

UNIVERSITY OF NAIROBI
SCHOOL OF LAW
PARKLANDS CAMPUS

IMPLICATION OF EU-ACP ECONOMIC PARTNERSHIP AGREEMENTS ON THE
REALIZATION OF SOCIO-ECONOMIC RIGHTS IN KENYA

BY

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11. Minister of Health and Others v Treatment Action Campaign and Others (2002) (5) SA 721

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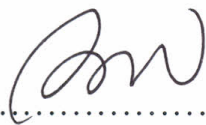
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I also wish to thank myself for the patience and positive aptitude that I have portrayed while undertaking this assignment. I have certainly grown and look forward to enhancing my studies beyond this level.

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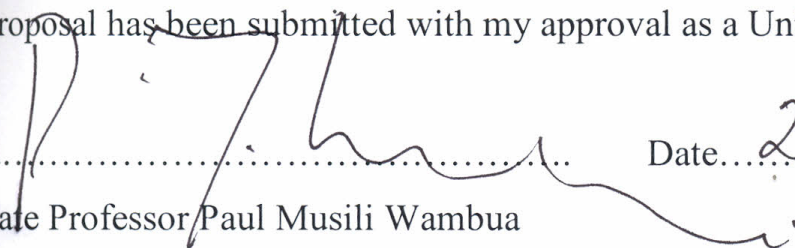
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ABSTRACT

Kenya is currently engaged in trade negotiations with the European Union (EU) through the framework of the African Caribbean and Pacific (ACP) countries – (EU) relations. Kenya is negotiating under the auspices of the East Africa Community. Once these negotiations are concluded Kenya is required to sign Economic Partnership Agreements whose content has been widely criticized.

Unlike its predecessor, Cotonou Agreement was founded on the foundation of among other the respect for International Convention on Economic, Social and Cultural Rights (ICESCR) the EPAs are founded on the trade liberalization theory. The aim of EPAs is to establish a regime that is compatible to international trade principles as envisaged within the WTO framework. The WTO framework gives minimal consideration for human rights hence a WTO compliant EPAs may see EAC countries enjoying less social and economic rights than they are currently.

The theme of this paper, therefore, is to interrogate the content of the EPAs, Kenya's obligations under EPAS and establish whether they indeed violate the socio-economic rights of developing countries, particularly Kenya. The study further proposes possible alterations that will see preservation of social-economic rights of Kenyans.

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background to the Problem

Kenya is currently engaged in trade negotiations with the European Union (EU) through the framework of the African Caribbean and Pacific (ACP) countries – (EU) relations. Kenya is negotiating under the auspices of the East Africa Community.¹ Once these negotiations are concluded and an agreement entered it will create a new cooperative framework based on partnership, cooperation, trade and political dialogue between the EU and the ACP countries. Economic Partnership Agreements (EPAs) have been described as a scheme intended to create a free trade area (FTA) between the European Union and its former colonies in Africa, the Caribbean and the Pacific (ACP). The EPAs is aimed at promoting trade development, sustainable growth and poverty reduction by helping the ACP countries integrate into the world economy and share in the opportunities offered by globalization. It is important to note that for well over 30 years, exports from the ACP countries were given generous access to the European market, yet this preferential access failed to boost local economies and stimulate growth in ACP countries.²

EPAs are designed to be the drivers of change that will kick-start reform and help strengthen the rule of law in the economic field thereby attracting Foreign Direct Investment (FDI), to provide scope for wide-ranging trade co-operation on areas such as services and standards and are “tailor made” to suit specific regional circumstances.³ The genesis of the EPAs can be traced to economic relationship between European Union countries and ACP countries governed by the Lomé Conventions.⁴ This relationship was aimed at ensuring that the Economic Partnership Agreements are being negotiated with African, Caribbean and Pacific regions engaged in a

¹ The last negotiations were held in Dar es Salaam, Tanzania on the 9th of June 2010 where the East Africa Countries agreed to accelerate negotiations and reach an agreement by November 2010. Such an agreement was never reached as anticipated.

² Ibid

³ Ibid

⁴ Walter Rodney, 1973, *How Europe Underdeveloped Africa*, Bogle-L'Ouverture Publications, London and Tanzanian Publishing House, Dar-Es-Salaam.

regional economic integration process, with the aim of promoting trade, between the two groupings, that is, the EU and the African, Caribbean and Pacific group of countries.⁵

They are a response to continuing criticism that the trade arrangements under the Cotonou Agreements⁶ were non-reciprocal and discriminatory and therefore incompatible with World Trade Organization (WTO) rules.⁷ The objectives of the Cotonou Agreement were to reduce and, in time, eradicate poverty, and also to promote sustainable development and the progressive integration of the ACP countries into the global economy. This partnership agreement was signed in the capital of Benin, Cotonou – hence the Cotonou Agreement. This Agreement continues the experiences of the Lomé Conventions.⁸

The Lomé Conventions are agreements which lay down the framework for cooperation on development policy, trade, economic policy and industry between the EU and what are known as the ACP countries. Since 1975, the framework for this cooperation has been laid down in the special intergovernmental agreement, the Lomé Convention. This agreement has been renegotiated several times, and the fourth and last in the series (Lomé IV) was signed in 1989, with a life of 10 years. On 23 June 2000, the Lomé Conventions were replaced by a new 20-year partnership agreement between the EU Member States on the one hand, and the ACP countries on the other hand.⁹

