

**EU-ACP Economic Agreements and WTO/GATT
Compatibility: Options for ACP countries under Cotonou
Agreement.**

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DECLARATION

I, COLBERT OUMA OJIAMBO, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university or institution for a degree or diploma. Other works cited or referred to are accordingly acknowledged. It is in this regard that I hereby present it in partial fulfilment of the requirements for the award of the LLM Degree in International Trade and Investment in Africa.

Signature: _____

Date: _____

This dissertation has been submitted for examination with my approval as the University Supervisor.

Signed.....

Prof. Daniel Bradlow

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Date.....

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First I am grateful to God for giving me life in abundance, for the nature that surrounds me, for the birds that sing to me a new song each morning, for the fish of the sea and the animals of the wild with whom I proudly share this universe and for my fellow human beings with whom I share the tribulations and jubilations of this modern life.

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DEDICATION

Firstly, to my mother, you held my little hand and took me to school to start a journey that has brought me this far, and throughout this journey, your presence has never departed from me. Secondly, to my brother Aldrin, you gave selflessly and your support is beyond what I can repay. Last but not least, to Milka, the pride of my heart.

Abbreviations

ACP	African, Caribbean and Pacific
AASM	Association of African States and Madagascar
COMESA	Common Market for Eastern and Southern Africa
CARIFORUM	Caribbean Forum
CRTA	Committee on Regional Trade Agreements
CEMAC	Economic Community of Central African States
EAC	East African Community
EBA	Everything But Arms
ECDPM	European Center for Development Policy Management
ECOWAS	Economic Community of West African States
EDF	European Development Fund
EEC	European Economic Community
EPA	Economic Partnership Agreement
EU	European Union
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GSP	Generalized System of Preferences
LDC	Least Developed Countries
MFN	Most Favoured Nation
REPA	Regional Economic Partnership Agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community
STD	Special and Differential Treatment
TDCA	Trade, Development and Cooperation Agreement
WTO	World Trade Organization
ODI	Overseas Development Institute

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EXECUTIVE SUMMARY

The member states of European Union (EU) and a group of African, Caribbean and Pacific (ACP) states are currently negotiating for new trading agreements compatible with World Trade Organization's (WTO) rules. Whereas both the EU and the ACP states are in agreement that the new trading arrangements must be WTO compatible, there is no consensus on the format of the new trading agreements. The EU has insisted that the new trading arrangements should be in the form of free trade agreements, established under Article XXIV of General Agreement on Tariffs and Trade (GATT). Unlike the previous EU – ACP trade agreements which were non – reciprocal, Article XXIV requires that the new trading agreements should be reciprocal. Consequently the EU has gone ahead to negotiate for reciprocal Economic Partnership Agreements (EPAs) with some of the ACP states. Some ACP countries which are opposed to reciprocity have proposed that the new trading arrangements should be established under the provisions of Enabling Clause. Others have suggested that EU should attempt to apply for a WTO waiver. The Cotonou Agreement, under which the new trading agreements are being negotiated, provides that in case of those countries which are not ready to negotiate for EPAs, the EU should examine alternative possibilities, in order to provide these countries with a new framework for trade which is equivalent to their existing situation and in conformity with WTO rules. So far no alternative trading arrangements have been proposed.

Although some ACP countries have agreed to negotiate for Economic Partnership Agreements under article XXIV of GAAT, there is no consensus on the interpretation of key provisions of Article XXIV. Under Article XXIV, the parties are required to remove *substantially all* trade barriers between themselves within *reasonable time*. The meaning of the phrases 'substantially all' and 'reasonable time' has remained controversial, with each party giving an interpretation that favours its interests. Lack of consensus on the meaning of these phrases has hindered the conclusion of negotiations for EPAs.

In a nutshell, the question of WTO compatibility presents the biggest hurdle to the conclusion of the new trading arrangements between the EU and the ACP group. This paper is an evaluation of the options available to the ACP countries to conclude WTO compatible trading arrangements with the EU. Chapter one of this paper is an introductory chapter which offers an overview of the entire paper. Chapter two sets out in details the historical background of the economic relationship between the EU and the ACP states. This chapter illustrates the historical background from which the new trading agreements have evolved to help the reader understand certain key features of the current economic partnership agreements. Chapter three looks at the GATT/WTO provisions relevant to the establishment of WTO compatible trading arrangements between EU and ACP countries. Particular emphasis is placed on Article XXIV, the Enabling Clause and the WTO waiver. Chapter four is the main chapter in which the paper explores the possibilities of concluding WTO compatible trading agreements under Article XXIV, Enabling clause and the WTO waiver. Chapter five draws the conclusions of this paper.

CHAPTER ONE

1.1 INTRODUCTION

The economic relationship between African, Caribbean and Pacific countries, and the European Union (EU), formally European Economic Community (EEC), has a long history that stretches beyond 30 years of Lomé and Yaoundé Conventions.¹ Formally it started with the treaty of Rome which established the European Economic Community (EEC) in 1957². However, even before the Treaty of Rome came into force, five of the six members of EEC³ had had some overseas colonies and dependencies.⁴ These colonies and dependencies were deemed to be extensions of their respective European Countries that colonised them. This relationship between the colonial masters and the colonies made it necessary to have the colonies incorporated into the Treaty. The relationship was based on the “principle of association”.⁵ The purpose of the association as indicated by Article 131 of the Rome Treaty was to, “*promote economic and social development of these Territories.*”⁶

With the Treaty of Rome, the EEC began providing special preferences to imports from overseas colonies and dependencies of France.⁷ This initial trade arrangement was formalized through an agreement between the EEC and the Association of African States and Madagascar (AASM).⁸ The EEC Member States, and in particular France, wished to exploit the raw materials from their overseas territories and hence the need arose to protect them. In essence, the need to incorporate these territories into the development agenda of the 1957 was not purely based on the desire to promote economic and social development of these territories. The driving force was the need to protect the interests of the EEC Member States, especially the continued supply of raw materials for their industries.⁹ This ‘theme of exploitation’ that was the basis of the initial relationship

¹ Kenya European Union Post Lomé Trade Negotiations (KEPLOTRADE).

² S Hennie ‘From mandate to economic partnership: The return to proper statehood in Africa’ (2007) 7 *African Human Rights Law Journal (AHLJ)* 90.

³ The original members of EEC are Italy, France, The Federal Republic of Germany, Belgium, Luxembourg and Netherlands. With the exception of Luxembourg, the rest had colonies and dependants either in Africa.

⁴ Hennie (n 2 above).

⁵ As above.

⁶ As above.

⁷ C Bjornskov & E Krivonos ‘From Lome to Cotonou: The New EU-ACP Agreement’ (2001) 2

⁸ As above.

⁹ Hennie (n 2 above).

between EEC and ACP was to be maintained in the subsequent economic arrangements between EU and ACP.¹⁰

After the signing of the Rome Treaty, the political situation in the former colonies started to change, as the wind of liberalization began to sweep across the continents. By 1960, some of the former colonies had gained independence from the European colonial powers. In 1963, representatives of EEC Member States and 17 AASM countries met in Yaoundé, Cameroon, and signed an agreement which was known as the Yaoundé Convention.¹¹ The Convention allowed for non – reciprocal duty free market access of the imports from the AASM countries into European market. The Yaoundé Convention lasted for five years and it was renewed in 1969 for further five years until 1975.¹² “The structure established in Yaoundé remains the framework for many aspects of ACP-EU cooperation until to date.”¹³

Meanwhile in 1973, Britain was admitted into the EEC membership. The entry of Britain brought about an expansion of the associated states by the accompanying commonwealth countries. Britain had her colonies in Africa, Caribbean and Pacific which had to be incorporated into the system. The Commonwealth countries together with the original AASM countries formed what was known as the African, Caribbean and Pacific (ACP) group.

Yaoundé II Agreement was succeeded by a new agreement known as the Lomé Convention, which was signed in the capital of Togo in 1975. The Lomé Convention was signed by nine EC Members States and 46 ACP countries.¹⁴ The Lomé Convention, like its predecessor, was based

¹⁰ R Blein says that “At the trade level the cooperation, by subsequent agreements, was an extension of the colonial specialisation and preferences. It enabled tropical products to retain access to European markets at better prices than those offered on the world market. This was the beginning of “trade preferences” which granted better access to the European markets of products from the newly independent countries.” However at the time most tropical commodities were being exported by companies run and funded by Europeans which were set up in ACP countries. See R Blein ‘From Yaoundé Conventions to the Cotonou Agreements: 40 years of Missed Connections’ (2007) *Grain de sel* 4

¹¹ ACP-EU Development Cooperation: http://www.ACP-EU_Development_Cooperation.org.

¹² ACP-EU Development Cooperation (as above).

¹³ ACP-EU Development Cooperation (as above).

¹⁴ ACP-EU Development Cooperation (as above).

on the system of non-reciprocal trade preferences between the ACP countries and the European Community (EC). Although the EU-ACP economic partnership was developed to stimulate economic and social development in ACP countries, the economies of these countries deteriorated under Lomé Convention, catalyzing a dramatic reform of the EU-ACP partnership by the millennium.¹⁵

As noted in the foregoing paragraph, the Lomé Convention established a trade system that was both, preferential and non – reciprocal.¹⁶ “These two features of the Lomé acquis (preferential treatment and non-reciprocity) raised two distinct legal issues within the World Trade Organization (WTO) system.”¹⁷ The EU accorded ACP imports duty and quota free market into EU markets. The same preferences were not extended to non – ACP countries, thus making the EU’s trade measure discriminatory. This was contrary to Article I.1 of WTO’s General Agreement on Tariffs and Trade (GATT) of 1947 (Most Favoured Nation Principle).¹⁸ On the other hand the ACP countries were not required to reciprocate the favours granted to them by the EU. There was no justification under the GATT/WTO rules for such discriminatory measure.

The illegality of the EU discriminatory measure came to the fore in 1994. Before then, the EU and ACP countries had insisted that the relationship between EU and ACP established a Free Trade Area (FTA) in conformity with Article XXIV of GATT 1947.¹⁹ The matter eventually came before the Dispute Settlement Body for determination by virtue of the complaint lodged by certain Latin American countries.²⁰ It was until the EU lost the case twice that they were forced to retreat and seek a WTO waiver that saw the continuation of the EU –ACP relationship to the expiry of its term in 2000.²¹

¹⁵ A Banthia ‘Success or Failure? An Evaluation of Fifty Years (1957-2007) of European Union Development Policy in Africa, Caribbean and Pacific’.

¹⁶ M Desta ‘EC-ACP Economic Partnership Agreement and WTO Compatibility: An Experiment in North-South interregional Agreements’ (2006) *Common Market Law Review (CML Rev)* 1349.

¹⁷ As above.

¹⁸ As above.

¹⁹ Desta (n 16 above) 1345.

²⁰ C M O Ochieng ‘The EU-ACP Economic Partnership Agreement and the Development Question: Constraints and Opportunities posed by Article XXIV and Special and Differential Treatment Provisions of the WTO’ *Journal of International Economic Law (JIEL)* (2007) 370.

²¹ Desta (n 16 above) 1345.

The Lomé Convention expired in 2000. However for some economic and legal reasons the parties to the Lomé convention did not intend to renew it without further considerations. First, for the entire period of its existence, Lomé regime had failed to achieve its objectives.²² Secondly the legal events that preceded its sunset period had made it impossible to sustain it within the WTO regulatory system. The parties agreed to negotiate a new trading arrangement in response to the shortcomings of the Lomé regime. More importantly, the new trade arrangement had to conform to the GATT/WTO requirements of non – discrimination. What followed was a Partnership Agreement between the members ACP Group of states and the EU and its member states. It was signed in 2000 in Cotonou, Benin, hence commonly referred to as Cotonou Agreement. It is to remain in force for a period of 20 years.

The new EU-ACP Agreement (Cotonou Agreement) was intended to address the shortcomings of the previous conventions. It is both a development cooperation and preferential trade agreement.²³ The Agreement states its objectives as, “...*reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy.*”²⁴

The Cotonou Agreement sets out two areas of cooperation between ACP countries and EU. These are development cooperation and economic and trade cooperation. Both areas are interlinked and complimentary. Measures taken by the parties in both areas must be mutually reinforcing.²⁵ The Central objectives of ACP-EU partnership are poverty reduction and ultimately its eradication; sustainable development; and progressive integration of the ACP countries into the world economy.²⁶ Therefore any economic and trade agreement between ACP and EU must support the above objectives, and both parties must ensure that any economic and trade agreements initiated between themselves within the sphere of Cotonou Agreement do not compromise the above objective.

²² Hennie (n. 2 above).

²³ Bjornskov & Krivonos (n 7 above) 2.

²⁴ Cotonou Agreement Article 1.

²⁵ Cotonou Agreement Art. 18.

²⁶ Cotonou Agreement Art. 19.

The aim of economic and trade cooperation is to foster *smooth and gradual integration* of ACP States into the world economy, thereby promoting their sustainable development and contributing to poverty eradication.²⁷ The Objective of economic and trade cooperation as set out in the Cotonou Agreement, is to enable ACP states play a full part in international trade.²⁸ Both parties to the Agreement are aware of the fact that the ACP countries are likely to be faced with a myriad of challenges during the implantation of the Agreement. The Agreement provides that the economic and trade cooperation measures should aim at managing these challenges, and not creating obstacles and new challenges. Further, given the wide disparity in the level of development between EU on one hand, and ACP countries on the other, the process of globalization of ACP economies should not be sudden but gradual over a reasonable period of time.²⁹

While the development strategies between the parties are well set out in the Cotonou Agreement, the economic and trade strategies are not. The Agreement provides that, “In view of the objectives and principles set out above, the Parties agree to conclude new World Trade Organisation (WTO) *compatible* (emphasis added) trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade.³⁰ It was in this context that negotiations for Economic Partnership Agreement (EPA) between EU and ACP Countries were launched on 27 September 2002.³¹

The compatibility of the new trading arrangements with WTO rules has been controversial and has elicited tension between the EU and ACP negotiating parties. The Cotonou Agreement suggests that the new trading arrangements will take the form of economic partnership agreements between EU and ACP countries which consider themselves in a position to do so and at the level they consider appropriate.³² The Agreement further provides that, “...the Community will assess the situation of the non-Least Developed Countries (LDCs)³³ which, after

²⁷ As above, Art. 34.1.

²⁸ As above, Art. 34.2.

²⁹ As above.

³⁰ (As above) Art. 36

³¹ Kenya European Union Post Lomé Trade Negotiations (KEPLOTRADE)

³² (n 23 above) Art 37.5.

³³ As regards the LDCs, they are already secured under the provisions of Everything But Arms (EBA), and therefore they are not obliged to execute EPAs.

consultations with the Community decides that they are not in a position to enter into economic partnership agreements and will examine all alternative possibilities, in order to provide *these countries with a new framework for trade which is equivalent to their existing situation and in conformity with WTO rules*³⁴ (emphasis added).

The obligation is placed on the EU to explore alternative possibilities and provide alternative framework for non-LDCs which consider themselves not in a position to enter into economic partnership agreements.³⁵ So far, no new alternative framework for trade has been identified, and the non-LDC ACP countries that did not enter into economic partnership agreement with EU automatically reverted to Generalized System of Preferences (GSP) system.³⁶ The EU sees EPAs as the best alternative, hence the reluctance to explore other possibilities. There is however increasing pressure for EU to identify an alternative framework for trade, in case the negotiations for EPAs fail. But some analysts have raised doubts about securing an alternative trading arrangement that meets WTO compatibility requirements as much as EPAs.³⁷ However, looking at the number of EPAs which have been initialled and advanced stages of negotiations for full EPAs, it may be said that most ACP countries have embraced the EPA route. But the conduct of the parties should not be taken as discharging the obligations to explore alternative framework for trade by the EU, or interpreted as a waiver by the non-LDCs to request for such alternative arrangements.

The Cotonou Agreement, contrary to the previous Lomé Conventions, requires the new trading arrangements between the parties to be WTO compatible. EPAs are discriminatory by nature, contrary to provisions of Article I.1 of GATT/WTO or Most Favoured Nation (MFN) principle.³⁸ However, there are exceptions to the general rule of non-discrimination. As far as

³⁴ Article 37.6 of Cotonou Agreement.

³⁵ Although the said obligation is binding on EU, it is not clear from the provisions of Cotonou agreement whether the parties can enforce the same.

³⁶ A request by Nigeria and Gabon to be put on GSP+ was declined by EU.

³⁷ Overseas Development Institute, European Center for Development Policy Management, 'The Potential Economic Impact and WTO Compatibility of the Economic Partnership Agreements' (May 2006) 33.

