

**THE COTONOU PARTNERSHIP AGREEMENT, THE ECONOMIC  
PARTNERSHIP AGREEMENTS AND WTO COMPATIBILITY: CAN  
INITIALED INTERIM EPAS BE NOTIFIED?**

**SYNOPSIS**

This Analytical Note analyses the legal status of the interim Economic Partnership Agreements (EPAs) under WTO law. This is because most of the EPAs thus far initialed are interim agreements. It is thus important to understand the legal status of these interim agreements under article XXIV of GATT. The Note concludes that ACP states that have initialed interim EPAs do not need to sign in order for the interim EPAs to be notified to the WTO. Secondly asymmetrical trade liberalization is perfectly legitimate in an interim EPA with a lengthy transitional period.

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## EXECUTIVE SUMMARY

1. This Analytical Note analyses the legal status of the interim Economic Partnership Agreements (EPAs) under WTO law. This is because most of the EPAs thus far initialed are interim agreements. It is thus important to understand the legal status of these interim agreements under article XXIV of GATT.
2. The Note concludes that:
  - i. ACP states that have initialed interim EPAs do not need to sign in order for the interim EPAs to be notified to the WTO. The purpose of the EU EPA Regulation under which the EU grants tariff preferences to any ACP country that has initialed an interim EPA is to ensure the WTO-legality of tariff preferences granted under an interim EPA, and to enable these agreements (once initialed) to be notified to the WTO. Given this treatment, it makes no sense for the EU now to claim that these agreements can only be notified to the WTO once they have been signed.
  - ii. Asymmetrical trade liberalization is perfectly legitimate in an FTA with a lengthy transitional period. It is worth emphasizing that article XXIV:7 places some minimal conditions on the form of an FTA during the transitional period. One important condition is that the CRTA finds that it is likely that the agreement will meet the terms of article XXIV:8 ('substantially all trade') at the end of the transitional period. The mere fact that there is asymmetry, especially when on one side trade is already fully liberalized, is no grounds for finding that such a result (liberalizing substantially all trade) is not likely.

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## I. INTRODUCTION

1. In 2000, the Cotonou Partnership Agreement was signed to replace the Lomé Conventions which previously regulated trading relations between Africa, Caribbean and Pacific States (ACP) and the then European Economic Community (EEC). The Cotonou Agreement has three pillars. The political and development pillars are due to expire in 20 years. The trade pillar expired at the end of 2007.<sup>1</sup>

## II. MARKET ACCESS

2. Under the Cotonou Agreement and in accordance with the principle of non-reciprocity, the ACP countries were under no obligation to offer reciprocal market access to the EU.<sup>2</sup> On the other side the EU granted ACP products full duty-free and quota-free access, except for products competitive with those falling under the Community's Common Agricultural Policy<sup>3</sup>, for which the only obligation was that they be granted treatment more favourable than non-ACP products.<sup>4</sup>

3. On services, Article 41 (4) of the Cotonou Agreement states that 'the Parties further agree on the objective of extending under the economic partnerships, **and after they have acquired some experience in applying the Most Favoured Nation (MFN) treatment under GATS**, their partnership to encompass the liberalization of services in accordance with the provisions of GATS and particularly those relating to the participation of developing countries in liberalization agreements.'

4. And on investment Article 78 (3) states that 'the Parties also agree to introduce, within the economic partnership agreements, and while respecting the respective competencies of the Community and its Member States, **general principles on protection and promotion of investments, which will endorse the best results agreed in the competent international fora or bilaterally.**'

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<sup>1</sup> Cotonou Agreement (2000) OJ L317/3, amended (2005) OJ L287/1

<sup>2</sup> Art. 5

<sup>3</sup> CAP products are (a) arable: cereals, sweet lupins, peas, field beans, animal feedstuffs, cotton, hops, sugar, fibre flax and hemp, olive oil, rice, dried fodder, flowers and live plants, tobacco, seed, honey, fruit and vegetables, seed flax, oilseed, silkworms, potatoes, wine; and (b) meat and dairy: beef and veal, milk and milk products, pig meat, poultry meat and eggs, sheep meat, and goat meat.

<sup>4</sup> Arts 1-2 Cotonou

5. From the above language, it is obvious that both the 'objective' of liberalizing services and on introducing 'principles' on protecting investments, are not hard and fast promises in terms of ACP countries making commitments on these subjects.

### III. POST-COTONOU TRADING ARRANGEMENTS

6. Article 36(1) of the Cotonou Agreement states that 'the Parties agree to conclude new World Trade Organisation (WTO) compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade.'

7. The two main ways in which this is to be achieved are set out in Article 37. Article 37 (1) states that Economic Partnership Agreements shall be negotiated and shall enter into force by at least 1 January 2008.

8. Alternatively, Article 37 (6) foresees that WTO-compatible market access opportunities equally favourable to those in Cotonou will be offered to any non-least developed ACP country that decides that it is not in a position to enter into an EPA. As of now only Gabon and Nigeria have made requests for alternative arrangements. In 2008 both Gabon and Nigeria applied to be considered for the GSP+ arrangement. Their applications were denied by the EU.