The first Lomé Convention (Lomé I), which came into force in April 1976, provided a new framework of cooperation between the then European Community (EC) and developing ACP countries, in particular former British, Dutch, Belgian and French colonies.¹⁰ It had two main aspects. Firstly, it provided for most ACP countries agricultural and mineral exports to enter the

⁵ European Commission: Trade: Economic Partnerships: [http://ec.europa.eu/trade/wider-agenda/development/economic partnerships/](http://ec.europa.eu/trade/wider-agenda/development/economic%20partnerships/) Accessed on the 28th of September 2011

⁶ Cotonou Agreement is a treaty between the European Union and the African, Caribbean and Pacific Group of Countries (ACP) signed in 2000 in Cotonou aimed at the reduction and eventual eradication of poverty while contributing to sustainable development and to the gradual integration of ACP countries into the world economy.

⁷ South Centre, 2007, Fact Sheet 1: Understanding the Economic Partnership Agreements (EPAs), South Centre Analytical Note, SC/AN/TDP/EPA/1, March 2007.

⁸ The Lome Convention: Has it changed anything within the ACP countries, <http://homepages.uel.ac.uk/mye0278/ACP1.htm>, Accessed on the 29th of September 2011

⁹ Ibid

¹⁰ Marjorie Lister, (1999), Conflict, development and the Lomé Convention, DSA European Development Policy Study Group Discussion Paper No. 12, April 1999, University of Bradford.

EC free of duty. Preferential access based on a quota system was agreed for products, such as sugar and beef, in competition with EC agriculture. Secondly, the EC committed ECU 3 billion for aid and investment in the ACP countries. The convention was renegotiated and renewed three times.¹¹

On 31 October 1979, the Lomé II Convention of economic cooperation between the nine Member States of the European Economic Community (EEC) and 57 ACP countries was signed in Lomé (Togo). It sought to increase aid and investment expenditure in favour of ACP countries. Lomé II expired in February 1985.¹² Lomé III came into force in March 1985 with the trade provisions being concluded and in May 1986 aid provisions were concluded. The Convention increased aid further and they expired in 1990.¹³

The Lomé IV Conventions were the last of the Lomé Conventions and they covered the period from 1990 to 2000. They were the most extensive development co-operation agreement between North and Southern countries both in terms of scope (aid and trade) and the number of signatories.¹⁴ The Convention stated that ACP cooperation is to be based on partnership, equality, solidarity and mutual interest. It recognized the principle of sovereignty and the right of each ACP state to define its own development strategies and policies, affirming development centered on people, respect and promotion of human, political, social and economic rights.¹⁵ Lomé IV covered a broad range of sectors eligible for support under the development finance cooperation chapters of the convention. These include the environment, agriculture, food security and rural development, fisheries, commodities, industry, mining and energy, enterprise (private sector) development, services, trade, cultural and social cooperation and regional cooperation. It has extensive provisions for trade cooperation which provides preferential treatment to ACP

¹¹ Ukpe, Aniekan Iboru, Will the EU-Africa Economic Partnership Agreements Foster the Integration of African Countries into the Global Trading System? (June 13, 2008). Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper. Available at SSRN: <http://ssrn.com/abstract=1145537>. Accessed on the 7 September 2009.

¹² Ibid

¹³ Ibid

¹⁴ Carol Cosgrove, (1994), Has the Lomé Convention failed ACP trade? (trade between African, Caribbean and Pacific states and the European Community) (Contemporary Issues in World Trade), Journal of International Affairs June 22, 1994.

¹⁵ Liaison Committee of Development NGOs to the European Union; Background document for Europe and Africa: Defining a new partnership, Conference held in Brussels from 28-29 April, 1995.

exports to the EU. In 1994, Lomé IV underwent a mid-term review which resulted in approval of an environment development fund to cover the five year period from 1995 to 2000.¹⁶

In 1995, the United States and other countries¹⁷ petitioned the World Trade Organization's (WTO) Dispute Settlement Body (DSB) to investigate whether the Lomé IV Convention violated General Agreement on Tariffs and Trade (GATT). The complainants alleged that the regime under Lome Conventions for importation, sale and distribution of bananas by the EC is inconsistent with GATT's articles on Most Favoured Nation Treatment (I), Concessions (II), National Treatment (III), Elimination of Quantitative Restrictions (XI) and Non-discriminatory Administration of Quantitative Restrictions (XIII) as well as provisions of the Import Licensing Agreement, the Agreement on Agriculture, the agreements on Trade –Related Investment Measures (TRIMs) and the General Agreements on Trade in Services (GATS).¹⁸

Later in 1997, the Panel of the WTO Dispute Settlement Body found that banana import and the licensing procedures for the importation of bananas by EC within the Lome regime were inconsistent with the GATT. The Panel ruled in favor of the plaintiffs, effectively ending the cross-subsidies that had benefited ACP countries for many years and concluded that agreements between the EU and ACP were indeed not compatible with WTO's GATT regulations.¹⁹

After the expiry of the Lomé IV in 2000 and the events between 1995 resulting in the USA petitioning the WTO Dispute Settlement Body, the Cotonou Partnership Agreement (CPA) was negotiated. The agreement established a comprehensive framework for ACP-EU relations and called for fundamental changes in their longstanding relationship, to reflect the changing times. It further aimed at gradual complete liberalization of trade between the signatory states by 2020.²⁰

¹⁶ Ibid

¹⁷ The complaining companies were United States of America, Ecuador, Guatemala, Honduras and Mexico.