³⁸ Article I.1 of GATT/WTO provides that, 'With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product

regional trade agreements are concerned, the exceptions are provided under Article XXIV of GATT/WTO and Enabling Clause. In limited situations, the contracting parties to GATT/WTO may apply for a waiver against the application of the Article I.1.³⁹ Therefore any preferential trading agreement executed by contracting parties, like the current EPAs between EU and ACP countries, must fall under one of the above exceptions in order to fulfil the WTO compatibility requirements. Since the alternatives to EPAs have not been mapped out, it is difficult to know with precision their compatibility requirements. What is certain is the fact that they would be discriminatory and preferential. Their compatibility therefore is most likely to be availed under the Enabling Clause provisions or by application of a WTO waiver.

In the case of EU-ACP EPAs, there is still controversy as to which exception is applicable. WTO compatibility has been interpreted by EU, and some of ACP countries, as in compliance with Article XXIV of GATT 1947.⁴⁰ The EU perceived EPAs to be FTAs and therefore falling within the jurisdiction of Article XXIV of GATT 1947.⁴¹ A section of ACP group objected to this interpretation. They argued that Article XXIV was very restrictive and that in any event non-reciprocal trade agreement could be established under the provisions of the Enabling Clause.⁴² Ochieng says that, “Legally, a non-reciprocal trade arrangement compatible with WTO rules is possible and the Cotonou Agreement provides for such an alternative under Article 37.6.”⁴³ However, the EU was against a non-reciprocal trade agreement, in view of the fact that both Yaoundé and Lomé conventions, which were both non-reciprocal trade agreements had failed to meet their economic objectives.

The issue of compatibility did not rest with the contestation over reciprocity and non-reciprocity. The interpretation of the provisions of Article XXIV is subject to much controversy. ACP countries view the EU’s textual interpretation of Article XXIV as too restrictive and detrimental

originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.’

³⁹ When the Lomé Convention expired in 2000, the EU had to seek a waiver, to enable it grant preferential treatment to ACP countries, during the preparatory period of EPAs.

⁴⁰ C M O Ochieng ‘Legal and Systematic Issues in the Interim Partnership Agreements: Which Way Now?’ (2009) 2 International Centre for Trade and Sustainable Development, Geneva, Switzerland.

⁴¹ Ochieng (n 20 above) 368.

⁴² Ochieng (n 40 above).

⁴³ As above.

to their long term developmental objectives. They have argued that due to the financial, trade and developmental needs of developing countries, developed countries should not seek reciprocity in their trade with developing countries.⁴⁴ However, the EU is of the view that Article XXIV provides sufficient flexibilities to enable the ACP countries realize their developmental goals. The question that must be answered in this dissertation is what type of interpretation should be accorded to Article XXIV, which would meet WTO compatibility without constraining the developmental, financial and trade needs of the ACP countries?

The Enabling Clause is another source of law through which WTO/GATT compatibility can be achieved. The Enabling Clause constitutes an exception from the MFN principle of GATT/WTO in four ways. It authorises:

- a) developed country tariff preferences for goods of developing country origin in accordance to generalized system of preferences (GSP) i.e. in the form ‘Generalized, non-reciprocal and non-discriminatory preferences beneficial to developing countries,
- b) differential and more favourable treatment with respect to the GATT provisions concerning non-tariff measures,
- c) special treatment of LDCs and
- d) the formation of South-South trade agreements as an exception from both Article I and XXIV of GATT/WTO.⁴⁵

However, the critics of Enabling Clause argue that EU-ACP economic agreements are contrary to paragraphs 2(a) of the Enabling Clause since ACP is a closed group while Enabling Clause demands that the benefits must be provided on GSP terms and that contrary to paragraphs 2(c) of the Enabling Clause on South-South arrangement, one of the parties to the EU-ACP EPA is a developed member. For these reasons it is argued that compatibility with GATT/WTO rules cannot be achieved through Enabling Clause.⁴⁶

Another question that this paper seeks to answer is whether EU-ACP trading arrangements can achieve WTO/GATT compatibility by the non-reciprocal agreement under the provisions of

⁴⁴ Ochieng (n 20 above) 369.

⁴⁵ Desta (n 16 above) 1353.

⁴⁶ Desta (n 16 above) 1354.

Enabling Clause or through the reciprocal mode under Article XXIV of GATT/WTO, and which of the two achieves the best balance between compatibility and the objectives of Cotonou Agreement? The possibility of another waiver, however limited, is also explored.

1.2 PROBLEM STATEMENT

The dissertation will examine the economic relationship between the EU and ACP countries, and in particular, the Economic Partnership Agreements currently being negotiated between EU and ACP countries, and their compatibility with GATT/WTO rules. The question of WTO Compatibility being addressed in this paper affects all EPAs, and therefore the paper does not restrict itself to any specific EPA or region.

In order to achieve the objectives of their economic relationship as outlined in the Cotonou Agreement, the parties agreed to negotiate new WTO compatible trading arrangements. However, there is no common understanding of how WTO compatibility is to be achieved. The issue of compatibility is central to the finalisation of the new trading arrangements between EU and ACP. In the absence of a common definition of 'WTO compatibility', each side to the negotiations has come up with what it understands to be the meaning of 'WTO compatibility'. The EU has insisted that the WTO compliance can only be achieved through Article XXIV of GATT 1947. Some ACP countries have accepted this view but are unable to accept the strict interpretation accorded to Article XXIV by the EU. Some ACP countries believe that compatibility can be achieved through Enabling Clause on non-reciprocal basis.

The dissertation investigates the ways through which the WTO/GATT compatibility can be achieved without jeopardising the objectives set out in the legal framework governing the economic relationship between EU and ACP countries. The dissertation will investigate the provisions of the Cotonou Agreement governing the EPAs and the GATT/WTO rules and the extent to which they affect the ensuing economic arrangements between EU and ACP countries. The dissertation will identify various interpretations accorded to the GATT/WTO rules governing compatibility to find out which interpretation solves the problem of compatibility without jeopardising the objectives of Cotonou Agreement.

1.3 RESEARCH QUESTION

The main research question that this study seeks to answer is: How can EU-ACP Economic agreements achieve WTO/GATT compatibility without jeopardising the objectives of the Cotonou Agreement?

In answering the main question, the following questions will also be answered:

- i.** What are the objectives of the Cotonou Agreement?
- ii.** What are the legal requirements for EU-ACP Economic Agreement compatibility with WTO/GATT rules?
- iii.** What are the ways of achieving compatibility under the GATT/WTO provisions?
- iv.** Which interpretation of GATT/WTO rules would meet WTO compatibility requirements without constraining the developmental, financial and trade needs of the ACP countries?

1.4 THESIS STATEMENT

The Objectives of Cotonou Agreement can be achieved through the non-reciprocal GATT/WTO compatibility requirements as opposed to the reciprocal provisions of Article XXIV of GATT/WTO. This dissertation seeks to demonstrate that the WTO compatibility of EPAs can be achieved through non-reciprocal trading arrangements between EU and ACP countries.

1.5 DEFINITION OF KEY WORDS

EU- ACP EPAs: refers to the economic partnership agreements between the European Member States and some of African, Caribbean and Pacific countries.

Cotonou Agreement: refers to Partnership Agreement between the members ACP Group of states and the EU and its member states signed on 23 June 2000 in Cotonou, Benin.

ACP: refers to African, Caribbean and Pacific Countries that are signatory to the Cotonou Agreement

EU: refers to All the Member States of European Union.

WTO/GATT compatibility: refers to the compliance of free trade areas with the provision of GATT/WTO, in particular Article XXIV governing free trade areas and customs union and the provisions of the Enabling Clause and other Special and Differential treatment provisions of GATT/WTO.

Reciprocity: refers to the principle that all parties to a free trade area or customs union must liberalize tariff and other barriers to trade between themselves in a reciprocal manner i.e. give and take basis.

1.6 SIGNIFICANCE OF THE RESEARCH

Firstly, this research aims at highlighting the options available for ACP countries as they enter into new trading arrangements with EU. The new trading arrangement must be WTO compliant. The ACP countries are torn between reciprocal and non-reciprocal options in their quest to fulfil their WTO/GATT requirements. The EU has decided on the reciprocal option but some ACP countries are of the view that such an option will jeopardise the objectives of the Cotonou Agreement. Therefore, this study will assist the negotiators for ACP countries to address the challenges and negotiate for good terms in the new EU- ACP economic arrangement. The study is relevant at the moment when the negotiations for new EPA are ongoing and ACP countries require as much input as possible to enable their negotiators and policy makers arrive at informed decisions.

Secondly, the issue of interpretation of Article XXIV of GATT/WTO is still contentious, not only within the EU-ACP economic framework, but also within the ongoing multilateral trading negotiations. Paragraph 29 of Doha Declaration empowers the WTO members to clarify and improve disciplines and procedures under the WTO provisions applying to regional trade agreements. ACP countries are participating in the negotiations, and therefore the information contained in this paper on the issue of interpretation of Article XXIV would be of great contribution to their negotiation points.

Thirdly, the paper would serve as contribution to the general jurisprudence of international trade law and as a point of academic reference for students and researchers

1.7 LITERATURE REVIEW

The ultimate objectives of the Cotonou Agreement are to eradicate poverty in the ACP countries. The importance of lifting the countries out of poverty cannot be understated, since the ACP group includes the world's poorest countries, the so called LDCs. Bjornskov and Krivonos, are however of the view that "...any developmental effort must be evaluated against the positive effects of globalisation."⁴⁷ It is with the same yardstick that one should measure the response of EPAs to the objectives of poverty eradication in ACP countries and their smooth integration into the world economy. Hoekman emphasises the "...importance of a liberal trade regime to industrial development and economic growth"⁴⁸. In terms of this view, he is supported by Vylder who emphasises the "...necessity of open trade as opposed to protectionist economic policies". Of course, many of the scholars will not argue against the trade liberalization in this era and age. However, ACP countries must be cushioned against the adverse effects of liberalization.

Due to their level of economic development, ACP countries should be allowed some flexibility when liberalizing their markets. The current EPAs under negotiation have presented ACP countries with unprecedented challenges. For the first time they are required to negotiate reciprocal trading arrangements between themselves and the economically advanced members of European Union. This has posed great challenges, not only at the economic front but also in the legal and structural framework. Of great interest is the legal requirement of compatibility of the EPAs with GAT/WTO rules.

The question of WTO compatibility has remained controversial, with each side of negotiation presenting their own interpretation of what amounts to WTO compatibility. Oyejide, and Njinkeu are of the opinion that compatibility can be achieved in two ways; either by the way of Enabling Clause or in accordance with Article XXIV of GATT/WTO.⁴⁹ A study conducted by ODI and ECDPM, however points to the fact that provisions of Enabling Clause may not be applicable to

⁴⁷ Bjornskov & Krivonos (n 7 above)

⁴⁸ B Hoekman *et al*, 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries: Objectives, Instruments and Options for the WTO.

⁴⁹ D Njinkeu & A Oyejide 'African Preparation for Trade Negotiations in the Context of ACP-EU Cotonou Partnership Agreement'.

EPAs because one of the parties is a developed country.⁵⁰ Gonzales is also of the opinion that Enabling Clause is inapplicable due to the status of EU as a developed partner.⁵¹

While the available literature largely points to the fact that the current EPAs should be treated as Free Trade Areas, and hence subject to Article XXIV of GATT/WTO, the interpretation of Article XXIV has been controversial and there is no general consensus of its meaning. Ochieng (2007) states that Article XXIV is ambiguous and that “the EU’s literal approach to interpretation of WTO laws is both legally problematic and relatively developmentally restrictive compared to ACP’S teleological approach to interpretation.”⁵² Ochieng is of the view that EU-ACP Economic agreement can meet the WTO/GATT compatibility requirements without the strict requirements of Article XXIV. However, Desta is of the view that WTO/GATT compatibility will be determined on the basis of GATT Article XXIV rather than Enabling Clause.⁵³ ODI and ECDPM Final Report states that Article XXIV poses a considerable challenge of interpretation with which EPA negotiators must grapple. “One problem is that no legally binding interpretation has been reached, even though GATT/WTO rules have been through many rounds of negotiations and formal interpretations”.⁵⁴

The ODI and ECDPM Final Report further suggests that “if the reciprocity concept (Article XXIV) is perceived as endangering the entire development impact of EPAs, then alternatives to EPAs must be found within the realm of “Enabling Clause”⁵⁵. The Report proposes application of GSP++ or a menu approach where individual countries opt out of specific chapters of an umbrella EPAs.⁵⁶ Gonzales entertains the idea that the parties to EPAs should try securing another waiver as an alternative to Article XXIV. This dissertation seeks to mediate an agreement between the divergent views.

⁵⁰ ODI & ECDPM (n 37 above).

⁵¹ Gonzales A, ‘Reciprocity in the future of ACP/EU Trade Relations with Particular Reference to the Caribbean’.

⁵² Ochieng C.M.O (n 20 above).

⁵³ Desta (n. 16 above).

⁵⁴ ODI & ECDPM (n 37 above)

⁵⁵ As above.

⁵⁶ As above.

1.8 RESEARCH METHODOLOGY

The approach in this paper would be descriptive, analytical, comparative and prescriptive. The descriptive approach will be applied to describe existing factual situations. The analytical approach will be used to analyze the GATT/WTO legal framework governing free trade areas and the Cotonou Legal framework to find out whether the compatibility test has been met. The comparative approach will be used to compare the legal provisions between EU-ACP Economic Agreements. Lastly the prescriptive approach will be used for policy recommendations.

Intensive library research and desk-top literature based review would be employed. This would entail gathering and analyzing available literature from library and the internet.

Primary and Secondary Sources of information

Primary Sources: Treaties such as the Treaty of Rome, the Yaoundé Convention, Lomé Conventions, the Cotonou Agreement, the various Economic Partnership Agreements between ACP countries and EU Member States, the GATT/WTO documents.

Secondary Sources: Text Books, Journal Articles, Reports and Papers from authoritative sources.

1.9 OVERVIEW OF CHAPTERS

Chapter One is an introductory chapter; it contains: the introduction to the dissertation, problem statement, research question, thesis statement definition of concepts, the significant of the research, literature review and research methodology.

Chapter Two is divided into three parts. The first part traces the origin of the EU – ACP relationship from the Treaty of Rome. It explores the colonial trading regime and the association of the ACP states with EU. The second part covers the emergency of ACP as a group and the establishment of formal trade agreements between ACP states and EU. The third part explores the historical events that led to the shift from non reciprocal trading arrangements to the new WTO compatible trading arrangements between ACP and EU.

Chapter Three covers the configuration of EPA negotiation groups and the current status of EPA negotiations. It also addresses the question of Compatibility of the EPAs with WTO rules. Particular emphasis is put on Article XXIV, Enabling Clause and WTO waivers. A detailed description of these key provisions is given in this chapter.

Chapter Four is the main chapter of the dissertation. First it sets out the objectives of Cotonou Agreement. Secondly it discusses the question of WTO compatibility. Thirdly it discusses the various options for achieving WTO compatibility. Various interpretations of the provisions of GATT/WTO relevant to the question of compatibility are discussed. Detailed evaluation of each of Article XXIV, Enabling Clause and WTO waiver is given.

Chapter Five is basically conclusions derived from the research.

CHAPTER TWO

2.1 The Treaty of Rome and the Convention of Association

The economic relationship between African, Caribbean and Pacific countries and the European Union (EU) has a long history that goes beyond the Lomé and Yaoundé Conventions⁵⁷ into the colonial era. Therefore the Cotonou Agreement, in this case, cannot be viewed in isolation. It is not independent of earlier historical development; on the contrary, it is conditioned and fashioned by it.⁵⁸ The historical relationships, although extinct in the juridical sense, continue very much in existence and have a bearing on the shape of the economic relationship between ACP States and EU. This chapter illustrates the historical background from which the Cotonou Agreement has evolved to help the reader understand certain key features of the current EPA negotiations and design.

The Economic relationship between ACP countries and Europe may be traced to colonial era. However during the periods of colonialism, trade between Europe and colonial dependants was restricted to few commodities. Besides spices, ivory and gold, the main exports were slaves. To discuss trade between Europe and colonial dependants during these early days is to discuss the “slave trade.”⁵⁹ The formal recognition of trade between Africa and Europe was made in the Treaty of Rome which established the European Economic Community (EEC) in 1957.⁶⁰ This marked the beginning of the historical events leading to the birth of the Cotonou Agreement four decades later.

At the time of signing the Rome Treaty, five of the six European Countries⁶¹ had overseas colonies and dependencies.⁶² France was a superpower and her colonies and dependencies had

⁵⁷ Kenya European Union Post Lomé Trade Negotiations (KEPLOTRADE).

⁵⁸ S.K Asante ‘The Lomé Convention: Towards Perpetuation of Dependence or Promotion of Interdependence’ (1981) *Third World Quarterly* 661.

⁵⁹ Guy Martin ‘Africa and the Ideology of Eurafica: Neo-Colonialism or Pan-Africanism?’ (1982) *The Journal of Modern African Studies* 223.

