 2007, no action has been taken to notify the agreements initialled to the WTO as would have been required. As a consequence, the benefits flowing from interim agreements and the comprehensive Cariforum EPA alike are being applied provisionally in violation to WTO rules. It has been argued, however, that the European Commission wishes to wait until EPAs have been signed (as opposed to initialled only), as a clear indication that ACP governments want to abide by their terms, before notifying them to the WTO. While this may seem logical, it is all the same against current WTO procedures regarding the notification and transparency requirements of RTAs (Box 3).

58. The December 2006 WTO Decision on a Transparency Mechanism for Regional Trade Agreements is clear, indeed, in requiring new RTAs to be notified to the WTO as soon as possible, not later than directly following ratification, or, in any case, before the trade preferences of a RTA start being implemented.

Box 3: Recapitulative scheme of WTO notification and transparency requirements for RTAs



57. The WTO Decision and the new mechanism aimed at improving both the

quantity and the quality of information available regarding this ever more common type of free trade agreements. Greater transparency about these agreements should help to monitor their conclusion and ensure their overall conformity with multilateral trade rules. For this reason, a notification of the conclusion of a RTA as well as information regarding its contents as early as possible was deemed useful in monitoring the process of conclusion of these agreements. In fact, formal notification should be followed by an examination of the contents of the agreement by WTO members ("transparency session"), with the possibility of follow-up written questions and answers.

58. Whether or not the EC is waiting for greater certainty before notifying interim EPAs to the WTO, what is certain is that the choice of applying EPA benefits, since 1 January 2008, without notifying these agreements, deviates from current WTO procedural requirements. Moreover, it surrounds EPAs with uncertainty as some have argued that the EC will use the fact that market access is hitherto provisional, to oblige countries having initialled an interim EPA to negotiate the remaining portions of a full EPA (*rendez-vous* clause) by the agreed timelines.

59. In that respect it must be recalled that:

- (a) any ACP country having initialled an interim EPA, and not only the EC, can notify these agreements to the WTO.
- (b) the conclusion of a fully comprehensive EPA is not a WTO requirement and can therefore advance separately from the WTO notification process. That is, there is no need to speed the EPA negotiating process on the account that an EPA must be notified to the WTO.
- (c) the continuation of trade preferences under interim EPAs are subject to WTO conformity (and hence notification), but, from the WTO perspective, not conditional to the negotiation of other aspects of the EPAs.

IV. WAY FORWARD AND STRATEGIC CONSIDERATIONS

60. There is wide scope to improve the interim EPAs that have been initialled. Such improvements may be negotiated bilaterally between the countries that have initialled such agreements and the EC and/or in the context of regional arrangements, which, it is hoped, will eventually replace individual country interim EPAs. To begin, countries having initialled an interim EPA will have to complete pending work to finalise the core areas of the agreements initialled. Discussions on the items enumerated under the *rendezvous* clauses will also have to be initiated and finalised. Finally, and perhaps most challenging of all, interim EPAs will need to be reformed to become regional – and not national – agreements.

A. Built-in agenda or outstanding work

61. Areas that will require immediate attention in 2008 as a result of priorities already identified and enumerated under the various agreements which were initialled include:

- Cariforum: Both parties need to finalize WTO compatible services schedules for Haiti & Bahamas within 6 months. A ministerial signature of the EPA is foreseen in April 2008, in Barbados. Cariforum is now expected to put into place all administrative & legal instruments to give effect to the EPA by 15 April 2008²².
- Cameroon / Central Africa: The negotiations will continue on the agreement initialled by Cameroon so as to include services and Singapore issues by the end of 2008. A Rules of Origin protocol is to be negotiated by 31 March 2008. The Central African region has confirmed its intention to complete a comprehensive EPA as soon as possible, probably in the course of 2008²³.
- EAC: The EAC EPA is one of the agreements which covers the least topics, and consequently, with a bulkier built-in agenda. Major issues related to Customs and trade facilitation, TBT, SPS, Singapore Issues and development cooperation are supposed to be negotiated, to reach a full EPA before July 2009. A major difficulty is how to reconcile the agreement signed by EAC with the agreements signed by other ESA countries, so that the regional economic integration agenda of COMESA, and particularly the implementation of a Customs Union, can move forward. Tanzania, a member of the EAC, is also a member of SADC, which could create problems for the establishment of a Customs Union in the SADC.
- ESA: A major issue that remains to be resolved relates to the participation of the EAC members in the COMESA customs union, due to come into effect by the end of 2008. A built-in agenda also has to be negotiated, including: Rules of Origin, EU outermost region safeguards, Customs & trade facilitation, TBT, SPS, competition, Investment, sustainable development, IP, public procurement, Agriculture.
- Papua New Guinea and Fiji: have to reach an agreement with the EU by the end of 2008 on: Fisheries, Services & Investment, competition, sustainable

²² EU - ACP EPA State of play and key issues for 2008, Commission Staff Working paper, EC- DG Trade, DG development.