¹⁸ Refer to the General Agreement on Tariffs and Trade came into force on 1st January 1948.

¹⁹ European Communities Vs. United States and Others WTO, DS27: 12th of April 1999.

²⁰ Supra note 9.

The Cotonou Agreements were still based on non-reciprocal trade preferences that granted duty free access to the EU market for nearly all products originating in ACP countries. The agreement was designed to establish a comprehensive partnership based on three complementary pillars namely; development cooperation, economic and trade cooperation and the political dimension.²¹ The political dimension and development cooperation pillars are due to expire in 20 years which is February 2020. The trade pillar expired at the end of 2007.²² The agreement's main objective was to reduce and eventually eradicate poverty in consistence with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy.²³ The Cotonou Partnership Agreement was also negotiated in appreciation of the 1966 International Convention on Economic, Social and Cultural Rights (ICESCR) which provides that every member of family race is entitled to enjoy his/her economic, social and cultural rights.²⁴

In light of the enhanced trade liberalization since 1995 under World Trade Organization (WTO) rules and the expiry of the Cotonou Partnership Agreement pillar on economic and trade cooperation in 2007, the Agreement was found to be contrary to the commitments and principles under the WTO trade system. In order to make the EU-ACP relationship compliant to the WTO rules, a more WTO compliant regime was proposed hence the ongoing EPAs negotiations.

EPAs negotiations were launched in September 2002, with 1 January 2008 as the deadline for bringing the EU-ACP trade regime into conformity with WTO rules.²⁵ In 2002, the first phase of negotiations started between the European Commission and the ACP group on issues of general interest to the all ACP countries of the agreements followed by separate negotiations with the six ACP regional configurations established for the negotiations. These six regional configurations are the Economic Community of West African States, East Africa Community, the Pacific Region, Southern African Development Community, Caribbean community and Dominican Republic and La Communauté économique et monétaire de l'Afrique centrale. The negotiations

²¹ An overview and historical background of the Cotonou Agreement. Available at: http://ec.europa.eu/development/geographical/cotonouintro_en.cfm. Accessed on the 24th October 2009.

²² Cotonou Agreement (2000) OJ L317/3, amended (2005) OJ L287/1

²³ Ibid

²⁴ International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

²⁵ Bassilekin. A. 2007, New ACP-EC waiver at the WTO (ECDPM Discussion Paper 71), Maastricht.

extended beyond the initial 1st January 2008 deadline with only one full EPA being signed between the EC and the Caribbean Forum (CARIFORUM).²⁶

EPA Negotiations between Eastern Southern Africa (ESA) and the EU commenced on February 7, 2004. Kenya started negotiation under the ESA configuration while it belonged to the East Africa Community. Other ESA members were drawn from the Common Market for Eastern and Southern Africa (COMESA). As negotiations progressed, especially on Market Access, it became apparent that EAC Partner States could not conclude EPAs in two different configurations without destroying the East Africa Customs Union. In August 2007, the East Africa Community Summit of Heads of State decided that EAC concludes an EPA with the EC as a bloc.

EAC Partner States initialed an interim Framework Economic Partnership Agreement (FEPA) with the European Union on 27th November 2007 in Kampala, Uganda, pending the signing of a comprehensive EPA by July 2009.²⁷ The rationale for signing the interim Framework Agreement was to protect the interests of the EAC region in trade arrangements with the EU given that the duty free quota free access to the EU was to lapse at the end of 2007.²⁸ The July 2009 deadline for signing the comprehensive EPA has since passed and no comprehensive agreement exists. In June 2010 the East African Community (EAC) Partner States and the European Commission (EC) agreed to accelerate negotiations and reach an agreement by November 2010 but so far no such agreement has been reached.²⁹

²⁶ On 15 October 2008 the European Union signed an Economic Partnership Agreement with 13 CARIFORUM countries: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Suriname, and Trinidad and Tobago. Guyana signed on 20 October. The Agreement is provisionally applied as of 29 December 2008.

²⁷ The Framework Economic Partnership Agreement comprised of General Provisions (scope, objectives and principles), Trade in Goods, Fisheries, Economic and Development Cooperation, Provisions on areas for future negotiations, Institutional & Final Provisions and Annexes and Protocols (Customs duties on originating products, Rules of origin and Administrative matters).

²⁸ Ministry of Tourism, Trade and Industry (Republic of Uganda), An Overview of the East African Community – EU Framework Economic Partnership Agreement (EPA); What is in it for Uganda? Available at: <http://www.mtti.go.ug/EPA.pdf>. Accessed on the 2 November 2009.

²⁹ Department of Corporate Communications and Public Affairs, June 2010, EAC-EC EPA Negotiations Held in Dar el Salaam, available at http://www.eac.int/trade/index.php?option=com_content&view=article&id=117:epa-negotiations&catid=40:press. Accessed on 31st March 2011.