⁶⁰ Hennie (n 2 above) 90.

⁶¹ The original members of EEC are Italy, France, The Federal Republic of Germany, Luxembourg, Netherlands and Belgium. With the exception of Luxembourg, the rest had colonies and dependencies either in Africa.

⁶² Hennie (n 2 above). The Associated territories were as follows: Benin, Ivory Coast, Mali, Mauritania, Niger, Senegal, Togo, Upper Volta (Burkina Faso) Cameroon, Central African Republic, Chad, Congo, and Gabon; (c) the former French colony of Madagascar, Rwanda, Zaire Mauritius and Somalia, (Martin, n 59 above) 228.

close ties with her.⁶³ French companies had established themselves in her colonies. There was significant trade flow between France and her colonies.⁶⁴ Therefore France desperately needed to protect her economic interests in her colonial dependencies.⁶⁵ Thus, when the time came for signing the Treaty of Rome, France was faced with a dilemma. The Treaty of Rome was essentially establishing a customs union, which meant France had to apply a common community external tariff against non-members, including her dependencies.⁶⁶ She was faced with the choices of severing her trade relationship with her dependencies or had them included in the Treaty. Soper says that “Severance was something that France could not contemplate.”⁶⁷ There was an established economic system between metropolitan France and her overseas dependencies.⁶⁸ However, in theory it would have been possible to include her dependencies in the Treaty, but the practical problems of such a scheme were insurmountable.⁶⁹ Cosgrove puts it very well that,

The treaty was to deal with sophisticated, complex economies and rules and regulations designed to integrate these developed structures were in no way applicable to overseas territories. If the negotiators had attempted to include them in the Treaty, there would have been to be so many exceptions and safeguards clauses as to render the original rules void, yet without the exceptions and safeguards the impact would have caused havoc in the weak and backward colonial economies.⁷⁰

⁶³T Soper ‘The European Economic Community and Aid to Africa’ (1965) *International Affairs (Royal Institute of International Affairs 1944-s)*, 464.

⁶⁴ As above.

⁶⁵ The colonial superpowers still had economic influence in their colonies. They controlled the exploitation of natural resources in these colonies. They gave generous grants and aid and technical assistance to colonial companies established in these colonies to facilitate exploitation of resources. The colonies became the main suppliers of raw materials for industries in Europe, and to some extent, industrialization of the European countries became dependent on raw materials from the colonies. “Even at the time of independence, the European nations still controlled or enjoyed large concessions in mineral prospecting and exploitation. They had monopoly in trade and investment in their colonies. Therefore it became evident that their interests had to be protected and as a gesture of goodwill, France devised the “price support system” which was intended to protect the production and marketing of primary commodities from these colonies”. When the treaty of Rome was signed later, some arrangement had to be made to accommodate the interest of France, the architect of the entire scheme. (See B.W Mutharika ‘The Enlargement of European Economic Community and its Implication on African Trade Development’, (1973) *Africa Spectrum*).

⁶⁶ Soper (n 63 above) 464.

⁶⁷ As above.

⁶⁸J J van der Lee ‘Association Relationship between the European Economic Community and African States’ (1967) *African Affairs* 198.

⁶⁹ C Cosgrove ‘The Common Market and Its Colonial Heritage’ (1969) *Journal of Contemporary History* 76.

⁷⁰ As above.

The inclusion of these territories into the Community would have meant that these dependencies are treated as equal partners with their colonial masters.⁷¹ Consequently the dependencies would have been required to open their markets to the other members of EEC, thus exposing their infant industries to competition. Furthermore, they would have been required to apply a common external tariff against the rest of the world, “notwithstanding the mockery of trying to thrash out common policies for countries as diverse as German and Senegal.”⁷²

It was apparent that the overseas dependants did not have the capacity to cope with the requirements of an integrated European economy, unless a special system was put in place to help them integrate smoothly and adjust to the new environment.⁷³ France demanded the accommodation of her colonies by the Community on special terms as a prerequisite for her own participation in the community.⁷⁴ The other members of EEC grudgingly accepted the demands of France.⁷⁵ The Treaty of Rome thus came to include a special section (Part IV) which established an Association between the Community and the overseas territories.⁷⁶ The terms of the association were set out in Articles 131 - 136 of the Treaty. An Implementing Convention was also annexed to the Treaty. The Convention was to remain in force for a period of five years.⁷⁷ It was the Implementing Convention that established what was perceived to be ‘free

⁷¹ Soper (n 63 above) 465.

⁷² (as above).

⁷³ Lee (n 68 above) 198.

⁷⁴ I Gruhn ‘The Lomé Lomé Convention: Itching towards interdependence’ (1976) 30 *International Organization* 243. “It was generally agreed that issue for France was not merely trade preferences, but her desire to distribute the burden of overseas aid among six European Community members” (Gruhn, 243). “France maintained that she was unable to shoulder the burden of her colonial links and at the same time find sufficient capital for home investment to enable her industries to meet German competition”. (Cosgrove, 79)

⁷⁵ The Germans bitterly opposed the idea. Soper says, “For Germany it meant a concentration of a part of their aid programme into a section of the developing world –primarily Francophone Africa- with which they had no special economic interests. By agreeing to the demands of France she was required to place \$200m over five-year period at the disposal of the a fund which would invest most of it in the Francophone Africa; and special trading privileges were to be given to overseas countries with which Germany did little business and in many cases tariffs had to be imposed against the imports of certain commodities from the countries with which Germany did considerable business. The Dutch shared these views and were reluctant to back a system that appeared to them as being too exclusive.” (Soper, 466) However Germany and Holland “were not prepared to risk wrecking the Embryonic EEC and consequently had no choice but to join in acknowledging the community’s colonial heritage and to participate in the formation of an acceptable accommodation.” (Cosgrove, 79)

⁷⁶ Asante (n 58 above) 662.

⁷⁷ Soper (n 63 above) 466.

trade area' between the Community and overseas dependencies.⁷⁸ It also created European Development Fund (EDF) as a source of supplementary aid.⁷⁹

Part IV set out four main features of the association, namely: establishment of a free trade area between the Community and overseas territories, establishment of free trade areas between the overseas territories themselves, inauguration of the Community preferences system the establishment of a joint investment fund of \$581m.⁸⁰ Article 131 outlined the purpose and object of Part IV of the Treaty as, "to promote the economic and social development of the countries and territories and... in the first instance serve to further the interests and prosperity of the inhabitants of these countries and territories in such a manner as to lead them to the economic, social and cultural development to which they aspire."⁸¹ Some analysts have argued that the system of association between the Community and overseas territories may have been designed to assist the associated territories in their infrastructural, social and economic development.⁸² Soper says that "There is no doubt that these provisions gave considerable benefits to the associates."⁸³ The perceived benefits were non – reciprocal free market access of the imports from the associated states and the EDF.⁸⁴

⁷⁸ The free trade area between the Community and Overseas dependencies created by the Implementing Convention remained in place until the DSB ruled in the *Banana cases* that it was incompatible with GATT Art. XXIV.

⁷⁹ C Rajan 'The Lomé Convention: An Evaluation of European Economic Community Economic Assistance to the ACP states (1982) 20 *The Journal of Modern African Studies* 179.

⁸⁰ Cosgrove(n 66 above) 77.

⁸¹ Cosgrove(n 66 above) 79.

⁸² Lee (n 68 above) 198.

⁸³ Soper (n 63 above) 465.

⁸⁴ The principles of free market access and reciprocity as explained by Soper & Lee are hard to reconcile with the colonial relationship that existed between the Europe and associated dependencies. The economies of the dependencies were under the control of the European superpowers. European companies had established themselves in these associated dependencies, and the commodities which were being exported to EEC markets were in reality being exported by the EEC nationals. The dependencies were at the time considered as the extensions of the European Countries that colonized them, as opposed to independent states. In any event, the EEC countries desperately needed these commodities for their industries. It is hard to imagine how they would have established barriers to entry of the same commodities that were considered as life-blood of their own industries. Therefore the idea of free market access as understood in the modern economic sense lacks logic in this case. Another idea which could not be supported is 'reciprocity'. The colonial dependencies had no control of how much of their natural resources were plundered by the EEC companies established in these colonies, and therefore the excess natural resources extracted by this companies could as well be regarded as sufficient compensation for the 'free market access' flaunted by EEC.

2.2 The Yaoundé Convention and the ACP group

The Convention of Association expired on December 31, 1962.⁸⁵ At that time most of the associated states had gained independence.⁸⁶ The newly independent states, with exception of Guinea, negotiated for another trade agreement with the EEC to replace the Implementing Convention which had just expired.⁸⁷ The new agreement known as Yaoundé Convention I⁸⁸ was signed in July 1963 and came into force in 1964.⁸⁹ Unlike the Implementing Convention, the Yaoundé Convention was a negotiated agreement between independent states.⁹⁰

The Yaoundé Convention was expected to put the interests of the new states at the forefront, since these countries had participated in its negotiation. However, contrary to the general expectation, the Yaoundé Convention was a replica of Part IV of the Treaty of Rome.⁹¹ The similarity in the two conventions raises doubt whether there was an effective negotiation between EEC and the newly independent states as independent and equal partners. Soper supported the notion that Yaoundé Convention was, "...in fact, a negotiated treaty between 24 states: six of the Europe and 18 associates."⁹² Lee and Cosgrove expressed a contrary opinion. Lee says that, "With the exception of Guinea, the governments of these countries all asked that the association between their countries and EEC be *continued* (emphasis added)."⁹³ Cosgrave says that "The association link was maintained and subsequently *renewed* (emphasis added) in Yaoundé Convention."⁹⁴ These comments by scholars give a general indication that Yaoundé Convention was a renewal or an outright continuation of Implementing Convention under the Treaty of Rome.

⁸⁵ Soper (n 63 above)466; Cosgrove (n 69 above) 80 & Lee (n 68 above)199.

⁸⁶ Soper (n 63 above) 466 & Lee (n 68 above)199.

⁸⁷ The decision by the newly independent states to negotiate an economic agreement with the EEC was interpreted in two ways. On one hand it was seen as a sign of political maturity of the leadership of these countries. On the other hand it was seen as an indication that the colonial superpowers were not ready to relinquish their hold on the economies of these new states (Cosgrove, n 66 above)80.

⁸⁸ It was named after Yaoundé, the capital of Cameroon, where it was signed.

⁸⁹ Soper (n 63 above) 467.

⁹⁰ The Implementing Convention was a unilateral agreement handed to the associated states by the EEC. It was drafted by the EEC members without the participation of the associated states.

⁹¹ Guy (n 59 above) 228.

⁹² Soper (n 63 above) 466.

⁹³ Lee (n 68 above) 199.

⁹⁴ Cosgrove (n 66 above) 80.

The structure of Yaoundé Convention was probably not intended by the new states. However, serious factors might have contributed to the shape and direction for negotiations of Yaoundé Convention. Firstly, the most compelling factor was lack of negotiation skills amongst the newly independent states. Secondly, the obsession with financial aid from EEC by the new states might have marred their attention from the details of negotiations, thus giving the EEC the leeway to determine the direction and outcome of the negotiations. For these reasons, any suggestion that Yaoundé Convention was a *negotiated* Treaty in the real sense cannot be sustained.

The Yaoundé Convention I expired in 1968 and it was subsequently renewed as Yaoundé Convention II in 1969 for a period of five years. The Yaoundé Convention II did not differ substantially from the first Convention. However, it introduced minor innovations, but still leaving the basic structure of the original agreement intact.⁹⁵ As Green remarked, “the second Yaoundé Convention in particular, retreated from the Eurafrican model but retained the basic nature of a set of paternalistic relationships ‘given’ by EEC and ‘accepted’ by the Associates.”⁹⁶

Prior to Yaoundé I negotiations, Britain, another imperial force which had colonies and dependencies overseas, sought to join the EEC membership in 1961, but her application was vetoed by France.⁹⁷ The failure to secure membership by Britain meant that the Commonwealth Africa and other commonwealth countries would not accede to the Convention of Association. Nevertheless, the EEC members agreed to give the Commonwealth African countries the option of negotiating for an association agreement under Article 238 of the Rome Treaty on the basis of reciprocal rights and obligations or signing an agreement for expansion of trade with the Community.⁹⁸ Consequently Nigeria negotiated for an agreement in 1966, which never came into force because of the French opposition to it on the grounds of the Nigerian Civil War. The

⁹⁵ Martin (n 59 above) 228.

⁹⁶ Asante (n 58 above) 662.

⁹⁷ The application by Britain to join EEC presented a dilemma for France. On one hand, the entry of Britain would have meant the convention of association would have been open to commonwealth Africa and certain other commonwealth countries. The benefits of the association which, hitherto, had been reserved for Francophone dependencies were under the threat of being shared among 100million additional Anglophone Africans, who were economically more advanced than the Francophone Africans. On the other hand it looked as if the membership of Britain would have resulted in expansion of the market for exports from Francophone Africa. Further, there would have been an additional British contribution to the development Fund. But eventually France was not ready to accommodate Britain and vetoed her application for membership (see Soper at pp.469).

⁹⁸ Mutharika (n 65 above) 126.

East African Community (EAC) countries of Kenya, Uganda and Tanzania also signed an Agreement with the EEC in Arusha in 1969 (Arusha Agreement).⁹⁹

Commonwealth countries did not show enthusiasm for Yaoundé Conventions despite having been availed the option of joining it. Probably this was largely due to rejection of the Britain's application to join the EEC. Soper says that, "But even before the veto, those Commonwealth African countries which had expressed their views were virtually unanimous in condemning the association." Besides Nigeria and the EAC countries, no other Commonwealth country attempted to join the Yaoundé Conventions or negotiate separate agreement with the EEC. In fact the attitude of the Commonwealth Africa was laced with suspicion and there was a general tendency to echo the views expressed by the Ghanaian President who accused the EEC members for neo – colonialism.¹⁰⁰

The Yaoundé Convention was a subject of diverse opinions. Scholars such as Asante attacked the Convention with the theory of neo-colonialism. Asante was of the opinion that the Conventions actually bolstered colonial structures. "As an unequal relationship, it ensured Europe's continuing economic domination of Africa even after formal decolonization".¹⁰¹ However, despite the forgoing criticism, the Yaoundé regime did not lack its share of support. Soper tried to counter the charges of neo-colonialism by asserting that the Yaoundé Conventions were as a result of hard-fought negotiations between 18 independent African states and six independent European ones.¹⁰² Soper was of the view that African states stood to benefit from free market access of their products to the European markets and that the industrialization programs and financial assistance outlined in the conventions were aimed at helping the African states diversify their economies.¹⁰³

Against the backdrop of Yaoundé regime was the changing shape of EEC, which to some extent helped ease the tension and suspicion displayed by the critics of Yaoundé Regime, and in particular the commonwealth countries. In 1973, two years before the expiry of the Yaoundé II Convention, Britain was admitted into EEC membership. Other than France, Britain was another

⁹⁹ Gruhn (n 74 above) 245.

¹⁰⁰ Soper (n 63 above) 474, Gruhn (n 74 above) 244.

¹⁰¹ Asante (n 58 above) 662.

¹⁰² Soper (n 63 above) 475.

¹⁰³ (As above).

imperial power with a larger number of colonies and dependants overseas. The entry of Britain into EEC had cleared the way for the commonwealth countries, which hitherto had remained out of the Yaoundé regime, to participate in the negotiations with EEC. The membership of Britain in EEC might have been viewed by many, and in particular her overseas colonies and dependencies, as an endorsement of the Yaoundé regime, despite the attacks and criticism from some of these dependencies. They had no choice but to follow their colonial master, to whom they were economically dependent. Therefore when the Yaoundé II expired in 1975 it was evident that the negotiations for the next convention would involve a bigger group than the previous conventions.¹⁰⁴ Britain had dependencies in Africa, the Caribbean and in the Pacific, which formed the commonwealth countries.

In the Treaty of Accession between the EEC and UK, the EEC proposed three options for the Commonwealth countries in Africa, the Caribbean and the Pacific to become associated with EEC. They were either to join Yaoundé Convention, conclude special conventions or conclude free trade agreements as a group or as individual countries.¹⁰⁵ However, with exception of a few African countries, majority of the Commonwealth countries did not have prior experience with the negotiations of trade agreements.¹⁰⁶ Therefore it was necessary that the African, Caribbean and Pacific countries should negotiate with EEC as a group as opposed to individual countries. Nigeria and the EAC countries¹⁰⁷ were mandated to spearhead the negotiations leading to the formation of the African, Caribbean and Pacific (ACP) Group as a formal organization. The Agreement establishing ACP group was signed on June 6 1975 in Georgetown by 46 countries, 37 African, six Caribbean and three Pacific countries.¹⁰⁸

2.3 From Lome Convention to Cotonou Agreement

The structure established in Yaoundé remains the framework for many aspects of ACP-EU cooperation until today.¹⁰⁹ The Yaoundé II Agreement expired in 1974 and it was succeeded by

¹⁰⁴ W Benedek 'The Lomé Lomé Convention and the International Law of Development: A Concretization of the New International Economic Order?' (1982) 26 *Journal of African Law* 82.