²³ "Central Africa: EPA 'Roadmap' agreed", Terraviva (18 February 2008). <http://www.ipsterraviva.net/Europe/article.aspx?id=5758>

development, IP, public procurement Development cooperation.

- Ivory Coast and Ghana / West Africa: The negotiations will continue so as to include services and Singapore issues till the end 2008. The rules of origin protocol have to be negotiated by 31 March 2008. West African ministers have confirmed their will to conclude an EPA with the European Union within 18 months (by July 2009). A major difficulty now consists in how to reconcile the agreements signed by these two countries with the objectives, parameters and market access offers that have been negotiated hitherto by the regional machinery.
- SACU, Mozambique, SADC: while negotiations regarding the built in agenda of the interim agreements initialled by SACU countries and Mozambique will have to start, a major open question is how to incorporate South Africa to the agreement which was initialled, or how to reform the text of that interim EPA in a way that could accommodate South Africa's concerns with respect to it.

B. Improvement of provisions in the interim EPAs

62. The texts of specific agreements contain clauses explicitly authorising or in fact mandating revisions or additions to interim EPAs. Other texts do not contain explicit clauses, but were accompanied by declarations or political statements that call for revisions. West Africa's Ghanaian and Ivorian texts are cases in point. In addition, there are also national declarations stating that interim agreements were signed on the understanding that they would be revised and improved where necessary. The most well known example concerns the reservations expressed by the Namibian government before initialling an EPA²⁴. In such cases, there is an explicit recognition of the need to review the terms of these texts over the coming months.

63. However, other agreements, which do not contain specific revision clauses or revision instruments, are not necessarily harder to improve. As a matter of fact, there has been some debate about the legal status of the agreements which were initialled at the end of 2007 and there seems to be no legal impediment in international law as to revisions of an agreement which has been only initialled (as opposed to signed). While signature is deemed to suggest a State's intention to be bound by an agreement and ratification consolidates that intention, initialling signals an intention, but does not necessarily preclude further changes to the text. This means that, at least until the signature of these agreements, they may be revisited with a view to making additions or revisions.

²⁴ http://www.acp-eu-trade.org/library/files/MTI_EN_131207_MTI_Media-release.pdf

64. After signature, revisions will become more difficult, particularly as it is expected that the agreements will be notified to the WTO. It is advisable that regions and countries finalising an EPA include clear revision clauses therein, including linked to a surveillance mechanism whereby the effects of EPA implementation can be monitored. In the absence of such clauses, ACP governments or regional machineries would need to consult the EC for revisions (through the institutional arrangements that may be contained in the agreements). Given the political and economic asymmetries opposing the ACP to the EU, this latter option may prove more cumbersome.

65. Alternatively, it can be argued that, in case of important detrimental effects of the agreements, they may be denounced by the ACP party and replaced, if necessary, with a new agreement. The new or revised text would need to be compatible with WTO regulations as well as notified to the WTO.

66. However, despite increasing calls for a revision of the initialled interim agreements²⁵, the EC has already expressed unwillingness at discussing aspects of the agreements that it deemed to be already agreed to.²⁶ This would be against the understanding on which the interim EPAs were initialled. Changing that will require a strong positioning of the ACP and probably a prioritisation of elements that need improvement. Areas that will require particular attention are:

- Outstanding areas of concern after technical assessment and regional consultations are conducted (e.g. revision clauses to confirm the prominence of regional integration goals, market access offers or elements of schedules of tariff elimination, etc.).
- Clauses or aspects that would gain from harmonisation at the all ACP level (e.g. elements of Rules of Origin, Third Party MFN clause, etc.);
- Clauses that have been agreed to in more favourable terms under other interim EPAs (implementation periods, specific safeguards, etc.);
- Review schedules of commitments with a view to finding greater convergence so that common lists can emerge eventually, or at least so that regional integration processes are not compromised.
- Eliminate sections that are not needed for:
 - o WTO compatibility: standstill, elimination of export taxes, third