The raging debate now focuses on the possible effects of signing the comprehensive agreement to the Social Economic Rights of Kenyans as originally envisaged in the Cotonou agreements. The proposed EPAs has been criticized that they violate socio-economic rights of the developing countries. This study therefore interrogates the content of the EPAs, Kenya's obligations under EPAS and establishes whether they indeed violate the socio-economic rights of developing countries, particularly Kenya. The study further proposes possible alterations that will see preservation of social-economic rights of Kenyans.

1.2 Statement of the Problem

Unlike the Cotonou agreement that were founded on the foundation of among other the respect for International Convention on Economic, Social and Cultural Rights (ICESCR) the EPAs are founded on the trade liberalization theory. The Cotonou Agreement commits the parties to the recognition and observance of the principles of the Universal Declaration of Human Rights, the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of all forms of Discrimination against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the 1949 Geneva Conventions and the other instruments of international humanitarian law, the 1954 Convention relating to the status of stateless persons, the 1951 Geneva Convention relating to the Status of Refugees and the 1967 New York Protocol relating to the Status of Refugees.³⁰

The aim of EPAs is to establish a regime that is compatible to international trade principles as envisaged within the WTO framework. The WTO framework gives minimal consideration for human rights hence a WTO compliant EPAs may see EAC countries enjoying less social and economic rights than they are currently.³¹ Upon initialing the EPA Framework on 27th November

³⁰ Preamble to the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the other Part signed in the June 2000.

³¹ Debates have been going on the extent to which WTO promotes human rights with some scholars arguing that there is no relationship between human rights and trade and other arguing that there is such a linkage. Refer to the following literatures: Caroline Dommen (2002) 'Raising human rights concerns in the World Trade Organization - actors, processes and possible strategies,' *Human Rights Quarterly*, Vol. 24, p. 1-50 and Gabrielle Marceau (2002) 'WTO Dispute Settlement and Human Rights,' *European Journal of International Law*, Vol. 13, No. 4, <http://ejil.org/forum_tradehumanrights>.

2007, the EAC Partner States and the European Commission reviewed various articles of the FEPA but some remained contentious. Some of the contentious articles relate to the liberalization of trade which in the opinion of the EAC countries may have adverse effects on the social-economic rights of its citizens. The issues include export taxes, Most Favoured Nation treatment and Economic & Development Cooperation.³²

Further, EU is the main trading partner for the EAC countries and therefore EU has a superior negotiation power over EAC. This fear may result in EAC compromising on protection of social and economic rights in favour of trade under EPAs.

This study therefore interrogates the effects of the EPAS on the social economic rights of Kenyans in light of liberalized trade and based on the fact that Kenya and its EAC counterparts have a lesser bargaining power as compared to the EU.

1.3 Research Questions

- a. What is the framework of the EPAs and what obligations do they place on Kenya as a signatory?
- b. What is the effect of EPAs on the socio-economic rights of Kenyans as envisioned under the Constitution of Kenya 2010?
- c. What reforms on EPAs is necessary so as to protect the socio-economic rights of Kenyans?

1.4 Hypothesis

The EPAs lead to more liberalized economies hence exposing Kenya to more competition from developed economies since her economy is based on production of primary goods. Such increased competition which is based largely on liberalized international trade will result in diminished earning for Kenya hence negatively affecting the living standards and rights of Kenyans.

³² East Africa Community, 2010, Briefing on EAC-EC EPA Negotiations, East Africa Community Website available at. http://www.eac.int/trade/index.php?option=com_content&view=article&id=121&Itemid=105. Accessed on the 31st March 2011.

1.5 Theoretical and Conceptual Framework

1.5.1 Theoretical Framework

This study relies on the theory of free trade and human rights. These theories are discussed below in greater detail and how they relate with the study.

a. Free Trade Theory

Free trade is a type of trade theory that allows trading parties transact without interference from government regulation or intervention and promoting a liberalized trade.³³ It is based on the absolute advantage theory as postulated by Adam Smith. Adam Smith wrote in *The Wealth of Nations*, “If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it from them with some part of the produce of our own industry, employed in a way in which we have some advantage.”³⁴ This theory was further advanced by David Ricardo’s comparative advantage theory. In his example, Ricardo imagined two countries, England and Portugal, producing two goods, cloth and wine, using labor as the sole input in production. He assumed that the productivity of labor (i.e., the quantity of output produced per worker) varied between industries and across countries. However, instead of assuming, as Adam Smith did, that England is more productive in producing one good and Portugal is more productive in the other, Ricardo assumed that Portugal was more productive in both goods. Based on Smith’s intuition, then, it would seem that trade could not be advantageous, at least for England.³⁵

However, Ricardo demonstrated numerically that if England specialized in producing one of the two goods and if Portugal produced the other, then total world output of both goods could rise. If an appropriate terms of trade (i.e. amount of one good traded for another) were then chosen, both countries could end up with more of both goods after specialization and free trade than they each

³³ Bhagwati, Jagdish (2002), *Free trade today*, Princeton: Princeton Univ. Press, pp. 3.

³⁴ Smith A., 1976, *The Wealth of Nations* edited by R.H. Campbell and A.S. Skinner, The Glasgow edition of the Works and Correspondence of Adam Smith, vol. 2a, p. 10.