¹⁰⁵ K O Hall & B W Blake , 'The Emergency of the African, Caribbean, Pacific Group of States: An Aspect of African and Caribbean International Cooperation(1979) 26 *African Studies Review*113.

¹⁰⁶ Hall & Blake (n 103 above) 114.

¹⁰⁷ These countries had attempted to negotiate trade agreements with EEC, and therefore it can be said that it was logical for them to be chosen to spearhead the negotiations on the basis of their prior experience.

¹⁰⁸ Hall & Blake (n 105 above) 111.

¹⁰⁹ Hall & Blake (n 105 above)113.

a new agreement known as the Lomé Convention, which was signed in the capital of Togo in 1975. The agreement was signed by nine EC Members States and 46 ACP countries.¹¹⁰ The Lomé Convention, like its predecessor, featured a system of non-reciprocal trade preferences between the ACP and the expanded European Community (EC), meaning that the ACP could export freely into the EC markets while the EC Member States were required to pay tariffs on their exports.

The Lomé Convention I, which was signed in 1975, was renewed in 1981. The Lomé II Convention was signed on October 31, 1979 in Lomé, Togo, and came into force in 1981 between 10 EEC countries and 63 ACP states.¹¹¹ Lomé II introduced only a few innovations, the main emphasis being on the consolidation and further development of the existing agreement.¹¹² It was succeeded by Lomé III (1985) and Lomé IV (1990). Unlike Lomé I, II and III, which were for a period of five years each, Lomé IV was the longest, covering a period of ten years up to 2000.

The most important improvements of Lomé Conventions were in three areas. Firstly, the Convention offered preferential access without reciprocity to the vast majority of exports from ACP countries. Secondly, the Convention introduced compensation schemes for ACP exports primary commodities whose earnings declined in short term. These were known as STABEX (for agricultural commodities) and SYSMIN (for mineral exports). Thirdly the Convention expanded the European Development Fund (EDF).¹¹³

Despite the foregoing innovations introduced into the EEC- ACP relationship by the Lomé Conventions, there is no trade agreement between EEC and ACP that has received negative publicity and attacks like the Lomé Conventions. Unlike the positive reception that accompanied its launch in 1975, the sunset days of Lomé regime witnessed numerous calls to have it overhauled. During the 25 years of existence, it provoked varied reactions. At its inception, a number of scholars and analysts openly came to its support. Zartman described it as "...a welcome development, and as the latest step in a slow historical process from colonial

¹¹⁰ Hall & Blake (n 105 above) 113.

¹¹¹ Benedek (n 104' above) 82.

¹¹² Hall & Blake (n 105 above)113.

¹¹³ V A Mahler, 'The Lomé Lomé Convention: Assessing a North-South Institutional Relationship' (1994) *Review of International Political Economy*235.

domination towards mutual cooperation and equality.”¹¹⁴ Gruhn similarly describes the Lomé Convention as a “progressive document” and an “itching towards interdependence”.¹¹⁵ Woulers says that Lomé Convention “is more than an enlargement of old colonial links”. She is of the opinion that the Convention is a step towards a “new system of relations between the EEC and ACP countries”. This relationship, she remarked, “can no longer be characterized as neo-colonialist”¹¹⁶

The critics of Lomé on their part denounced the agreement as yet another manifestation of an exploitative international division of labour.¹¹⁷ Martin says that “Europe's main objective through the Lomé Conventions has been to obtain secure and stable access to Africa's strategic raw materials...while gaining preferential access to additional markets, where the excess capacity of European industries can find a convenient outlet.” He concludes by stating that “Lomé I was indeed a neo-colonial pact, linking Europe and Africa in a contractual relationship of little value to the latter, but of great benefit to the former.”¹¹⁸ In a nutshell, Africa was seen from the European perspective as an instrument for industrial development of Europe.¹¹⁹

Parfitt agrees further with Martin that the Lomé regime performed dismally and below the expectations of those who had viewed it as ‘useful step toward a new international economic order.’¹²⁰ On his part, Parfitt attacked the shortfalls of the provisions of the Lomé Convention, in particular the rules of origin, safeguard measures and financial aid. He states that, “It was clear that the ACP countries had failed to substantially expand their exports to Europe. This failure is largely attributed to the stringent rules of origin which stipulated that 50% of the value added must have been produced within the ACP states or the EEC in order to access to the community markets.” The architects of the rules of origin intended to perpetuate the dependence of ACP to

¹¹⁴ Asante (n 58 above) 658.

¹¹⁵ As above. For further details see Gruhn (n 74 above).

¹¹⁶ (As above).

¹¹⁷ The concept of international division of labour is well explained by Martin in his exposition of the ideology of EuroAfrica, in which Europe and Africa were seen as ‘interdependent’ and ‘complementary’. According to this ideology, Europe required the raw materials from Africa and markets for their finished products while Africa needed the capital, technology, and knowhow of Europe. Africa thus became the main suppliers of raw materials and agricultural commodities while Europe reserved for itself the exclusive right to industrial production supply of manufactured goods. For further details see Martin (n 59 above) 225 & Parfitt (n 120 below) 722, ‘Lomé was meant to preserve the existing division of labour rather than create a new dispensation’.

¹¹⁸ Martin (n 59 above) 231.

¹¹⁹ Martin (n 59 above) 226.

¹²⁰ T.W Parfitt ‘Equals, Clients or Dependents? ACP Relationship with EEC under the Lome Convention’ *The Journal of Modern African Studies*, (1987) 717.

EEC and ensure that ACP countries did not develop beyond mere suppliers of raw materials. In essence any imports into ACP countries which would have had a significant contribution to industrial development in these countries had to come from the EEC, under terms dictated by the EEC. The Lomé Convention further introduced the safeguard measures, which further complicated attempts by ACP states to export to EEC markets. The EEC architects of Lomé Convention indeed realized that these measures will elicit little interest from ACP States and therefore introduced grants and loans on easy terms just to keep ACP countries interested in a rather disappointing trade arrangement. STABEX and SYSMIN appeared to be designed to secure EEC access to ACP agricultural product and minerals.¹²¹

David Wall is another critic who urged that Lomé was “not only neo-colonial in tone but also it perpetuated the client status of Africa”.¹²² Michael Dolan was another neo – colonial theorist.¹²³ In the opinion of Lynn Mytelka, the Lomé Convention brought about a new order of international division of labour, where ACP countries were mere suppliers of raw materials and agricultural commodities.¹²⁴ In his support of the theory of ‘international division of labour’, Asante was of the opinion that “the main interest of Europe in the Lomé ‘deal’ was to ensure a ‘reliable flow of cheap primary products’ and to retain her already ‘established markets in Africa for manufactured and capital goods’”.¹²⁵ ACP countries’ main interest in the Lomé Convention was to expand their European markets for manufactured and processed goods.¹²⁶ Therefore there was conflict of interests. Asante argues further that, “This essential incompatibility of interest had reflected not only most of the provisions of the Lomé Convention but also, and perhaps more importantly the implementation of the provisions”.¹²⁷

Beyond the criticism from scholars, the trading performance of the ACP countries was one of the major disappointments of the Lomé Regime. The ACP share of the European market was in decline since its inception.¹²⁸ From an average of 7% in 1975, the ACP exports to the ECC had

¹²¹ As above.

¹²² Asante (n 58 above) 659.

¹²³ As above.

¹²⁴ As above.

¹²⁵ Asante (n 58 above) 663.

¹²⁶ As above.

¹²⁷ Asante (n 58 above) 663.

¹²⁸ T Parfitt ‘The Decline of Eurafrica? Lomé’s Mid-Term Review’ *Review of African Political Economy, The Cunning of Conflict* (Mar., 1996) 59.

dropped to a mere 3.7% by 1991, at the time when Lomé IV was coming into force.¹²⁹ As the Lomé Convention progressed slowly towards its end, a general disquiet about its future was starting to emerge. The European Commission was the first to argue that “the impact of trade preferences has been disappointing and Lomé needs to change because it has failed to meet any one of its principal objectives.”¹³⁰ For example, three-fourths of LDCs are ACP members.¹³¹ There was no doubt that the Lomé Regime had failed to bring the ACP economies into the world economy. Furthermore the ACP countries failed to diversify their export products to include processed and manufactured goods.¹³²

On their part, the ACP states registered a number of concerns about the Lomé Regime. They felt that the size of aid was inadequate, coverage of STABEX was limited and their trade preferences in EEC were diluted.¹³³ The dilution of preferences was not only as a result of EEC’s expansion and bilateral agreements with other groups such as Maghreb and Mashreq, but also as a result of multilateral rounds of negotiations that helped to reduce the MFN rates.¹³⁴ The EU had entered into preferential trade agreements with several countries in Latin America, South East Asia and the Mediterranean.¹³⁵ These preferences collectively acted to reduce the value of the Lomé preferences enjoyed by ACP countries.¹³⁶ The expansion of the EEC itself by the entry of Eastern Europe countries into its membership further complicated things for ACP countries in terms of aid received. For example in 1991, the ACP states received on average 44% of the

¹²⁹ As above.

¹³⁰ R Gibb ‘Post-Lomé: The European Union and the South’ *Third World Quarterly* (Jun., 2000) 463.

¹³¹ As above.

¹³² As above.

¹³³ A. J. Kondonassis ‘Some Major Trade and Development Programs of the European Economic Community with the LDCs: Toward a Common Development Policy?’ *Journal of Economic Issues* (Jun., 1984) 656.

¹³⁴ The Value of the ACP’s non-reciprocal trade preferences had been eroded with successive GATT tariff reductions. As a result of the reduction of the EU’s Common External Tariff (CET), following the implementation of the Uruguay Round, the value of the trade concessions offered by Lomé to the ACP had in relative terms diminished significantly. Lomé regime offered few benefits above those available under the WTO’s MFN regime, under which 84% of the ACP exports to the EU were allowed duty free, with the remaining 16% of exports being taxed at around 8%. In other words, Lomé trade preferences benefited only 16% of the ACP exports and furthermore, this percentage was set to fall dramatically as the Uruguay Round was implemented (see Gibb at pp 466).

¹³⁵ Gibb (n 130 above) 466.

¹³⁶ As above.

amount of aid that the 10 Eastern European countries that joined the EU's Phare aid programme received.¹³⁷

Besides the criticism levelled against the Lomé Convention by the scholars and its failure to meet any of its objectives, perhaps the biggest challenge that was facing the Lomé Convention was an external force emerging from the regulatory environment governing international trade. Since the creation of WTO, the Lomé Convention was "seen as operating in accordance with principles and philosophies at odds with a neo-liberal growth philosophy".¹³⁸ There was a growing perception that the non-reciprocal Lomé regime was contrary to the GATT/WTO principle of Most Favoured Nation (MFN). The MFN rule is at the centre of GATT/WTO system.¹³⁹ It is contained in Article I: 1 of GATT.¹⁴⁰ Under this principle, if any GATT/WTO signatory grants to another country any advantage, favour, privilege or immunity to products originating from that other country, it must immediately and unconditionally give the same treatment to imports from all signatories.¹⁴¹

The EU tried to justify its relationship with ACP and insisted that the Lomé regime was compatible with the GATT/WTO principles. This sparked a series of legal cases that were brought against EU to challenge its discriminatory trade regime with ACP states. In 1997 the WTO Dispute Settlement Body (DSB) through the panel decision in the *EC - Banana* cases¹⁴² declared the Lomé Convention to be discriminatory contrary to Article I: 1 of GATT/WTO. The EU had to retreat and seek a waiver for the trade preferences of Lome Convention.

¹³⁷S R Hurt 'Co-operation and Coercion? The Cotonou Agreement between the European Union and ACP States and the End of the Lomé Convention' *Third World Quarterly* (2003) 165.

¹³⁸Gibb(n 130 above) 469.

¹³⁹ WTO Guide To the Uruguay Round Agreements (1998) 43. Retrieved from Electronic Database (WTO Electronic Documentation, CD-ROM, 2009 release).

¹⁴⁰ Article I:1 of GATT states that, "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating of all other in or destined for the territories contracting parties".

¹⁴¹ WTO Guide To Uruguay Round Agreements (n 139 above) 43.

¹⁴² In the *Banana* cases, EU granted preferential treatment to Bananas originating from Caribbean, ACP states but refused to grant similar treatment bananas from Lomé other GATT/WTO signatories from Latin America. 'Although the case against the Union's banana regime was brought by, among others, Guatemala, Honduras, Mexico and Ecuador, it was instigated and pursued by the USA, which has no banana export of its own, in support of Chiquita, a large American multinational, and its right to market and ship bananas to the EU', see Gibb (n 130 above) 468.

In addition to the failure to meet any of its objectives, Lome Regime had failed the legitimacy test under GATT/WTO and its overhaul was inevitable. There were only two ways of making Lome Regime compatible with GATT/WTO: to end the practice of non-discrimination by extending preferential treatment to all GATT/WTO signatories “at a specified level of development”, or by establishing free trade areas between EU and ACP.¹⁴³ These options are available as exceptions to MFN principle.

The ACP countries, which were still experiencing the effects of diluted preferences by virtue of expansion of EEC, were not in favour of the idea of extending the preferences, which hitherto, were exclusively enjoyed by them, to all other developing countries. The case for ACP countries was that this option would significantly reduce their market access in “absolute terms” and also reduce their “preferential margins in relative terms”.¹⁴⁴ The European Union, on its part, had already indicated its bias against non-reciprocity and it was not interested in entering into another non-reciprocal trading arrangement. With the foregoing in mind, the parties to Lomé embarked on negotiations for another trading regime. The new trading regime was to comply with GATT/WTO and at the same time maintain discriminatory preferences. The outcome of their intense negotiations, stretching for a period of over 18 months, was the Cotonou Agreement, which was signed on 23 June 2000 in Cotonou,¹⁴⁵ Capital of Benin, and came into force in June 2001 for a period of 20 years.

The Cotonou Agreement was intended to address the shortcomings of the Lomé Conventions. It is both a development cooperation and preferential trade agreement. Preferential trade agreement is “agreement to agree”.¹⁴⁶ The Agreement states that, “The partnership shall be centered on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy.”¹⁴⁷ These objectives are meant to inform all development strategies and economic and

¹⁴³ Gibb (n 130 above) 469.

¹⁴⁴ Gibb (n 130 above) 467.

¹⁴⁵ Lomé The agreement was scheduled to be signed in Suva, Fiji on 8 June 2000. However the Coup in Fiji caused the cancellation, and the ceremony taken to Cotonou (see M Holland 20/20 Vision the EU’s Cotonou Partnership Agreement at p.163).

Lomé ¹⁴⁶Bjornskov & Krivonos (n 7 above) 2.

¹⁴⁷ Article 1 of Cotonou Agreement.

trade cooperation, taking account of the political, economic, social, cultural and environmental aspects of development.¹⁴⁸ .

The Cotonou Agreement sets out two areas of cooperation between ACP countries and EU. These are development cooperation and economic and trade cooperation. Both areas are interlinked and complimentary. Measures taken by the parties in both areas must be mutually reinforcing.¹⁴⁹ The central objective of ACP-EU development cooperation is poverty reduction and ultimately its eradication; sustainable development; and progressive integration of the ACP countries into the world economy.¹⁵⁰ Therefore any economic and trade agreement between ACP and EU, must support the above objective, and both parties must ensure that any economic and trade agreements initiated between themselves within the sphere of the Cotonou Agreement do not compromise the above objective.

The aim of economic and trade cooperation is to foster *smooth and gradual integration* of ACP States into the world economy, thereby promoting their sustainable development and contributing to poverty eradication. The Objective of economic and trade cooperation as set out in the Cotonou Agreement, is to enable ACP states play a full part in international trade.¹⁵¹ Both parties to the Agreement are enlightened to the fact the ACP countries are likely to be faced with a myriad of challenges during globalization of their economies. The Agreement provides that economic and trade cooperation measures should aim at managing these challenges, and not creating obstacles and new challenges. Further, given the wide disparity in the level of development between EU on one hand and ACP countries on the other, the process of globalization of ACP economies should not be sudden but gradual, over a reasonable period of time.¹⁵²

While the development strategies between the parties are well set out in the Cotonou Agreement, the economic and trade strategies are not. The Agreement provides that, ““*In view of the objectives and principles set out above, the Parties agree to conclude new World Trade*

¹⁴⁸ As above.

¹⁴⁹ Article 18 of Cotonou Agreement.

¹⁵⁰ Article 19 of Cotonou Agreement.

¹⁵¹ Article 34 of Cotonou Agreement.

¹⁵² As above.