9. It is however important to note that such alternative arrangements are not favoured by the EU. In a leaked memorandum to European Commission Delegations, the Director-General of DG Trade stated that, while no ACP country yet requested an alternative [before 2008], 'we should also say that EPAs are our best alternative ... and any other options will be less valuable for trade and development.' The memorandum also referred to alternatives as 'in reality, impractical.'<sup>5</sup>

10. Negotiations on EPAs commenced in September 2002 and were due to be completed in time for the agreements to come into force on 1 January 2008. The broad framework for these negotiations was set out originally in the Cotonou Agreement as follows: 'Negotiations of the economic partnership agreements will be undertaken with ACP countries which consider themselves in a position to do so, at the level they consider appropriate and in accordance with the procedures

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<sup>5</sup> See Carl, 'Note for the Attention of Delegations in ACP Countries: Recent UK statements on EPAs' Brussels, Trade/MPC D (2005) 3910, 11 April 2005, available at [www.epawatch.net/documents/doc287\\_1.doc](http://www.epawatch.net/documents/doc287_1.doc)

agreed by the ACP Group, taking into account the regional integration process within the ACP.’<sup>6</sup>

#### IV. WTO COMPATIBILITY

11. By the end of 2007, 20 countries in Africa and the Pacific had initialed an interim EPA with the EU, covering trade in goods. Fifteen Caribbean states signed a comprehensive EPA, covering areas beyond trade in goods. Since then, Cameroon, Cote d’Ivoire, Lesotho, Botswana, Swaziland and Mozambique have also signed goods only EPA with rendez-vous clauses to continue negotiations on other trade-related issues (services, investment, government procurement and competition). As to the content of EPAs, the overall framework is that of ‘WTO compatibility.’ This is essentially a reference to Article XXIV of GATT, which permits regional trade agreements between WTO Members only if they eliminate all barriers to trade on ‘substantially all the trade’ between the parties to the agreement. There has never been an agreed definition of ‘substantially all the trade’, but it is proposed by the EU to mean around 80 per cent of all trade between the parties.

12. As most of the EPAs thus far initialed are interim agreements, it is also important to understand the legal status of these interim agreements under article XXIV of GATT. According to Article XXIV: 5 (c), an interim agreement must include ‘a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.’ Paragraph 3 of the Understanding states that: the ‘reasonable length of time’ referred to in paragraph 5 (c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.

13. There is no such requirement for ‘full’ regional trade agreements for the obvious reason that these are formally presumed already to provide for liberalization on substantially all the trade between the parties. On the other hand, the practice in the WTO has been to treat interim agreements as ‘full’ regional trade agreements for notification and review purposes. Since 1995, not one of the around 300 agreements notified to the Committee on Regional Trade Agreements (CRTA) has been notified as an interim agreement.<sup>7</sup> This is despite the fact that virtually none of these agreements formally meets the requirements of a full customs union or free trade area. For example, the EC described the EC – Chile interim agreement as a ‘fully fledged FTA’, even though ‘the entry into

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<sup>6</sup> Art. 36 (5) Cotonou

<sup>7</sup> See WTO, Regional Trade Agreements Notified to the GATT/WTO and in force, available at [www.wto.org/english/tratop\\_e/region\\_e/type\\_e.xls](http://www.wto.org/english/tratop_e/region_e/type_e.xls)

force and the ten year transition period were incorporated in the entire Agreement.<sup>8</sup>

14. At the end of 2006, the WTO General Council adopted a Decision on a Transparency Mechanism for Regional Trade Agreements, which substantially modified the notification and examination procedure for regional trade agreements. The WTO Transparency Decision imposes a procedural requirement to notify the WTO of any agreement under which preferences are granted – before the agreement enters into force.<sup>9</sup> For this purpose, an initialed text should be sufficient.<sup>10</sup>

15. There are various points to note about the Transparency Decision. Most importantly, the parties are now under a specific obligation to provide the Secretariat with detailed and specified data on the agreement within 10 weeks (20 weeks for developing countries) of notification,<sup>11</sup> which must be no later than ratification or, if earlier, decision on provisional application of the agreement and prior to its implementation.<sup>12</sup> This data must include the following for the goods aspects in RTAs at the tariff- line level:

- (a) Tariff concessions under the agreement:
  - (i) a full listing of each party's preferential duties applied in the year of entry into force of the agreement; and
  - (ii) when the agreement is to be implemented by stages, a full listing of each party's preferential duties to be applied over the transition period.<sup>13</sup>

16. The above requirements enhance the role of the Secretariat and diminish the role of the CRTA. The Secretariat prepares a factual report based primarily (but not exclusively) on this information,<sup>14</sup> while the CRTA no longer produces a report and recommendations on the agreement, as foreseen in the original terms of reference, but now does no more than hold a single meeting, based on written questions submitted earlier, at which the agreement is 'considered'.<sup>15</sup>

17. Despite the CRTA terms of reference, a formal review is therefore no longer undertaken by the CRTA on the compatibility of a regional trade

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<sup>8</sup> CRTA, Examination of the Interim Agreement between the EC and Chile – Note on the Meeting of 28 July 2005, WT/REG/164/M/1, 6 October 2005, para 10.