³⁵ David Ricardo, 1821, *On the Principles of Political Economy and Taxation*, 3rd ed. London: John Murray.

had before trade. This means that England may nevertheless benefit from free trade even though it is assumed to be technologically inferior to Portugal in the production of everything.³⁶

Free trade theories of absolute and comparative advantage underpin the World Trade Organization (WTO) system which operates under three main principles discussed below.³⁷

Non-Discrimination Principle: Nondiscrimination has two major components: the most-favored-nation (MFN) rule, and the national treatment principle. Both are embedded in the main WTO rules on goods, services, and intellectual property, but their precise scope and nature differ across these three areas. The MFN rule requires that a product made in one member country be treated no less favorably than a “like” (very similar) good that originates in any other country.

National treatment ensures that liberalization commitments are not offset through the imposition of domestic taxes and similar measures. The requirement that foreign products be treated no less favorably than competing domestically produced products gives foreign suppliers greater certainty regarding the regulatory environment in which they must operate.³⁸

Reciprocity Principle: Reciprocity is defined as a fundamental rule by which plural parties maintain the balance of treatment by means of granting the same or equivalent rights and benefits and/or undertaking obligations to each other. Reciprocity is a fundamental element of the negotiating process. It reflects both a desire to limit the scope for free-riding that may arise because of the MFN rule and a desire to obtain “payment” for trade liberalization in the form of better access to foreign markets.³⁹

Transparency: Enforcement of commitments requires access to information on the trade regimes that are maintained by members. The agreements administered by the WTO therefore incorporate mechanisms designed to facilitate communication between WTO members on issues.⁴⁰

³⁶ Supra

³⁷ Bernard Hoekman, *The WTO: Functions and Basic Principles*, World Trade Organisation. Available at: <http://www.profesores.ucv.cl/mberthelon/Hoekman%202002.pdf>. Accessed on 31 October 2009.

³⁸ Ibid

³⁹ Ibid

⁴⁰ Ibid

It is these principles that inform the current negotiations on EPAs. The EU-ACP trade relations under Lomé Agreements and the Cotonou Partnership agreements were done outside the WTO principles. The timeframes given for the expiry of WTO waiver on EU-ACP non-reciprocal relations lapsed and now the EPAs are negotiated to be WTO compatible.

b. Human Rights Theory

The human rights theory is encapsulated in the United Nations Universal Declaration of Human Rights (UDHR) and other human rights instruments like the ICESCR draws from the UDHR. The UDHR provides for key principles namely universality of human rights, inalienability of human rights and interdependence of human rights.⁴¹

Principle of universality of human rights: principle of universality of human rights provides that all human beings are equal regardless of their political, economic, spiritual and cultural systems; or geographical location. The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration on Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions.

Inalienability of human rights: Human rights are inalienable. They should not be taken away, except in specific situations and according to due process. For example, the right to liberty may be restricted if a person is found guilty of a crime by a court of law.

Interdependent and indivisible: All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.

⁴¹ Refer to United Nations Human rights, Office of the High Commissioner for Human Rights, Website: <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>. Accessed on the 30 October 2009.

Trading within an environment of liberalized trade systems like WTO may not necessarily guarantee these human rights principles. As the EPA negotiations go on it is important that these human rights principles are observed. This is so because if human rights are universal, inalienable, interdependent and indivisible then poor countries need to be treated favorably to enhance their economies and hence improve the economic rights of its people. Human beings in poor countries are equal to human beings in developed countries and therefore they should be uplifted to enjoying rights that people from developed countries enjoy. One way of uplifting them is by giving them favorable economic terms in international trade under EPAs.

1.5.2 Conceptual Framework

This study is based on the concept of **human rights** and the **concept of justice** which have been explored in detail in Chapter two together with the legal philosophy that informs both the concept of human rights and the concept of justice. **The concept of human rights** has evolved through different phases in human history. A general definition of human rights is that they are the "rights and freedoms to which all humans are entitled". It is worth noting that human beings cannot be treated on unequal terms in the application of human rights norms. **The Concept of Justice** has three facets - interpersonal adjudication,⁴² law based on fault⁴³ and an emphasis on procedures.⁴⁴ **These have been expounded in detail in Chapter two**

1.6 Justification for The Study

This study highlights some of the effects EPAs on economic, social and cultural rights of Kenya. This study is important in view of the on-going EPAs negotiation. It is hoped to raise a red flag to negotiators and influence their decisions. Further, the study contributes to the existing academic literature on the subject of EPAs.

⁴² The Concept of Justice by Dr. Mark Mooray, available at <http://ourcivilization.com.cooray/ibof/Chap182.htm>, accessed on 11th October 2011

⁴³ Ibid

⁴⁴ Ibid

1.7 Literature Review

It is noteworthy that several scholars have commented on the ACP-EU partnership ever since it was negotiated. Other scholars have written on the negotiations of the proposed EPAs. In the following paragraphs the study reviews the current literature with a view to exposing the gaps that exist and which this study seeks to fill.