²⁵ The African Union, for instance, called "for the review of the interim EPAs, in line with the concerns raised by African Heads of State during the Second Africa-EU Summit"; AU declaration on the EPAs. Available at: http://www.africa-union.org/root/au/Conferences/2008/january/summit/docs/decisions/Assembly_Decisions_171-191.pdf

²⁶ "Africans Stuck With EU Deals", IPS News (29 January 2008). "European Union trade commissioner Peter Mandelson has distanced himself from a pledge to enable African countries revise a series of Economic Partnership Agreements (EPAs) recently clinched with Brussels" available at <http://www.ipsnews.net/news.asp?idnews=40974>

party MFN clause, free circulation, trade remedies, standards, services, investment, trade related rules, balance of payment clauses, competition, intellectual property, public procurement, personal data protection, administrative cooperation, dispute settlement, etc.

- and the content of which is questionable from a developmental viewpoint, or from the point of view of EPAs' initial objectives.
- Add provisions needed to:
 - ensure the proper implementation of the agreement (e.g. time-bound assistance to support costs of implementation or adjustment);
 - allow for a monitoring and evaluation of the impacts of the EPAs' implementation on productive capacity, government revenue, ACP terms of trade, etc;

C. Other strategic considerations

67. A major difficulty in all regions concerns the shift from national, partial agreements to regional, comprehensive agreements. Specific situations that require attention include:

- Market access situation: LDCs that have not signed an interim EPA and whose legal framework for exports to the EU has been shifted to the EBA scheme are actually at a less advantageous situation than they were under Cotonou market access conditions. This is so because the rules of origin which are applicable to the EBA are less favourable than those which prevailed under Cotonou (and which have been rolled over with some improvements to the interim EPAs).
- Negotiating machineries: since national administrations have taken over the negotiating process at the end of 2007, the formal regional negotiating machineries have been de-stabilised²⁷. There need to be clear roadmaps redefining the role and structure of these machineries, which also create systematic cooperation and information sharing mechanisms with national stakeholders. National and regional experts will need time to understand new agreements and prioritise next steps in the negotiations. In case existing national texts cannot be reconciled with regional positions, regions may explore "à la carte" solutions, whereby individual

²⁷ The African Union has expressed concern regarding the fact that the « process leading to the conclusion of Interim Economic Partnership Agreements did not build on what was negotiated earlier and in particular that political and economic pressures are being exerted by the European Commission on African countries » to initial Interim EPAs. AU Declaration on EPAs (Doc. EX.XL/394(XII)). See supra at footnote 25.

countries within an EPA region would have the choice of undertaking deeper liberalisation commitments or accepting more stringent normative elements. The bottom line, however, should be to preserve regional unity and regional integration objectives.

V. CONCLUSION

68. The conclusion of interim EPAs has considerably de-stabilised EPA regions and the ACP countries as a group. Existing interim EPAs will inevitably have an impact on the negotiating positions and bargaining leverage of all the regions where national texts have been initialled. Moreover, the comprehensive Cariforum EPA text is very likely to become a model for all other regional agreements, both with respect to core areas and to trade-related disciplines. Having regard to the differences in the developmental level and administrative capacity between Caribbean and particularly African countries, this could be a source of concern.

69. Now that the 31 December 2007 deadline has lapsed, the main source of pressure for the hasty conclusion of an EPA (i.e. the expiration of the Cotonou Waiver at the WTO) has become obsolete. This opens prospects of a more balanced negotiating environment. However, it is very likely that the EU will continue to put pressure for the conclusion of comprehensive EPAs as soon as possible. ACP countries must, however, utilise the greater negotiating latitude they have as a result of having already secured a fully compatible WTO agreement with the EU. Trust relationships will have to be rebuilt, though, both between neighbouring ACP countries and between the ACP and the EC. Agreement on the remaining elements (for countries which have concluded an interim agreement, either full or interim) or on all the elements (for the 43 other ACP) will not be an easy task.

70. The immediate priority should consist in rebuilding regional cohesion, solidarity and empowering regional negotiating machineries. This will ensure that the state of affairs is understood and that next steps can be prioritised. This is a task that lies largely in the hands of ACP governments and regions and the sooner it is completed, the better.

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