<sup>9</sup> General Council, Decision on a Transparency Mechanism for Regional Trade Agreements of 16 December 2006, WT/L/671, 18 December 2006

<sup>10</sup> L. Bartels, *The Legal Status of the Initialed EPAs and the Legal Constraints on Renegotiations*

<sup>11</sup> General Council, Decision on a Transparency Mechanism for Regional Trade Agreements of 16 December 2006, WT/L/671, 18 December 2006., para. 7 (a)

<sup>12</sup> Ibid., para 3

<sup>13</sup> Ibid., Annex, para 2

<sup>14</sup> Ibid., para 7 (b)

<sup>15</sup> Ibid., paras. 11 and 12

agreement with Article XXIV GATT. In practice, this shifts the onus for any challenge to a regional trade agreement to dispute settlement.<sup>16</sup>

## V. ASYMMETRY DURING THE TRANSITIONAL PERIOD

18. The question of asymmetry is usually analysed in the static context of the meaning of 'substantially all the trade' between the parties under Article XXIV:8. However, especially with a lengthy transitional period, an equally important question is the extent to which asymmetry is permitted during the transitional period. It is worth emphasizing that article XXIV:7 places minimal conditions on the form of an FTA during the transitional period. One important condition is that the CRTA finds that it is likely that the agreement will meet the terms of article XXIV:8 ('substantially all trade') at the end of the transitional period. The mere fact that there is asymmetry, especially when on one side trade is already fully liberalized, is no grounds for finding that such a result (liberalizing substantially all trade) is not likely. In sum, asymmetrical trade liberalization is perfectly legitimate during the transitional period.<sup>17</sup>

19. Together with the suggestion that based on law and practice, the transitional period for interim agreements to which developing countries are party may substantially exceed the normal 10 year period, this means that interim agreements between developed and developing countries are effectively immune from the strictures of Article XXIV for a substantial period of time, both in terms of political review and dispute settlement. This is a conclusion of some significance for the EU's EPAs.<sup>18</sup>

## VI. PROVISIONAL APPLICATION OF THE INTERIM EPAs ON THE PART OF THE EU

20. Provisional application of an agreement usually takes place at the time of signature, but there is no reason that it could not take place earlier. The granting of unilateral preferences by the EU to ACP countries that have initialed the interim EPA under the EPA Regulation (Council regulation 1528/2007 of December 20 2007[2007] OJ L 348/1, in force on January 2008) is an example of this situation.

21. However article 2 (3) of this Regulation states that such region or state will be removed from the list by the Council, acting by qualified majority upon a proposal from the Commission, where:

- a. the region or state indicates that it intends not to ratify an agreement which has permitted it to be included in Annex I (the list)

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<sup>16</sup> L. Bartels, 'Interim agreements under Article XXIV GATT' 8 (2) *World Trade Review* (2009) at p. 343

<sup>17</sup> *Ibid.*, at p. 349

<sup>18</sup> *Ibid.*



- b. ratification of an agreement which has permitted a region or state to be included in Annex I list has not taken place within a reasonable period of time such that the entry into force of the agreement is unduly delayed; or
- c. the agreement is terminated, or the region or state concerned terminates its rights and obligations under the agreement but the agreement otherwise remains in force.

22. Therefore provisional application may be terminated by notifying the other party. This scenario is a cause of concern for some African states that have initialed but not yet signed the EPAs. This regulation seems to have made EU law GATT Article XXIV plus in that it goes beyond the requirement of Article XXIV.

23. On the side of African states, the initialed interim EPAs do not impose any obligations on them. African states are only under an obligation to implement its terms once it has entered into force.<sup>19</sup> Entry into force takes place upon ratification or after ratification if this is specified in the agreement as it is in the interim EPAs.<sup>20</sup>

## VII. CONCLUSION

24. WTO law does not require the inclusion of other trade-related issues, such as services or investment.

25. The purpose of the EU EPA Regulation under which the EU grants tariff preferences to any ACP country that has initialed an interim EPA is to ensure the WTO-legality of tariff preferences granted under an interim EPA, and to enable these agreements (once initialed) to be notified to the WTO. Given this treatment, it makes no sense for the EC now to claim that these agreements can only be notified to the WTO once they have been signed.<sup>21</sup>

26. The EU's position does make one wonder about the EU's high-pressure tactics in the negotiations leading up to the initialing of the EPAs in late 2007. Its claim was that it needed EPAs in place by the end of the year to meet the deadline of the expiry of the Cotonou Waiver. However, when some countries did initial these agreements at the end of 2007, the EU did nothing with them. Apparently what was urgent in 2007 is not so urgent in 2009.<sup>22</sup>

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<sup>19</sup> L. Bartels, *The Legal Status of the Initialed EPAs and the Legal Constraints on Renegotiations*

<sup>20</sup> Ibid.

<sup>21</sup> Ibid

<sup>22</sup> L. Bartels, *The EU's Economic Partnership Agreements* WTO Scholars' Forum, UCL, 23 June 2008

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**Chemin du Champ d'Anier 17  
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