Undercutting Africa, Economic Partnership Agreements, Forests and the European Union's quest for Africa's Raw Materials,⁴⁵ the article states that Economic Partnership Agreements (EPAs), between the European Union and ACP countries, are in complete disarray. Despite the passing of a key negotiating deadline at the end of 2007, and relentless pressure from European Commission (EC) negotiators, many ACP countries, including Nigeria, Congo and Gabon in Africa, have refused to sign any form of EPA (even though some have lost their tariff preferences as a result). The overall consequences for their economies are simply too threatening. One potentially significant consequence of the passing of the 2007 deadline is that for many ACP countries, especially in Africa (where a higher proportion of countries are also Least Development Countries (LDCs) with little to lose from the failure of the negotiations) there may now be less pressure to conclude EPAs. Now is an ideal moment to reconsider the likely long-term impacts of EPAs. One of the most worrying aspects of EPAs is that all ACP countries are being put under extreme pressure to open their markets: the European Union (EU) expects ACP countries to liberalise 80% or more of their tariff lines. This means that ACP countries signing up to an EPA will lose a key development tool used by industrialized economies themselves and can expect to experience severe economic difficulties if European imports flood their markets. The article compares this with the World Trade Organization (WTO), in which most African countries are completely exempt from removing their import tariffs, precisely because their economies are weak and vulnerable.

The article refers to one of the EC's own Sustainability Impact Assessments even predicts that EPAs could "*accelerate the collapse*" of the manufacturing sector in West Africa. The inclusion of investment liberalisation in the Caribbean EPA also provides a clear and worrying indication

⁴⁵ Ronnie Hall for Friends of the Earth, (2008), *Undercutting Africa, Economic Partnership Agreements, Forests and the European Union's Quest for Africa's Raw Materials*, London, Friends of the Earth.

of an additional commitment the EU will seek from other ACP countries if EPA negotiations continue. Liberalizing investment in sectors such as forests and agriculture – both of which are mentioned explicitly in the Caribbean EPA's investment clauses – could have a dramatic impact on deforestation rates, subsistence farming and food security. Countries agreeing to liberalise investment could have to hand over more rights to foreign corporations to exploit forests, fisheries, agriculture and other natural resources such as oil and gas, and this could in turn lead to even more forests and small farms being cleared to make way for logging, mining and export-oriented agriculture.

This article addresses the impact of EPAs in Africa which is relevant to the study herein. It however, differs from the study because the study is specifically concerned with Kenya.

Amin Alavi et al⁴⁶ illustrates that almost all economic estimates show that, at least in the short term, many ACP countries will be negatively affected by the EU's demand for reciprocity. The EPA arrangement is not WTO compatible and there is need to make it compatible. It identifies several areas of controversy when discussing EPAs which include, the incompatibility of EPA to WTO rules and the substantive issues other than tariff liberalization, which are addressed in the negotiations across the different EPA configurations – that is, the non-tariff related content of EPAs regardless of the above-mentioned institutional context. The article also discusses the controversy on an appropriate EPA Rule of Origin methodology in terms of the EU's intention to generalize the use of a Value Added criterion as its preferred method of calculating the origin of traded goods, as against ACP countries' favouring of a Change of Tariff Classification criterion, which is said to be simpler and less restrictive. At the same time, academic studies differ in their estimation of the likely supply response to a significant change in Rule of Origin methodology. This article discusses various controversial areas when negotiating the EPAs which is relevant to the current study. It does not however, give specific areas of controversy relating to Kenya and the current study interrogates and fills this gap.

⁴⁶ Amin Alavi, Peter Gibbon and Niels Jon Mortensen, (2007) EU-ACP Economic Partnership Agreements (EPAs) Institutional and Substantive Issues, Copenhagen, Danish Institute for International Studies.

An Impact Study of the EU-ACP Economic Partnership Agreements (EPAs) in the Six ACP Regions is an article that presents a very detailed and dynamic analysis of the trade-related aspects of Economic Partnership Agreements (EPAs) negotiations. They use a dynamic partial equilibrium model - focusing on the demand side - at the HS6 level (covering 5,113 HS6 products). Two alternative lists of sensitive products are constructed, one giving priority to the agricultural sectors, the other focusing on tariff revenue preservation. In order to be WTO compatible, EPAs must translate into 90 percent of bilateral trade fully liberalized. ACP exports to the EU are forecast to be 10 percent higher with the EPAs than under the GSP/EBA option. On average ACP countries are forecast to lose 70 percent of tariff revenues on EU imports in the long run. Yet imports from other regions of the world will continue to provide tariff revenues. Thus when tariff revenue losses are computed on total ACP imports, losses are limited to 26 percent on average in the long run and even 19 percent when the product lists are optimized. The final impact on the economy depends on the importance of tariffs in government revenue and on potential compensatory effects. However this long term and less visible effect will mainly depend on the capacity of each ACP country to reorganize its fiscal base. This article discusses the effects of EPAs as if they were uniform. It is important to note that EPAs differ from one negotiating group to the next and the issues they address and the effects thereof may be completely different. The paper does not therefore focus on the East Africa region where Kenya is negotiating.

EU Trade Partnerships with Developing Countries discusses various issues and options of addressing the issues in relation to the EPA and the WTO rules.⁴⁷ Some of the issues discussed include;

- a. How to reconcile the special status of the ACP Group with the EU's obligations to the WTO? After almost three decades of offering the ACP non-reciprocal preferential access, the EU plans to replace the existing trade regime by Economic Partnership Agreements (EPAs). These would not be fully reciprocal: the ACP argues that poor and small developing countries need asymmetric treatment, which the WTO allows only on a non-discriminatory basis for all developing countries (GSP, for example).

⁴⁷ Ian Gillson and Sven Grimm, (2004), *EU Trade Partnerships with Developing Countries*, London, Overseas Development Institute.