*Organisation (WTO) compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to "trade"*¹⁵³ (emphasis added). It was in this context that negotiations for Economic Partnership Agreement (EPA) between EU and ACP Countries were launched on 27 September 2002.¹⁵⁴

¹⁵³ Articles 36 of Cotonou Agreement.

¹⁵⁴ Kenya European Union Post Lomé Trade Negotiations (KEPLOTRADE) <http://www.keplotrade.org>.

CHAPTER THREE

3.1 Overview of the EU-ACP EPAs

The Cotonou Agreement does not provide explicitly for the configuration of ACP countries for negotiation purposes. Article 37.5 of Cotonou Agreement provides that the negotiations are open, first to those countries “which consider themselves in a position to do so at the level they consider appropriate and in accordance with the procedures agreed by the ACP Group, taking into account regional integration process within the ACP.”¹⁵⁵ This article envisages individual ACP countries negotiating separately as opposed to one unified ACP group. This is probably in recognition of the differences in levels of economic development and negotiating capacities amongst ACP countries. The EU members are negotiating as a group. However, the article emphasizes that the ACP members should adopt the common procedures agreed upon by the ACP Group when negotiating with the EU. The ACP countries that do not consider themselves in a position to negotiate for EPAs should be provided with “alternative possibilities”.¹⁵⁶ The obligation to explore alternative possibilities is on EU. However, it is not clear from the agreement whether such an obligation is enforceable.

Other than ACP countries negotiating individually, there is room for groups of ACP countries to negotiate as regional groupings. Regional integration process is emphasized as an important factor when considering regional groupings for negotiations. Perhaps this was the motivation for the European Commission’s (EU) position¹⁵⁷ that the negotiations for ACP-EU new trading agreement should be based on existing regional groupings as far as possible. This was contained in the Commission’s Green Paper of 1996, which developed the notion of Regional Economic Partnership Agreement (REPAs).¹⁵⁸

The EU’s emphasis for regional grouping was seen as an opportunity for ACP to enter into the world economy. It was argued that a large group of ACP countries would present a bigger market for goods and services and opportunities for investment. Also, the removal of trade

¹⁵⁵ S Bilal ‘*The Future of ACP – EU Trade Relations: An overview of Forthcoming Negotiations*’ (2002) 1 ECDPM-ODI Discussion Paper 19.

¹⁵⁶ Article 37.6 of Cotonou Agreement.

¹⁵⁷ The position of the EU was contained in the Commission’s paper, “*Orientation on the Qualifications of ACP Regions for the Negotiations of Economic Partnership Agreement*” and later presented as in “the 1996 Green Paper” which developed the notion of Regional Economic Partnership Agreement .See Bilal (as above) para 3.

¹⁵⁸ Bilal (as above) para 3.

barriers on a large group presented a faster avenue for integrating the economies of ACP countries into the world economy. Another support for regional grouping was the idea of economies of scale in production.¹⁵⁹ Taking account of the existing regional groupings in ACP countries, the EU Commission was aware of the possibility of creating overlapping EPAs and therefore insisted that ACP countries which are members of more than one regional grouping should commit to one regional grouping for the purpose of negotiating EPAs.¹⁶⁰ The EU also recognized that although regional grouping were ideal for negotiations, there were some ACP members who did not belong to any of the existing regional entities. Such countries were free to negotiate EPAs individually, “provided they qualify for EPAs”.¹⁶¹ The EC set somewhat ambiguous conditions for qualification for country specific EPAs. Firstly, the country specific EPA should not negatively affect regional integration initiative within the ACP, and secondly that the negotiations for these EPAs should only be considered only if the establishment of the country specific EPA is likely to contribute to the sustainable development and poverty eradication of the country concerned.¹⁶² Therefore from the outset, the EU favoured regional economic partnership agreements over country specific EPAs.

Mapping ACP negotiating groupings on the basis of existing regional bodies was complicated by the membership of non-ACP members in these regional bodies. For instance, South Africa, a non-ACP, was a member of Southern Africa Customs Union (SACU) together with Botswana, Lesotho, Namibia and Swaziland (BLNS). Egypt, another non-ACP country, was a member of the Common Market for Eastern and Southern Africa (COMESA) free trade area together with ACP members. Dealing with these two particular countries presented a dilemma for EU. To exclude them from negotiations would have been contrary to the Cotonou Agreement’s principle of regional integration. On the other hand, including them would have defeated the purpose and objectives of Cotonou Agreement, which is a discriminatory trading regime. In the COMESA free trade area, it was easier to exclude Egypt from the negotiations, because in a free trade area, each country is free to pursue its own external trade policies independently. However, such a measure will be difficult to implement under a customs union where the members of the customs

¹⁵⁹ Bilal (as above)20.

¹⁶⁰ Bilal (as above) 21.

¹⁶¹ Bilal (as above)22.

¹⁶² As above.

union have a common external policy.¹⁶³ For this reasons South Africa had to be included in the Southern African Development Cooperation (SADC) EPA negotiations.¹⁶⁴ But due to its non ACP status, it had to negotiate and sign a separate bilateral agreement on Trade, Development and Cooperation with the EU and its members.

Another concern in the ACP configuration was the existence of “Everything But Arms” (EBA) initiative. The Least Developed Countries (LDCs) of the ACP Group were already enjoying the benefits provided in EPA under the EBA initiative. Such countries had no incentive to participate in EPA negotiations.¹⁶⁵ Eventually only nine of the 41 LDCs in the ACP Group managed to initial or sign an EPA.¹⁶⁶

Economic Partnership Agreements negotiations begun in 2002 with ACP as a group but later in 2004 split into regional negotiating groups.¹⁶⁷ However, at the time, only three regions had established functioning Customs Unions. Eventually six EPA regional negotiating groups were established.¹⁶⁸ These groupings either incorporated non-members into existing regional groups as was the case in the Caribbean and Pacific, or merged existing “sub-regions” to create a bigger region as was the case in Africa where SACU was absorbed into SADC negotiating group.¹⁶⁹ Some sub-regions were split to create more negotiating groups. For example, COMESA was split into ESA, EAC and SADC. Table 1 shows the ACP configuration for EPA negotiations and the countries which have initialled or signed interim and full EPA as at December 2007.

¹⁶³ As above.

¹⁶⁴ Article 2.2 of the Protocol 3 annexed to the Cotonou Agreement states that, “South Africa shall be fully associated in the overall political dialogue and participate in the joint institutions and bodies set out under this Agreement.”

¹⁶⁵ Bilal (n 155 above)23

¹⁶⁶ L Fontagne et al ‘ An Impact Study of the EU – ACP Economic Partnership Agreement in the Six ACP Regions’ (2008) 12.

¹⁶⁷ M Meyne ‘Economic Partnership Agreement: a ‘historic step’ towards a partnership of equals’? (2008) ODI Working Paper.

¹⁶⁸ East African countries of Kenya, Uganda, Tanzania, Burundi and Rwanda, although they negotiated under the ESA negotiating group, they later broke off and signed their own separate EPA as EAC Group.

¹⁶⁹ Meyne (n 167 above) 5.

Table 1: ACP Configuration and EPA Signatories

Configurations	Members	Signatory states in December 2009	Countries falling into EBA/Standard GSP	Proportion of signatory countries (%)	Number of liberalization schedules
ESA EPA	Comoros Djibouti Eritrea Ethiopia Madagascar Malawi Mauritius Seychelles Sudan Zambia Zimbabwe	Comoros Madagascar Mauritius Seychelles Zimbabwe	Djibouti Eritrea Ethiopia Malawi Sudan Zambia	45	5
EAC EPA	Burundi Kenya Rwanda Tanzania Uganda	Burundi Kenya Rwanda Tanzania Uganda	—	100	1
SADC EPA	Angola Botswana Lesotho Mozambique Namibia South Africa Swaziland	Botswana Lesotho Mozambique Namibia Swaziland	Angola	71	2
CEMAC EPA	Cameroon Chad Cent. African Rep. Congo DR Congo Eq. Guinea Gabon S. Tomé/Principe	Cameroon	Chad Cent. African Rep. Congo DR Congo Eq. Guinea Gabon S. Tomé/Principe	12.5	1
ECOWAS EPA	Benin Burkina Faso Cape Verde Côte d'Ivoire Gambia Ghana Guinea Bissau Liberia Mali Mauritania Niger Nigeria Senegal Sierra Leone Togo	Côte d'Ivoire Ghana	Benin Burkina Faso Cape Verde b Gambia Guinea Bissau Liberia Mali Mauritania Niger Nigeria Senegal Sierra Leone Togo	13	2
PACP EPA	Cook Islands Fed. Micronesia Fiji Kiribati Marshall Islands Nauru Niue Palau Papua New Guinea Samoa Solomon Islands Tonga Tuvalu Vanuatu	Fiji Papua New Guinea	Cook Islands Fed. Micronesia Kiribati Marshall Islands Nauru Niue Palau Samoa Solomon Islands Tonga Tuvalu Vanuatu	14	2
CARIFORUM	Antigua/Barbuda Bahamas Barbados Belize Dominica Dominican Rep. Grenada Guyana Haiti Jamaica St Kitts/Nevis St Lucia St Vincent/Grenadines Suriname Trinidad/Tobago	Antigua/Barbuda Bahamas Barbados Belize Dominica Dominican Rep. Grenada Guyana Haiti Jamaica St Kitts/Nevis St Lucia St Vincent/Grenadines Suriname Trinidad/Tobago	—	100	1

Source: M Mayne 'Economic Partnership Agreements: A 'historic step' towards a 'partnership of equals'?' (2008).

As the deadline for the WTO Waiver, approached, many ACP countries had not negotiated for EPAs. Panic begun to set in, particularly among non-LDC ACP members, upon their realization that EU was not going to seek extension of the waiver and that there was no fallback mechanism in place. The non-LDCs realized that unless they signed an EPA before the December 2007 deadline, they were likely to lose their preferences to the EU market. The EU was adamant that only “trade in goods EPAs would be sufficient to meet the December deadline.”¹⁷⁰ It became obvious that most ACP countries were not ready to sign comprehensive EPAs. Therefore EU crafted what became to be known as the “steppingstone agreements”, which provided for continued negotiations for comprehensive EPAs.¹⁷¹ Consequently 35 of the 77 ACP countries signed or initialed these “steppingstone” or interim agreements. The 35 signatories included 9 LDCs and 26 non-LDCs. The remaining 42 ACP countries which did not sign included 32 LDCs which are eligible to benefit from the EBA initiative, and 10 non-LDCs, which now fall under the standard GSP, in absence of new ‘alternatives to EPAs’.¹⁷²

Only three of the six configurations have more than half of their members initialed or signed an EPA.¹⁷³ All members of EAC and Caribbean Forum (CARIFORUM) signed an interim EPA and a full EPA respectively as a group, achieving 100% of the signatories. In SADC EPA, with exception of Angola, all other members separately initialed interim EPAs, but subsequently Namibia failed to sign her EPA¹⁷⁴. In CEMAC, Cameroon was the only signatory. In ECOWAS, Ghana and Cote d’Ivoire signed separate interim EPAs. The rest of the ECOWAS members have been invited to join either Ghana or Cote d’Ivoire EPAs. It appears that the ECOWAS is set to be divided into two ‘sub-groups’: Francophone and Anglophone.¹⁷⁵

¹⁷⁰ (As Myne(n 167above)7.

¹⁷¹ As above, para 2.

¹⁷² Fontagne (n 166 above).

¹⁷³ Myne (n 167 above)8.

¹⁷⁴South Africa, another member of SADC configuration, signed a separate Trade, Development and Cooperation Agreement. Since 2004 SACU Agreement requires the consent of all members to enter into external trade relations. Therefore the EPA obligations entered into by the Botswana, Lesotho, Namibia and Swaziland without the consent of South Africa are not enforceable. See Myne (n 167 above)11.

¹⁷⁵ Myne (n 13 above).

The majority of these interim agreements were initialed at the last minute, which creates doubt as to whether EPAs were properly negotiated trade agreements in the strict sense. ODI undertook a comprehensive review of the draft interim EPAs in 2007:

The analysis revealed that there were huge gaps in areas on which the text was supposed to be agreed and that all texts had a long way to go before they resembled anything like a ‘standard’ trade agreement. None of the texts for example, contained detailed annexes (such as liberalization schedules and rules of origin) to give effect to the decisions of principle embodied in the main text. The absence of annexes indicated that they either did not exist or had not yet been agreed – either of which was bad news less than a month before signatories were due to initial the EPAs.¹⁷⁶

Yet within a period of less than one month to the expiry of the December 2007 deadline, 35 of the 77 ACP countries had initialed an interim EPA.¹⁷⁷

3.2 EPAs and GATT/WTO Compatibility

At the heart of the entire GATT/WTO edifice is the basic principle of non-discrimination or MFN principle. It is contained in Article I.1 of GATT. It states as follows:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.¹⁷⁸

¹⁷⁶Mayne (n 166 above) 7.

¹⁷⁷As above.

¹⁷⁸Final Act: the Results of the Uruguay Round of Multilateral Trade Negotiations (1994) *The General Agreement on Tariffs and Trade 1947*. Retrieved from Electronic Database (WTO Electronic Documentation, CD-ROM, 2009 release).

The MFN or non-discrimination principle means that products originating from any GATT/WTO member shall be accorded the same treatment accorded to like products originating from any other GATT/WTO. In other words if a GATT/WTO member grants favour, privileges, advantages or immunity in respect to customs duties and charges imposed on importation of any product originating in other country, the same member shall accord *immediately and unconditionally* the same favours, privileges, advantages or immunity to like products originating from all other members of GATT/WTO. The privileges, favours, advantages or immunities apply in respect to customs duties and charges, and methods of levying the same on or in connection with importation or exportation of products, and in respect to matters in paragraphs 2 and 4 of Article III of GATT (National Treatment on Internal Taxation and Regulations).¹⁷⁹ All GATT/WTO members are entitled to the most favourable and unconditional treatment by the other members and none should be discriminated against.

There is no better way of explaining the provisions of Article I.1 than the decisions and findings of the judicial arm of WTO. In the *Canada-Autos*¹⁸⁰ case, the Appellate Body explained the object and purpose of MFN principle as follows: "*Th[e] object and purpose [of Article I] is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I: 1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis.*"¹⁸¹ The Appellate Body further, while emphasizing the object of Article I.1, stated that,

¹⁷⁹ Art. III. Para. 2 states that, "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1." Para. 4 states that, "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product." (See n 23 above).

¹⁸⁰ Appellate Body Report, Canada — Certain Measures Affecting the Automotive Industry, **WT/DS139/AB/R, WT/DS142/AB/R**, adopted 19 June 2000, DSR 2000:VI, 2995. The offending measures involved exemption from import duties on certain motor vehicles if the exporter was affiliated with a Canadian manufacture/importer. The exporters of the said motor vehicles were located in few countries.

¹⁸¹ WTO Analytical Index: Guide to WTO Law and Practice 1ST Edition, (2003) 138. Retrieved from Electronic Database (WTO Electronic Documentation, CD-ROM, 2009 release).

We note next that Article I:1 requires that 'any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.' The words of Article I:1 refer not to some advantages granted 'with respect to' the subjects that fall within the defined scope of the Article, but to 'any advantage'; not to some products, but to 'any product'; and not to like products from some other Members, but to like products originating in or destined for 'all other' Members.¹⁸²

The Appellate Body conclude its finding as follows:

[F]rom both the text of the measure and the Panel's conclusions about the practical operation of the measure, it is apparent to us that '[w]ith respect to customs duties...imposed on or in connection with importation...' Canada has granted an 'advantage' to some products from some Members that Canada has not 'accorded immediately and unconditionally' to 'like' products 'originating in or destined for the territories of all other Members.' And this, we conclude, is not consistent with Canada's obligations under Article I: 1 of the GATT 1994.¹⁸³

Similarly in *Indonesia - Autos*¹⁸⁴ the Appellate Body stated that,

We note also that under the February 1996 car programme the granting of customs duty benefits to parts and components is conditional to their being used in the assembly in Indonesia of a National Car. The granting of tax benefits is conditional and limited to the only Pioneer Company producing National Cars. And there is also a third condition for these benefits: the meeting of certain local content targets. Indeed under all these car programmes, customs duty and tax benefits are conditional on achieving a certain local content value for the finished car. The existence of these conditions is inconsistent with the provisions of Article I:1 which provides that tax and customs duty advantages

¹⁸² WTO Analytical Index: Guide to WTO Law and Practice (n 181 above) 139.

¹⁸³ WTO Analytical Index: Guide to WTO Law and Practice (n 181 above) 142.