- b. How to reconcile special treatment for the Least Developed countries (LDCs) with EPAs based on regions of ACP countries? Under the EBA initiative, LDCs have been granted duty-free and quota-free access to the EU for all products. The regions, however, all include both LDCs and others, so either the EPAs must provide for differentiation among members or they will offer worse treatment to the LDCs than they have under EBA.
- c. How to reconcile the EU's programme of extension of its regional arrangements to an increasing number of developing countries (to the ACP and others) with its support for multilateralism? Multilateral negotiations are needed to deal with the difficult issues on the WTO agenda, such as agricultural reform. Regionalism could undermine the multilateral process both through creating countries with an interest in protecting regional or preferential access and through the strain it places on negotiating resources (especially in LDCs).
- d. How to reconcile differentiated trading arrangements with development goals? Each additional offer of special treatment to some developing countries, whether through regions or preferences, creates losers in other developing countries.
- e. How to make the EU's trade policy coherent with its development goals? Member States and small groups within them have protected domestic production and prevented reforms, for example of the Common Agricultural Policy (CAP), which would offer opportunities to developing countries.

The issues that are discussed in this article are same of the issues that this study will be addressing; however, it differs from this study because it discusses these issues in a general manner and not focused on Kenya.

Will the EU-Africa Economic Partnership Agreements Foster the Integration of African Countries into the Global Trading System? This article states that New Economic Partnership Agreements were intended to replace the non-reciprocal EU-ACP trade relationship by 1 January 2008 in a bid to further the development of ACP countries under a WTO-compatible framework.⁴⁸ African countries and regions failed to conclude any EPAs by that date

⁴⁸ Ukpe, Aniekan Iboru, Will the EU-Africa Economic Partnership Agreements Foster the Integration of African Countries into the Global Trading System? (June 13, 2008). Society of International Economic Law (SIEL)

due to scepticisms on the deeper trade implications of the EPAs and the non-implementation of the EPA preparatory programme. However, in a move that has seen the disintegration of Africa's EPA negotiating groups and compromised regional integration across the continent, many African countries broke ranks to initial bilateral goods-only Interim Agreements with the EU as a first step towards concluding full EPAs. This paper sets out to examine the state of play of the EPA negotiations against the backdrop of the last-minute initialed Interim Agreements and their implication on the regional integration agenda of the African Economic Community (AEC). It argues that although such Interim Agreements may well preserve market access preferences, it is already having devastating effects on regional integration –the very basis of Africa's development strategy. The paper goes further to explore an alternative approach to concluding EPAs that would be compatible with both WTO provisions and the regional integration agenda of the Africa Economic Community. The paper focuses on Africa which is a too wide area of study in case of EPAs. As stated above EPAs are negotiated regionally and African has over three negotiating regions. Kenya falls into the East Africa Community negotiation block with unique concerns from the rest of Africa and therefore this study shall highlight those concerns in a more localized level.

Poverty Impacts of an Economic Partnership Agreement between Uganda and the EU paper analyzes the poverty impacts of an Economic Partnership Agreements agreement (EPA) between Uganda and the EU.⁴⁹ As Ugandan exports are also eligible for duty-free access to the EU under the Everything But Arms scheme the main impact of the EPA will be to require liberalization of EU exporters' access to the Ugandan market. There are fears this could threaten the incomes of poor people through lower prices for agricultural commodities, the crowding out of vulnerable industries, and loss of government revenue. We examine these fears by means of a qualitative analysis using data from a 1999 social accounting matrix of the Ugandan economy and the 2002/2003 household budget survey. We then quantify the effects on the economy and poverty employing a combined CGE-micro simulation model. The qualitative analysis shows that the scope for trade liberalization with the EU is very limited and that particularly the poor

Inaugural Conference 2008 Paper. Available at SSRN: <http://ssrn.com/abstract=1145537>. Accessed on 26 October 2009.

⁴⁹ Boysen, Ole and Matthews, Alan, Poverty Impacts of an Economic Partnership Agreement Between Uganda and the EU (September 10, 2008). Available at SSRN: <http://ssrn.com/abstract=1282191>, Accessed on 26 October 2009.

have only weak links to formal markets. The quantitative analysis suggests that the macroeconomic impacts of an EPA are minor but positive, implying that the economic adjustment costs might turn out to be low. Whether the very small poverty effects are positive or not depends on the selection of sensitive products in the EPA, although under all scenarios the very poorest appear to lose.

This agreement focuses on Uganda which is categorized as a least developed country in international relations while Kenya is categorized as a developing country. Despite the two countries, Uganda and Kenya being in the same negotiating region, their interests in EPA may still differ based on their international economic categorization.