¹⁸⁴ Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R.

accorded to products of one Member (here on Korean products) be accorded to imported like products from other Members 'immediately and unconditionally'.¹⁸⁵

Prior to the Cotonou Partnership Agreement, the EU had maintained a series of discriminatory and non-reciprocal trade regimes with ACP Group. Products from the ACP countries were allowed to enter the EU market duty and quota free, while the ACP countries were not required to reciprocate. At the same time the EU maintained tariffs and quantitative restrictions on similar products originating outside the ACP group. A group of South American countries found the EU-ACP trade regime unfavourable, and in particular to the export of their bananas to the EU market. Consequently they brought a series of cases against the EU to challenge the banana regime maintained by EU.

In the *EC – Banana III*,¹⁸⁶ while upholding the panel decision, the Appellate Body stated:

On the first issue, the Panel found that the procedural and administrative requirements of the activity function rules for importing third-country and non - traditional ACP bananas differ from, and go significantly beyond, those required for importing traditional ACP bananas. This is a factual finding. Also, a broad definition has been given to the term 'advantage' in Article I:1 of the GATT 1994 by the panel in *United States - Non-Rubber Footwear*. It may well be that there are considerations of EC competition policy at the basis of the activity function rules. This, however, does not legitimize the activity function rules to the extent that these rules discriminate among like products originating from different Members. For these reasons, we agree with the Panel that the activity function rules are an 'advantage' granted to bananas imported from traditional ACP States, and not to bananas imported from other Members, within the meaning of Article I:1. Therefore, we uphold the Panel's finding that the activity function rules are inconsistent with Article I:1 of the GATT 1994.

After suffering humiliating defeat before the Appellate Body, in a series of *Banana Cases*, brought by Honduras, Guatemala, Ecuador, Mexico and US against it, the EU had to retreat and

¹⁸⁵ WTO Analytical Index: Guide to WTO Law and Practice (n 26 above) 141.

¹⁸⁶ *European Communities – Regime for the Importation, Sale and Distribution of Bananas* Panel Report, **WT/DS27/R**[...], adopted 25 September 1997, as modified by the Appellate Body Report, **WT/DS27/AB/R, DSR 1997:II** (see n 26 above) 21.

seek a waiver to enable it carry the Lomé regime to its conclusion. The legal drama finally marked the end to the long era of discriminatory and non-reciprocal trade regime between EU and ACP countries. EU and ACP countries meanwhile, embarked on negotiations to bring their trade practices in conformity with Article I.1 of GATT.

The conformity to GATT/WTO was to be achieved in two possible ways: abolish discrimination and allow all GATT/WTO members to import or export on MFN basis or seek exemptions to the Article I.1 of GATT. Of course, the ACP countries were not ready to give up the preferences accorded to them by the EU and face competition from other GATT/WTO members who are economically more advanced than them. The EU wished to end the non-reciprocal arrangement with ACP Group. A compromise was reached in the Cotonou Agreement which succeeded the Lomé regime in 2000. Article 36.1 of the agreement provides that, “In view of the objectives and principles set out above, 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.” Since the Cotonou Agreement is discriminatory in nature, any agreement concluded within it is inherently discriminatory and hence incompatible with WTO, unless the same is covered by the exceptions to the MFN principle. Therefore all EPAs (both interim and comprehensive), which have been initialled or signed between ACP countries and EU are inherently discriminatory and therefore they can only be compatible with WTO through the exceptions to MFN principle.

3.2.1 Article XXIV

Article XXIV of the GATT on Territorial Application-Frontier Traffic-Customs Unions and Free-trade Areas, allows GATT/WTO members to derogate from their Article I obligations where a customs union or free trade is formed or an interim agreement leading to the formation of either a customs union or a free trade area is adopted between two or more customs territories.¹⁸⁷ Of importance to this dissertation is free trade area. It is understood to mean a “group of two or more customs territories in which the duties and other restrictive regulations of commerce [...] are eliminated on *substantially all trade* [emphasis added] between the

¹⁸⁷ Article XXIV 5 of GATT.

constituent territories on products originating in such territories”¹⁸⁸ Free trade areas are discriminatory in nature. They apply favourable preferential tariffs as between the members without extending the same tariffs to none members. Such preferential trade measure would be contrary to the MFN principles of Article I. However, Article XXIV 5 provides that “the provisions of this Agreement [GATT] shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free trade area ...”

Article XXIV recognizes the object and purpose of free trade areas as “to facilitate trade between constituent territories and not to raise barrier to the trade of other contracting parties with such territories.”¹⁸⁹ Therefore, the formation of a free trade area is subject to stringent conditions. The duties and other regulations of commerce maintained by each constituent territory at the time of the formation of the free trade area, or adoption of the interim agreement, in respect to the trade of none members of the free trade area, should not be higher than the corresponding duties and regulations of commerce in each of the members of the free trade area prior to the formation of such a free trade area or adoption of the interim agreement.¹⁹⁰ Furthermore, in the case of an interim agreement leading to the formation of a free trade area, “a plan or schedule for the formation of such a free trade area within a *reasonable length of time*” (emphasis added) should be included in the agreement.¹⁹¹ However, the GATT Agreement does not provide for what amounts to a reasonable length of time. The Committee on Regional Trade Agreements, is mandated to examine such agreements and if it is of the view that the free trade area cannot be formed within the time stipulated in plans and schedules, or that the period given is not reasonable one, it will make recommendations to that effect. The parties to the free trade area agreement will be required to comply with the recommendations before the free trade area comes into force or is maintained.¹⁹²

An attempt to clarify the issue of length of time was made in the Understanding on the interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, which states that the *reasonable length of time* should only exceed 10 years in exceptional

¹⁸⁸ Article XXIV 8(b) of GATT.

¹⁸⁹ Article XXIV 4 of GATT; See also *Turkey – Textile Case*; WTO Analytical Index 389.

¹⁹⁰ Article XXIV 5(b) of GATT.

¹⁹¹ Article XXIV 5 (c) of GATT.

¹⁹² Article XXIV 7(b) of GATT.

circumstances. What amounts to exceptional circumstances is however not defined. If the parties to the interim agreement feel that the period of ten years is not sufficient to establish a free trade area, they are required to provide full explanation to the Council for Trade in Goods as to why time should be extended.¹⁹³

3.2.2 Enabling Clause

In 1979, GATT/WTO members adopted the decision of 28 November 1979 on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing countries, commonly known as the ‘Enabling Clause’. It allows for derogation from Article I of GATT as far as differential and favourable treatment of developing countries is concerned. However, the provisions of Enabling Clause only apply where: (a) the preferential treatment is accorded to the developing country by a developed country on the basis of Generalized System of Preferences,¹⁹⁴ (b) the developing countries form a regional or global agreement to reduce or eliminate tariff amongst themselves, (c) there is a preferential treatment of LDCs among the developing in the context of any general or specific measures in favour of developing countries and, (d) there is differential and non – favourable treatment with respect to non- tariff barriers provided under GATT.¹⁹⁵

Both LDCs and developing countries are not required to reciprocate any preferences accorded to them by the developed countries under the provisions of Enabling Clause.¹⁹⁶ The purpose and object of this agreement is to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for trade for other WTO members. The preferential measures under the Enabling Clause should be designed in such a way as to respond positively to the development, financial and trade needs of developing .countries¹⁹⁷

¹⁹³ Understanding on the interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 Para 3

¹⁹⁴ As contained in the Decision of the Contracting Parties of 25 June 1971, relating to the establishment of “generalized, non-reciprocal and non – discriminatory preferences beneficial to developing countries” (BISD 18s /24).

¹⁹⁵ Decision of 28 November 1979 on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing countries para 2.

¹⁹⁶ As above para 5 & 6.

¹⁹⁷ As above para 3(a)& (c).

3.2.3 Waiver

Article IX of the Agreement Establishing the WTO allows the Ministerial Conference in “in exceptional circumstances”, to waive the obligations of the GATT/WTO members imposed on them by the agreement. What amounts to exceptional circumstances is however not defined. The Understanding in Respect of Waivers of Obligations under the General Agreement on the Tariffs and Trade 1994 provides for the basic requirements of a waiver. A request for a waiver must “describe the measures which the member proposes to take, the specific policy objectives which the member seeks to pursue and the reasons which prevent the member from achieving its policy objectives by measures consistent with its obligations under GATT 1994.”¹⁹⁸ A request for a waiver concerning the multilateral Trade agreement in Annex 1A or IB or IC is submitted initially to the Council for Trade in Goods, Services or TRIPS respectively, as the case may be, for consideration within a period not exceeding 90 days. Thereafter, at the end of the period, the relevant council submits its report to the Ministerial Conference for the decision to grant or deny a waiver.

The decision of the Ministerial Council is taken by consensus, and where the consensus cannot be reached, the decision to grant a waiver is taken by a vote of three-quarters of the members. The decision granting the waiver also states the exceptional circumstances justifying the decision, the term of the waiver and the conditions governing its application¹⁹⁹

¹⁹⁸ The Understanding in Respect of Waivers of Obligations Under the General Agreement on the Tariffs and Trade 1994.

¹⁹⁹ Agreement Establishing The WTO, Article IX 4.

CHAPTER FOUR

4.1 The Cotonou Agreement Objectives and GATT/WTO Compatibility

The Cotonou Agreement is both a development, economic and trade agreement. It was signed at the time when ACP countries were disillusioned by the achievement of the previous trade agreements of Lomé and Yaoundé. Throughout the Lomé regime, the ACP Countries had failed to increase their share of the European market. Over half of the ACP members remained poor and marginalised. Generally the participation of ACP Countries in the international trade was disappointing. These shortcomings necessitated change of trading regime.

The Cotonou Agreement was negotiated as the solution to the shortcomings of the previous trading regimes of Lomé and Yaoundé. It states that, “the partnership shall be centred on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy”. In other words, the Cotonou Agreement aims at reducing and eventually eradicating poverty, while at the same time have the economies of the ACP countries integrated into the world economy gradually. Therefore, these key objectives should be at the heart of any agreement negotiated by the parties to the Cotonou agreement. These objectives are supposed to inform all development strategies.²⁰⁰ Paragraph two of the preamble affirms the parties “commitment to work together towards the achievements of the objectives of poverty eradication, sustainable development and the gradual integration of the ACP Countries into the world economy.”

While the developmental strategies are well set out in the Cotonou Agreement, the economic and trade strategies are not. The Agreement states that “in view of the objectives and principles set out above, the parties agree to conclude new World Trade Organization (WTO) compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade.” Besides minor innovations introduced by the Cotonou Agreement, the issue of WTO compatibility presents the biggest difference between the Cotonou and Lomé Agreements. In fact the biggest criticism of Lomé centred on its incompatibility with

²⁰⁰ Article 1 of Cotonou Agreement.

the WTO principles. The political and legal events that followed implementation of Lomé necessitated negotiations of a new trading arrangement based on WTO compatibility.

While in principle the parties agree on the general objectives and aims of the new trading arrangements, the format these new trading arrangement should take to achieve the twin requirements of meeting the objectives of the Cotonou Agreement while at the same time achieving WTO compatibility has never been agreed upon by all the parties. The question of compatibility in the sense of EU-ACP trading arrangement could only be interpreted in one way: compliance with Article I: 1 of GATT (MFN principle). Compliance with Article I can be achieved in two broad ways under the GATT/WTO rules. Either the parties stop discrimination and apply trade measures on MFN basis to all WTO members or maintain the discriminatory trade measures under one of the exceptions to Article I. By agreeing to negotiate the Cotonou Agreement which is by itself inherently discriminatory, the EU and ACP countries have chosen to maintain a discriminatory trading regime, and therefore the new trading regime must be under one of the exceptions to Article I.²⁰¹ The previous chapter discussed the exceptions to Article I. The question the parties to the Cotonou Agreement have been unable to agree on is of which of the exceptions to Article I the new trading arrangements should fall under.²⁰²

The EU, through its Green Paper published in 1996, outlined four options for the new trading arrangements: status quo, integration of all ACP countries into the GSP system, apply unified reciprocity by a unified ACP group or apply differentiated reciprocity by different sub-groups of ACP group.²⁰³ The EU seems to have fallen in favour with the idea of reciprocity. After a thorough evaluation of the differences between the members of the ACP group, the EU preferred

²⁰¹ Brazil – Measures affecting Imports of Retreated Tyres, **WTO Doc. WT/DS332/R (2007)**, Report of the Panel, Para. 7.273. “The Panel noted that [t]his types of agreement inherently provides for preferential treatment in favour its members, thus leading to discrimination between those members and other countries.”- Islam *et al* (2009)7. For further reading, see also the European Community - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region, **GATT Doc. L/5776 (1985)**, Report of the Panel.

²⁰² G Faber & J Orbie ‘The EU’s insistence on reciprocal trade with the ACP group Economic interests in the driving seat?’ Paper prepared for the EUSA Tenth Biennial International Conference Montreal, Canada (17-19 May 2007) 14.

²⁰³Faber & Orbie (n 202 above) 2.

differentiated reciprocity to a unified reciprocity.²⁰⁴ Since then the EU has made reciprocity a central feature of the shape and format of the new trading arrangement with ACP group.²⁰⁵

Reciprocity emanates from Article XXIV of GATT which provides that as a condition for establishment and maintenance of a free trade area, contrary to Article I of GATT, there must be elimination of duties and other restrictive regulations of commerce on *substantially all trade between the parties* (emphasis added).²⁰⁶ In other words, the EU is of the view that the best way to achieve WTO compatibility is to establish a free trade area under Article XXIV of GATT. The obsession of the EU with reciprocity was so intense that possible alternatives to reciprocity such as GSP+ or a new WTO waiver or enlargement of the ACP group to the LDC status were rarely considered.²⁰⁷

The ACP initially questioned and openly resisted the idea of reciprocity. They preferred the status quo. The Libreville Declaration issued by the first summit of ACP heads of State and Government in Gabon in 1997, called on EU to “maintain non-reciprocal trade preferences and market access in successive agreement.”²⁰⁸ The thought of conceding to reciprocal trade arrangement was completely out of order for the ACP countries. This was reflected in the above declaration, “... Nevertheless, we are deeply disturbed by the prospect of disruption in our fragile and vulnerable economies and disintegration of the social fabric of our countries which would arise from insensitive application of the WTO rules and obligations as potentially demonstrated by the recent ruling of the WTO Appellate Body on the EU Banana regime.”

However, when time come for negotiation of Cotonou Agreement, the position of EU seemed to take a centre position and the final Cotonou Agreement is skewed towards EU’s position of reciprocal free trade agreement. Article 36(1) states that, “... the Parties agree to conclude new WTO compatible trading agreements, *removing progressively barriers to trade between them* [emphasis added] and enhancing cooperation in all areas relevant to trade”. Article 37.7 further states that “Negotiations of the economic partnership agreements shall aim notably at

²⁰⁴ As above.

²⁰⁵ As above.

²⁰⁶ Faber & Orbie (n 202 above) 14, for further reading see also EEC – Import Regime for Bananas **GATT Doc. DS38/R (1994)**, Report of the Panel – Islam *et al* (2009) 7.

²⁰⁷ Faber & Orbie (n 202 above) 3.

²⁰⁸ As above.

establishing the timetable for the *progressive removal of barriers to trade between the Parties, in accordance with the relevant WTO rules* (emphasis added).” Why did the ACP accept an arrangement that was contrary to what they had initially sought? Farbie & Orbie attribute this unexpected turn by ACP to “asymmetrical distribution of bargaining power between ACP and the EU”.²⁰⁹

Besides the ACP group, another voice of dissent came from Non Governmental Organisations (NGOs). Notably European NGOs opposed the idea of reciprocity. They mobilised campaigns (STOP-EPA) against EPAs and politicised the idea of reciprocity in a number of European countries.²¹⁰ To its credit, the UK did not agree with the idea of reciprocity. However the EU trade Commissioner Mr. Mandelson condemned the decision of the UK not to rally behind the reciprocal EPAs and termed it as “reinforcing the views of the more sceptical ACP states and raising the prospects of alternatives that are, in reality, impractical.”²¹¹ Another support for NGOs’ rally for non-reciprocity came from the European Parliament. The Parliament expressed concern that “... too rapid a trade liberalization between the EU and the ACP could have a negative impact on the vulnerable ACP economies.” The Parliament further argued that “... liberalizing trade between unequal parties as a tool for development has historically proven to be ineffective and even counterproductive.”²¹² Thus, the opposition to the EPAs came from both within the EU and ACP group. Probably this lack of enthusiasm for reciprocity among ACP countries explains why few ACP countries have signed EPAs.

Faber & Orbie have attempted to explain the EU’s quest for reciprocity as the desire to promote the economic interest of the EU, and in particular the need to secure market for the EU exports into third countries. Their views are reinforced by the arguments raised against the EPAs by several commentators such as STOP-EPA campaign and the Africa Trade Network. The STOP-EPA campaign for instance had indicated that

[T]he overriding emphasis on liberalization in the EPA negotiation proves that these negotiations are about expanding the Europe’s access to the ACP markets, rather than the

²⁰⁹ As above.

²¹⁰ Faber & Orbie (n 202 above) 4.

²¹¹ Faber & Orbie (n 202 above) 5.

²¹² As above.

ACP countries development ... The EU has narrowed down the Cotonou objectives of poverty eradication and sustainable development to a self serving trade and investment liberalization agenda.”²¹³

The African Trade Network saw EPA arrangement as an attempt by the north to open up the economies of the developing countries for the benefit of their industries. Oxfam, another NGO, stated that

The European Commission clearly wants to use the EPAs as a tool to open markets and further its own interest. This is not good. EPAs in their current form would be detrimental to development. They are free trade agreements by any other name and are currently designed to get the most for Europe without the necessary considerations of the negative effects on the weaker developing country parties.²¹⁴

Louse Curran *et al* have denied the argument that the economic interests are the driving force behind the EU’s quest for reciprocity. On the contrary they have argued that “... most ACP markets are too small and underdeveloped to be of interest to EU business.”²¹⁵ In support of EU’s position, they base their argument on the “... need to conform to [substantially all trade] requirement, which calls for a certain opening of the ACP markets ...”²¹⁶

The debate on WTO compatibility did not just end with the question of reciprocity. Even for those parties that decided to conclude new WTO compatible Economic Partnership Agreements under the Article XXIV of GATT were faced with the hardest task of interpretation. Article XXIV is probably the most controversial and ambiguous provision of GATT/WTO. Scholars and WTO members alike have never arrived at a consensus on its exact meaning, with some terming it as an “absurdity” and a “contradiction”.²¹⁷ Article XXIV allows WTO members to form free trade areas which are contrary to Article I provided they liberalize *substantially all trade*

²¹³ Faber & Orbie (n 202 above)7.

²¹⁴ As above.

²¹⁵ Louse Curran *et al* “The Economic Partnership Agreements: Rationale, Misperceptions and the non-trade aspects p 6.

²¹⁶ As above.

²¹⁷ R Islam & S Alam, ‘Preferential Trade Agreements and The Scope of GATT Article XXIV, GATS Article and the Enabling Clause: An appraisal of GATT/WTO Jurisprudence’ (2009), *Netherlands International Law Review (NILR)* 3.

between them and within a *reasonable length of time*.²¹⁸ The meaning of the phrases ‘substantially all trade’ and ‘reasonable length of time’ has elicited controversy and much debate, not only between EU and ACP group, but also within WTO itself.

The EU is of the view that a liberalization of 90% of the trade between the parties to the EPAs is sufficient to meet the requirement of substantially all trade.²¹⁹ However, there is no legal basis for the EU’s threshold except that it appears appealing and therefore unlikely to raise objections from non-ACP members of WTO. For example, the Trade, Development and Cooperation Agreement (TDCA) signed between the EU and South Africa provides for the Liberation of 95% by the EU and 86% by South Africa, achieving a liberalization of 90% of trade between the parties.²²⁰ The EU has floated this agreement as a precedent for the EU=ACP EPAs. However, that which is common to many analysts is that the TDCA cannot be applied to EPAs. They recognise that South Africa is at a higher level of economic development than most, if not, all of ACP countries.²²¹

The ACP countries are pushing for maximum flexibilities in the interpretation of Article XXIV on the basis of their need to protect their sensitive products and to allow sufficient time for their economies to adjust to the changes brought by the liberalization.²²² Their efforts are backed by the Cotonou Agreement itself. Article 35.3 requires the EPAs to take into account the different needs and levels of economic development of ACP countries: “In this context the Parties reaffirm their attachment to ensuring Special and Differential Treatment for ACP least developed countries (LDCs) and to taking due account of the vulnerability of small, land locked and island countries”. These classes of countries constitute the biggest part of the ACP group. The Cotonou Agreement further provides in Article 37.7 that the negotiations for the EPAs should take account of:

[T]he level of development and socio-economic impact of trade measures on ACP countries, and their capacity to adapt and adjust their economies to the liberalization

²¹⁸ For detailed analysis of ‘Substantial all trade’, and ‘Reasonable length of time’ see Ochieng (n 40 above) 7.

²¹⁹ Louse Curran *et al* (n 215 above) 5.

²²⁰ As above.

²²¹ As above.

²²² Overseas Development Institute(ODI) *et al* “The Potential Economic Impact and WTO Compatibility of the Economic Partnership Agreement” (2006) 14.

process. The negotiations will therefore be as flexible as possible in establishing the duration of a sufficient transitional period, the final product coverage, taking into account sensitive sectors, and the degree of asymmetry in terms of timetable for tariff dismantlement, while remaining in conformity with WTO rules then prevailing.²²³

Some scholars and analysts have argued that liberalization by ACP group at lower levels will still meet the, ‘substantially all trade’ condition. For instance, a liberalization of 60% by the ACP will meet the condition of ‘substantially all trade’ if the EU liberalizes by 100%, giving an overall of 80% liberation of trade between the parties.²²⁴

The Confusion on the interpretation of the phrase ‘substantially all trade’ is further worsened by lack of clarification from the WTO. The Committee on Regional Trade Agreements (CRTA), whose mandate is to evaluate the compliance of notified RTAs with GATT/WTO rules has not done much to help the situation. Of all the RTAs notified, in only one case has there been a consensus of opinion that the RTA was in conformity with the requirements of the Article XXIV²²⁵ However, none of the RTAs notified to date has been found to be incompatible with Article XXIV.²²⁶ The practice and conduct of CRTA make it highly improbable that the liberalization at threshold of 60% of trade between EU and ACP will make the EPAs incompatible with WTO as alleged by the EU.

The extent of ambiguities of Article XXIV was manifested when the interpretation of this Article was brought before the DSB, the judicial arm of WTO, in the *Turkey-Textile* case.²²⁷ Noting the lack of consensus among the GATT/WTO members on the meaning of the phrase ‘substantially all’, the Appellate Body stated as follows:

Sub-paragraph 8(a) (i) of Article XXIV establishes the standard for the *internal trade* between constituent members in order to satisfy the definition of a 'customs union'. It requires the constituent members of a customs union to eliminate 'duties and other

²²³ Ochieng (n 40 above) 1.

²²⁴ L Curran (n 215 above) 5.

²²⁵ Islam *et al* (n 217 above) 5, The Czech – Slovakia RTA was found compatible.

²²⁶ Ochieng (n 20 above) 372. “Despite the fact that the EU was the first RTA to be notified to the GATT/WTO, no consensus has been reached on its compatibility with Article XXIV.” For further reading see also Islam *et al* (n 217 above) 5.

²²⁷ *Turkey – Restrictions on Imports of Textile and Clothing Products* Panel Report, WT/DS34/R, adopted 19 November 1999, as modified by the Appellate Body Report, WT/DS34/AB/R, DSR 1999:VI.

restrictive regulations of commerce' with respect to 'substantially all the trade' between them. Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term 'substantially' in this provision. It is clear, though, that 'substantially all the trade' is not the same as *all* the trade, and also that 'substantially all the trade' is something considerably more than merely *some* of the trade.²²⁸

Probably being aware of lack of agreement on the interpretation of this Article amongst WTO members, the Appellate Body refrained from setting any benchmarks for the term 'substantially' but instead gave an equally vague interpretation. Nonetheless, this pronouncement by the Appellate Body is the closest the WTO has come to interpreting the provisions of Article XXIV.

In the situation of legal uncertainty, each party to the EPAs has proposed a figure that serves their own interest, and the ultimate level of liberalization will have to depend either on the political will of each party to accommodate the interests of the other, or on the political and economic power of the dominant party to push it down the throat of the other party. Therefore, the argument by the EU that 90% liberalization between the parties to EPAs is the appropriate level is not based on any legal foundations but on political and economic exigencies at play within the EU. There is no obligation under WTO for the ACP countries to adopt the interpretation of EU.

Going by the jurisprudence on the interpretation of Article XXIV, 60% of liberalization is not the same as "all the trade" but it is "more than merely some of the trade". To achieve a liberalization of 60% between the parties, the ACP countries need to liberalize by 20% if the EU is to liberalize by 100%. Therefore a liberalization of 50% by the ACP countries is generous enough and legally acceptable. It will give an average of 75% liberalization of trade between the EU and ACP countries if the EU was to liberalize 100% of its imports. Diouf has argued that "...

²²⁸ *WTO Analytical Index: Guide to WTO Law and Practice 1ST Edition, (2003)* 395, retrieved from Electronic Database (WTO Electronic Documentation, CD-ROM, 2009 release). For further reading see also Islam *et al* (n above) 19 para 2. For further reading see Diouf (2009) 25 & Islam *et al* (2009) 18.

nothing but unilateral political will of [ACP] West African countries or an efficient pressure of the EC, should force them to go beyond the opening up of 60%.”²²⁹

The EU’s argument that such a low level of trade liberalization between the parties will make the EPAs objectionable is untenable. Firstly, the WTO has no sufficient legal tools to take such an action against an EPA that meets the minimal requirements of Article XXIV. So far, none of the RTAs notified has been rejected on the ground of liberalization despite the fact that only one RTA, throughout the history of GATT/WTO, has been found to be compatible with Article XXIV. It is unlikely to happen to the EU-ACP EPAs. Secondly, third parties may only raise an objection to the EPAs if it raises conditions which are more stringent than those which existed before the EPA was established. The current EPAs do not modify the “rights and obligations of third countries”. Thirdly, it will be an insurmountable hurdle to support an action founded on low liberalization levels in view of the ambiguities and flexibilities of Article XXIV.²³⁰

Substantially all Trade encompasses both a quantitative and qualitative approach.²³¹ The quantitative approach takes a percentage of the total trade as an indication of coverage. There is no figure given, both in the Article and by the available jurisprudence. Each party to FTA is free to come up with what they believe to be the sufficient percentage. The Qualitative approach takes into account the products to be liberalized. Sometimes a whole sector may be excluded if it is deemed sensitive. This has been the case with agricultural sector in most recent RTAs as was observed in EFTA/Tunisia Free Trade Area.²³² The ACP countries could exclude whole sectors, for example agriculture, on food security grounds or rural development reasons. Some sectors such as investment and competition have been excluded from Doha Round of negotiations. This would be sufficient ground to exclude them from EPA negotiations.²³³

On the question of ‘reasonable length of time’ the EU prefers the time frame stipulated in the Understanding on Interpretation of Article XXIV which states that a period longer than 10 years

²²⁹ E H Diouf “Article XXIV of GATT and the EPAs: Legal Arguments to West Africa’s Market Access Offer” (2009) 29.

²³⁰ Diouf(n 229 above) 30.

²³¹ *Turkey - Textile* case (n above) para 9.18

²³² Diouf (n 229 above) 26.

²³³ As above.

should only be allowed in exceptional circumstances.²³⁴ However, the phrase ‘exceptional circumstances’ has not been clarified. The EU proposal for periods closer to the 10 year limitation is an indication of lack of appreciation of special needs and circumstances of ACP countries. The ACP countries have proposed longer periods ranging from 20-25 years. There is nothing legally wrong for longer periods and there is sufficient precedent to support this view. In their Communication to the WTO, the ACP group stated that, “with regards to RTAs, entering into force in the latter half of the 1990, only in rare cases do transitions periods exceed ten years. In the recent surge of RTAs, however, transition periods have been known to go well beyond ten years. These cases are becoming the rule rather than the exception.”²³⁵

The EU’s TDCA with South Africa allowed for implementation period of 12 years. Other examples are: Japan-Philippine (12 years), USA-Morocco (24 years), EU-Morocco (12 years), Thailand-New Zealand (20 years), Thailand-Australia (20 years), Australia-USA (18 years) and Canada-Chile (18 years).²³⁶ No legal challenges have been brought against these longer periods and no explanation of ‘exceptional circumstances’ were given, notwithstanding the fact that these FTAs are established between economies that are more advanced than the ACP economies.

The pursuit for longer transition period by the ACP group is justified both in law and economically. The Understanding on the Interpretation of Article XXIV allows longer period than the 10 year baseline, on condition that explanation of ‘exceptional circumstances’ is given. However, as noted from the FTAs which have been notified, the general practice is that this condition is rarely enforced. The low levels of economic development in ACP countries should be sufficient justification for transition periods longer than the 24 year period allowed in the USA-Morocco FTA.²³⁷ Furthermore, the presence of LDCs in ACP group should give leverage for longer periods than what the EU has proposed. The ACP countries are already making an effort in the Doha negotiations to inject further flexibilities into the definition of ‘reasonable length of time’ provided by the Understanding on the Interpretation of Article XXIV. One submission to Doha submissions states that the transition period “should be determined in such a

²³⁴ Understanding on the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, for further reading see Islam *et al* (2009) 20.

²³⁵ Diouf (n 229 above) 31.

²³⁶ Diouf (n 229 above) 32.

²³⁷ Diouf(n 229 above) 33.

manner that is consistent with the trade, development and financial situation of countries, but in any case not less than 18 years”.²³⁸

There is no doubt that the economies of ACP countries lack the proper institutional capacity to handle “panoply of WTO rules.”²³⁹ Some WTO rules become “unambiguously beneficial only as countries become richer.”²⁴⁰ The principles of -non-discrimination and reciprocity were negotiated on the basis of equality. GATT contracting members inadvertently adopted the principle of sovereign equality of general international law to govern their trade relationship. It was an erroneous assumption that all nations are ‘economically’ as well as politically equal. While it might be true for political sovereignty, it is not so in the economic sphere. The recognition of the inherent inequality among WTO members prompted the subsequent negotiations of the Enabling Clause²⁴¹ to cater for Special and Differential Treatment (SDT) of developing countries.²⁴²

The strict interpretation of Article XXIV would render many of the SDT provisions in GATT/WTO less valuable to the ACP countries which desperately need them most.²⁴³ The reciprocal market opening between countries which are widely ‘unequal’ such as the EU, the world’s richest and ACP countries, the world’s poorest, might lead to severe consequences that might hinder development in the ACP countries.²⁴⁴ The approach taken by the EU is underpinned by economic interests of “expanding its market access in ACP countries while limiting the number of concessions it may be asked to make to developing countries by holding onto the already legally binding SDT provisions within WTO”.²⁴⁵ ACP countries are more interested in SDT afforded to them under the GATT/WTO provisions. Furthermore, the Cotonou Agreement, on which the EPAs are hinged, provides that: “In this context, the Parties reaffirm their attachment to ensuring special and differential treatment for all ACP countries and

²³⁸ Desta (n 16 above) 1373.

²³⁹ B Hoekman *et al* “Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries: Objectives, instruments and Options for the WTO” (2003) 3.

²⁴⁰ As above.

²⁴¹ Decision of 28 November 1979 on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing countries.

²⁴² Ochieng (n 20 above) 375.

²⁴³ Ochieng (n 20 above) 365.

²⁴⁴ B Gavin “The EU – ACP Economic Partnership Agreements: What Impact on Development” (2007) 3.

²⁴⁵ Ochieng (n 20 above) 365.

to maintaining special treatment for ACP LDCs and to taking due account of the vulnerability of small, landlocked and island countries.”²⁴⁶

The inclusion of express provisions for SDT in both GATT/WTO and Cotonou Agreement underscores the importance of SDT for economic development of developing countries. The EU has repeatedly stated that the objectives of EPAs are first and foremost about poverty reduction and economic development and integration of ACP countries into world economy.²⁴⁷ Ironically, Article XXIV, upon which EU-ACP EPAs are established do not have provisions for SDT. This is a clear indication that Article XXIV was never meant to apply to RTAs involving developing and least developed countries. There are good reasons to support this view, both from historical and logical perspective.

Article XXIV has the misfortune of having been negotiated at a time when RTAs between developing and developed countries or least developed countries did not exist.²⁴⁸ The origin of Article XXIV is not clear but it is believed that it was introduced by the US negotiators, in order to give legal effect to the trade agreement between US and Canada.²⁴⁹ It was this secret agreement, which never came into force that influenced the negotiations of Article XXIV.²⁵⁰ From its inception it was intended to apply to RTAs between economies at the same level of development. Since the issues of developing countries and least developed countries were not at the forefront during its negotiations, it can well be argued that it was never intended to apply to RTAs involving developing and least developed countries.²⁵¹ It was also not intended to apply to mixed RTAs involving developed countries such as EU and developing countries such as ACP countries. Mixed RTAs are recent phenomena. There are no explicit SDT in Article XXIV for developing countries in the context of mixed RTAs.²⁵²

²⁴⁶ Article 35.5 of Cotonou Agreement.

²⁴⁷ Gavin (n 244 above) 2.

²⁴⁸ Diouf (n 229 above) 16. For further reading see also South Centre Analytical Note “Revising EPAs and WTO Compatibility” (July 2005) 3.

²⁴⁹ Ochieng (n 20 above) 372.

²⁵⁰ See Ochieng (n 20 above) 373, for detailed analysis of the historical origin of Article XXIV.

²⁵¹ South Centre Analytical Note “Revising EPAs and WTO Compatibility” (July 2005) 3.

²⁵² B Onguglo & T Ito “Towards Greater Flexibility and Special and Differential Treatment in WTO rules in the Context of Economic Partnership Agreements between ACP States and the EU”.

The emergency of mixed RTAs must have caught the GATT/WTO members unprepared. Two articles of GATT governed RTAs. One was Article XXIV and the other was the Enabling Clause. When developing countries raised objection to the application of Article XXIV on RTAs involving them, GATT Contracting parties carefully crafted Enabling Clause to apply specifically to RTAs between developing countries. Article XXIV had been found devoid of SDT which developing countries needed. When mixed RTAs emerged, there was no specific provision in GATT/WTO to govern such agreements.²⁵³ By default, Article XXIV has been extended to mixed RTAs for which it was never intended. The absence of SDT in Article XXIV was not intentional. Article XXIV was developed at the time when mixed RTAs did not exist, and at the same time it was not intended to apply to RTAs involving developing countries and therefore it would not have provided for SDT.²⁵⁴ The omission of SDT in Article XXIV was dictated by the prevailing circumstances at the time. Since then, WTO members have moved with concerted efforts to review the provisions of GATT/WTO affecting RTAs.

Article V of the General Agreement on Trade in Services (GATS), the equivalent of Article XXIV of GATT, expressly provides for SDT, where developing countries are involved in an RTA with a developed country.²⁵⁵ “The availability of SDT treatment in the GATS shows that there is no a priori reason for the absence of similar treatment in the GATT”.²⁵⁶ Furthermore, the WTO members have undertaken to modify the provisions of Article XXIV during the Doha Round Negotiations.²⁵⁷ The Actions of WTO members since the Uruguay round shows that Article XXIV was not intended to be devoid of SDT and that they are ready and willing to renegotiate Article XXIV to provide for SDT.

Although the Doha Round might not be concluded soon, the intention of the WTO members to amend Article XXIV remains live. Any RTAs negotiated in the interim period cannot overlook that general intention, but instead must be shaped by it, particularly if the majority of the parties

²⁵³ Ochieng (n 20 above) 375.

²⁵⁴ Diouf (n 229 above).

²⁵⁵ South Centre Analytical Note (n 251 above) 6, for further reading see Diouf (n 299 above) 19.

²⁵⁶ South Centre Analytical Note (n 251 above) 8.

²⁵⁷ “Para 29 of the Doha Ministerial Declaration provides that Members should negotiate to clarify and improve the disciplines and procedures under the existing WTO provisions applying to RTAs. The paragraph requires the negotiations to take into account the developmental aspects of RTAs.” See South Centre Analytical note (n 251 above) 18.

to the RTA have expressed their support for a renegotiated Article XXIV, as it is the case with ACP group in the EU - ACP EPAs.²⁵⁸ The interpretation of Article XXIV equally must support the intentions of the WTO to fill the historical and inadvertent void in this Article instead of giving interpretation that is contrary to the general intention of the WTO members concerning mixed RTAs.²⁵⁹ Although Article XXIV does not take account of SDT, nothing in the Article prohibits WTO members from taking SDT into account when negotiating for an FTA between developed and developing countries.²⁶⁰

In the *Turkey-Textile* case the Appellate Body noted that the circumstances in which Article XXIV was negotiated have changed. “We are ... aware that the economic and political realities that prevailed when Article XXIV was drafted have evolved and that the scope of regional trade agreements is now much broader than it was in 1948”.²⁶¹ The broader sense alluded to by the Appellate Body includes the emergency of mixed RTAs. Consequently, the interpretation of the Article XXIV cannot remain as it were in 1948 when mixed RTAs did not exist, but must factor in the changing shape of RTAs. Further a contextual interpretation of Article XXIV “that legitimates asymmetry in EPAs” is more appropriate in the changing circumstances of RTAs than its liberal meaning.²⁶²

The flexibilities available in Article XXIV are not sufficient to meet the objectives of the Cotonou agreement. Article XXIV requires serious amendments to include the SDT provisions to cover mixed RTAs. As Ochieng (2009) rightly observed that:

Existing rules fail to create fair and equitable treatment between different types of RTAs based on their developmental impact and promotion of developing countries participation in world trade. For example, while preferential tariff and partial liberalization agreements among developing countries fall under the Enabling Clause, ambitious and full-fledged RTAs, such as Free Trade Agreements between developed and developing countries are subject to the stricter requirements of GATT Article XXIV. Yet, North–South RTAs have at least as high a development impact as any of those falling under the Enabling

²⁵⁸ South Centre Analytical Note (n 251 above) 6 para.3.

²⁵⁹ Diouf (n 229 above) 19.

²⁶⁰ Diouf (n 229 above) 16.

²⁶¹ Diouf (n 229 above).

²⁶² Diouf (n 229 above) 26.

Clause, and it is difficult to see why the substantive requirements should be radically different.”²⁶³

The EU has claimed that Article XXIV has sufficient flexibilities to cater for needs of ACP countries and therefore there is no need to include binding SDT in Article XXIV. The EU’s position is incorrect. Article V of GATS the equivalent of Article XXIV introduced binding SDT in case of trade in services. This is an indication that “there is no *a priori* reason for the absence of a similar treatment in the GATT.”²⁶⁴ The EU is basing its argument for flexibilities on the basis of ambiguities inherent in Article XXIV. In *Turkey-Textile* case the Appellate Body limited the extent to which such flexibilities could be relied upon. The ACP countries have argued that the de facto flexibility in Article XXIV is “neither secure in nature nor sufficient in scope and legally valid to provide the SDT they require.”²⁶⁵ They argue that such flexibilities should not be used as “substitutes for legally binding operational and effective S&D provisions”.²⁶⁶ Hoekman *et al* state that “what is needed is a general recognition that SDT and more explicit considerations of the development implications of WTO rules benefit all members and a willingness by both developed and developing countries to engage constructively in the development of new SDT disciplines ... this will have to include a shift away from demands for open ended concessions for developing countries as a matter of right.”²⁶⁷

Irrespective of differences in these seemingly irreconcilable views, at the heart of GATT/WTO is the objective of “raising the standards of living, ensuring full employment and a large and steady growing volume of real income and effective demands, developing the full use of the resources of the world and expanding the production and exchange of goods.”²⁶⁸ The preamble to the WTO agreement is quite specific. It recognizes the “need for positive efforts designed to ensure that developing countries, and specifically the least developed country among them secure a share in the growth in international trade commensurate with the needs of their economic

²⁶³ Ochieng (n 40 above) 8.

²⁶⁴ South Centre Analytical Note (n 251 above) 8.

²⁶⁵ Ochieng (n 20 above) 376.

²⁶⁶ As above.

²⁶⁷ Hoekman *et al* (n 239 above) 2.

²⁶⁸ Ochieng (n 20 above 2007) 377. See also para 1&2 of the preamble to agreement establishing WTO.

development.”²⁶⁹ Equally important is the objective of Cotonou Agreement of reduction and eventual eradication of poverty in ACP countries, and their integration into world economy. Therefore, every interpretation of the GATT/WTO provisions that affect RTAs like EPAs must take into account these objectives. Generally a holistic interpretation of Article XXIV, as provided under the Vienna Convention on the Law of Treaties,²⁷⁰ is more credible to the realization of the above objectives than the literal interpretation being advanced by the EU. The holistic interpretation encompasses “historical context, WTO case law and the objectives and purposes of WTO”.²⁷¹ Further, any interpretation that seems to undermine the objectives of poverty reduction would be inconsistent with the Cotonou Agreement.

4.2 Options Available to ACP Countries in EPAs Negotiations

The Cotonou Agreement on which EU-ACP EPAs are founded provide that, “In 2004, the Community will assess the situation of the non-LDC which, after consultations with the Community decide that they are not in a position to enter into economic partnership agreements and will examine *all alternative possibilities* [emphasis added], in order to provide these countries with a new framework for trade which is equivalent to their existing situation and in conformity with WTO rules.”²⁷² This Article imposes an obligation on the EU to provide alternative framework for trade for those developing countries which are not in a position to enter into an EPA. However, the EU is in defaults on this provision. First, no assessment was done in 2004 as envisaged by the Article, and secondly no new alternative framework has been provided, despite the obvious fact that some non-LDC countries are not ready to enter into EPAs.

4.2.1 Enabling Clause

Although the Enabling Clause has the flexibilities that ACP countries are seeking in Article XXIV, the same is dotted with legal restrictions that make its application to EU-ACP EPAs challengeable. First its application is limited to RTAs between developing countries.

²⁶⁹ As above.

²⁷⁰ See Vienna Convention on the Law of Treaties.

²⁷¹ Ochieng (n 20 above) 376.

²⁷² Article 37.6 of Cotonou Agreement.

Consequently it will not apply to EU-ACP EPAs because EU is a developed member. It is also limited to RTAs entered into by GATT Contracting Parties. On the contrary, the EU-ACP EPAs involve parties who are not members of WTO.²⁷³ In addition, any preferences extended under the GSP system must be extended to all non-LDC. Extension of preferences to all non-LDC countries will defeat the purpose and object Cotonou Agreement. However, the non-LDC ACP countries which do not wish to enter an EPA may be signed up to the new GSP+ which has better terms than the standard GSP. But this unilateral scheme is subject to severe conditions for qualification, which non-LDCs have found too cumbersome to meet. For instance, it requires the beneficiaries to ratify “16 core human and labour law rights conventions as well as at least seven further conventions related to environment and governance principles.”²⁷⁴ They are further subjected to a horde of conditions and requirements to demonstrate that the beneficiary country is “vulnerable”.²⁷⁵

The so-called requirements for qualifications for GSP + have no legal foundations and do not make any economic and developmental sense. They have been erected by the EU so as to favour the choice for EPAs. The EU has spared no effort, both financial and technical resources, to oversee the negotiations and implementation of EPAs. It is hard to explain why similar effort could not be applied to ensure that the non-LDC ACP countries that do not sign EPAs are allowed a smooth transition to GSP+. But instead the non-LDC which do not sign EPAs are punished by being subjected to the standard GSP while at the same time EU is erecting conditions against the GSP+ which is a better alternative to EPAs than the standard GSP. EU’s double standard casts serious doubts on its agenda for EPAs.

4.2.1 *Waiver*

Apart from the difficulties experienced in obtaining a waiver, the real security for such a waiver is not guaranteed. Waivers are subject to periodic reviews, and it could be terminated during any of such reviews. Furthermore, waivers do not cover derogation from all GATT/WTO rules, but, only some of them, as it was stated in the *EC-Banana* case.²⁷⁶ Therefore a waiver will be an

²⁷³ Islam *et al* (n 217 above) 32.

²⁷⁴ Curran *et al* (n 215above) 10.

²⁷⁵ As above.

²⁷⁶ South Center Analytical Note (n 251) 3.

unsuitable solution for alternatives to EPAs for those non-LDC ACP countries which do not enter into an EPA.

CHAPTER FIVE

CONCLUSION

The Cotonou Objectives of Poverty reduction and integration of the economies of the ACP Countries into world economy governs all trade agreements between EU and ACP. In view of the above objectives, the parties to Cotonou Agreement agreed to negotiate trade agreements that are compatible with WTO rules. The issue of WTO compatibility has been the biggest challenge for the parties to Cotonou Agreement. The format of the new WTO compatible trading agreement has not been agreed upon by all the parties to the Cotonou Agreement. The EU has insisted that the new trading agreements should be in the form of free trade Agreements negotiated under Art XXIV of GATT 1947. While some of the ACP Countries have agreed to negotiate free trade Agreements in the form of EPAs with EU, they openly objected to strict interpretation of the provisions of Article XXIV.

Under Article XXIV, the parties to EPAs are required to progressively remove trade barriers between themselves. The ACP Countries are opposed to this element of reciprocity. Their arguments are based on economic realities of these countries. Firstly, the majority of ACP Countries heavily rely on the revenues from import duties to run their economies. Secondly, they need to protect their infant industries and some sensitive sectors such as Agriculture. Thirdly, ACP Countries have very low and weak economies compared to their EU counter parts and therefore they should not be required to reciprocate to EU's preferences. They have argued that strict interpretation of Art. XXIV will defeat their economic objectives. They have demanded for maximum flexibilities in the interpretation of the provisions of Article XXIV, in particular the requirements of 'substantially all trade' and 'reasonable length of time'.

The EU has argued that Art. XXIV has sufficient flexibilities and advocated for strict interpretation of this article. On the issue of 'substantially all trade' the EU has insisted that 90% liberalization of trade is sufficient to meet the requirements of 'substantially all trade'. On the issue of "reasonable length of time", the EU tends to go by the bench mark set by the Understanding on the Interpretation of Article XXIV of GATT, and they have suggested periods closer to the 10 year bench mark. Both interpretations by the EU have no legal basis and are detrimental to the economic aspirations of the ACP Countries.

The ACP Countries used to liberalize by the bare minimum. It has been proposed in this paper that a liberalization of 50% by the ACP Countries will meet requirements of 'substantially all trade' if the EU was to liberalize by 100%. It will give an average of 75%, which is "more than merely some of the trade". The ACP Countries have no legally compelling reason to go by the interpretation given by EU and they should not be forced to liberalize beyond 60% of their trade.

A liberalization of 60% of their trade will allow them sufficient room for exclusion of their sensitive products or whole sectors if needed.

The proposal for low liberalization by ACP countries is supported by economic reasons as explained in foregoing paragraphs and by the existing jurisprudence and conduct of the WTO parties. Firstly, none of the RTAs notified to WTO has been rejected on the ground of low liberalization levels and it is unlikely that any of the EU-ACP EPA will be objected to even if they liberalize by 60%. Secondly, WTO has no sufficient legal tools to take such an action against an EPA that meets the minimum requirements of Article XXIV. Thirdly, it will be an insurmountable hurdle to sustain an action founded on low liberalization levels in view of the ambiguities and of Article XXIV.

On the question of reasonable length of time, there is sufficient evidence as demonstrated in this paper, of periods exceeding the 10 year bench mark. Some of the periods have been allowed in RTAs involving developed economies for instance USA - Morocco has a transitional period of 24 years. The ACP Countries should not be compelled to settle for the 10 year bench mark. Instead, they should be allowed transition periods exceeding 25 years as proposed by some of them. Such a proposal is well supported by the economic exigencies of the ACP economies. They are too weak and it will require considerable length of time to adjust their economies to the near trend of globalization. The Cotonou Agreement has recognized these facts by requiring that trade liberalization of ACP economies should be gradual over a reasonable length of time. The economic reality of ACP countries presents exceptional circumstances to warrant extension of the transition period beyond the bare minimum. Furthermore, going by the existing RTAs, there is sufficient precedent to support extension of the transition period beyond 24 years.

The flexibility available in Article XXIV is not sufficient to meet the economic objectives of the ACP countries. Article XXIV requires serious amendment to include legally binding SDT provisions.

Beyond Article XXIV, ACP countries are limited on options for achieving WTO compatibility. The only other GATT/WTO provision governing economic trade agreements is the Enabling Clause. However, the presence of EU as a developed party rules out the possibility of extending the application of Enabling Clause to ACP-EU trade arrangements. Furthermore, Enabling Clause is limited to RTAs involving GATT Contracting Parties. ACP group consists of countries which are not members of WTO. Extension of Enabling Clause to EU-ACP economic arrangement will definitely be objectionable on the basis of these legal requirements.

In limited cases, the WTO members have granted waivers in respect to EU-ACP economic trade agreements. The last waiver expired in 2007; when the EU failed to apply for an extension of the same. Apart from the difficulties experienced in obtaining a waiver, the real security for such a waiver is not guaranteed. It is limited to a specified period of time and covers limited derogations from the WTO rules. Waivers cannot offer a permanent solution to WTO

compatibility question, except short term measures. In current circumstances of a politically charged multilateral trading system, the possibility of obtaining a waiver remains a tall order for both EU and ACP countries.

In conclusion, of all existing options, under WTO rules, Article XXIV offers the most viable option for meeting WTO compatibility. However Article XXIV requires serious amendments if it has to achieve the twin requirements of WTO compatibility and at the same time meet the economic objectives of ACP countries. The amendment sought will require inclusions of SDT provisions in Art xxiv. The possibility of such an amendment has remained elusive in view of the stalled multilateral trade negotiations of Doha Round.

The ACP countries should continue pushing for amendment to Art XXIV. Meanwhile the interpretation of the existing provision of Art XXIV should be directed by the common intention of WTO members to amend Article XXIV. Any interpretation of the Article should be based on the understanding that the members are desirous of amending Art XXIV to include SDT provisions. Thus a holistic interpretation that compasses maximum flexibilities will be sufficient, in the meantime, to meet the requirements of WTO compatibility and the economic objectives of the Cotonou Agreement.

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