Assessing the Economic Impacts of an Economic Partnership Agreement on Nigeria⁵⁰ discusses potential economic implications for Nigeria of an Economic Partnership Agreement with the European Union. It uses the World Bank's Tariff Reform Impact Simulation Tool to assess the effects of preferential tariff liberalization with respect to the European Union. The results suggest that the impact of an Economic Partnership Agreement on total imports into Nigeria will be slight. This is in part because the Agreement will likely allow the most protected sectors to be excluded from liberalization, and also because where substantial tariffs are involved much of the increase in imports from the European Union will occur at the expense of other suppliers of imports. It is this trade diversion, arising from the discriminatory nature of the EPA, which generates a negative welfare impact of the tariff reforms. One way for Nigeria to limit these losses is to pursue non-preferential trade liberalization before implementing an EPA. The paper looks at the large number of import bans in Nigeria and argues that the positive impact on welfare of removing these import bans is likely to be substantial. Their removal would undermine a major reason for cross border smuggling and pave the way for a return to normal regional trade flows. The paper shows how an Economic Partnership Agreement presents an opportunity for accelerating the reforms that are needed to support a strategy to increase regional and global trade integration. Such an agreement is more likely to have positive and significant

⁵⁰ Andriamananjara, Soamiely, Brenton, Paul, Von Uexkull, Jan Erik and Walkenhorst, Peter, *Assessing the Economic Impacts of an Economic Partnership Agreement on Nigeria* (April 1, 2009). World Bank Policy Research Working Paper Series, Vol. , pp. -, 2009. Available at SSRN: <http://ssrn.com/abstract=1401225>.

impacts when integrated into a comprehensive strategy toward competitiveness and alleviation of the supply constraints that have stifled the impact of previous trade agreements. Key issues that should be addressed include liberalization and regulatory strengthening of services sectors to ensure that all firms in Nigeria have access to efficiently produced backbone services and initiatives to address the country's poor trade logistics performance.

Nigeria falls into the ECOWAS negotiating region while Kenya falls into the ESA negotiating region. This raises different concerns which this study specifically addresses.

The Position Paper on Economic Partnership Agreements (EPA) and Human Rights prepared by international Federation for Human Rights discusses a historical background between the European Community (EC) and Africa-Caribbean-Pacific (ACP) Countries.⁵¹ The paper also gives an account of how the all EU member states and ACP countries through regional and international conventions have human rights obligations in particular regarding economic, social and cultural rights. The majority of ACP countries are committed to respect both 1966 Covenants on Human rights. Among the 76 ACP States negotiating EPAs with the EC, 52 are parties to the International Covenant on Economic, Social and Cultural rights (ICESCR) and 54 have ratified the International Covenant on Civil and Political rights (ICCPR). The countries have also negotiated different instruments that protect human rights.

The article discusses the various effects of the EPAs on the human rights provided in these instruments. The necessary tax regime reforms to compensate loss, added to the reduction of customs revenues in the aftermath of market liberalization may lead to an extremely important fall in the ACP countries' budgets. Their capacity to finance public policies may decrease dramatically. The competitiveness of local formal sectors might also be harmed as they will certainly support new taxes and will have to face the competition of multinationals who can negotiate favorable conditions to implant their activity threatening not to invest or to relocate their investments. Hence, governments might have to chose between renouncing to funding social policies (education, health etc) due to decreasing incomes , and having difficulty to attract

⁵¹ The Position Paper on Economic Partnership Agreements (EPA) and Human Rights prepared by international Federation for Human Rights in June 2007.

foreign investors if fiscal conditions are not as beneficial to investors as those proposed by other countries. These economic effects have negative impact on various human rights including right to work and right to food.

This paper is relevant to the current study because it discusses the effects of EPAs to human rights. The current study also interrogates the effects of EPAs to human rights in Kenya but focuses on economic and social rights. The paper differs from the study on the basis that focus of the current study is specific to economic and social rights in Kenya as opposed to this paper which focuses on human rights and the World generally.

Sebastian Vollmer et al did a Background Paper on the EU-ACP Economic Partnership agreements Empirical Evidence for Sub-Saharan Africa.⁵² They inform that since early 2008 interim trade agreements between the EU and six regions of ACP countries (respectively sub-groups within the region) are in force. These agreements could be stepping stones towards full Economic Partnership Agreements between the EU and all ACP countries. They estimate the welfare effects of the interim agreements for nine African countries: Botswana, Cameroon, Cote d'Ivoire, Ghana, Kenya, Mozambique, Namibia, Tanzania, and Uganda.

Their results indicate that Botswana, Cameroon, Mozambique, and Namibia will significantly profit from the interim agreements, while the trade effects for Cote d'Ivoire, Ghana, Kenya, Tanzania, and Uganda are close to zero. However, Tanzania and Uganda also have the potential to experience positive welfare effects, but predicted results of the liberalization based on the interim agreement's reduction rates fall short of the potential of a full liberalization.

Their study is relevant to this study because it does provide empirical figures on how these countries including Kenya shall lose. It does however provide very general discussion without any relationship with human rights.

⁵² Sebastian Vollmer et al (n.d), Background Paper on the EU-ACP Economic Partnership agreements Empirical Evidence for Sub-Saharan Africa, University of Göttinge. Available on: http://siteresources.worldbank.org/INTWDR2009/Resources/4231006-1204741572978/epa_v1.pdf. Accessed on 11 September 2009.

Church Leaders' Statement on Economic Partnership Agreements in Kenya highlighted several issues that reflect the concerns of many Kenyans with regard to EPAs.⁵³ They acknowledge that the EU continues to be an important destination of Kenya's exports, the market share for Kenyan goods in East Africa and other African countries is growing particularly under the East Africa Community (EAC) and Common Market for East and Southern Africa (COMESA) regional groupings. They are however convinced that the free trade agreements under EPAs will undermine our government's national development plans. For example, The government had formulated the Strategy for Revitalisation of Agriculture and the Economic Recovery Strategy both of which recognise the need to attain national food security. The Strategy for the Revitalisation of Agriculture aims to restore profitability and viability of the agricultural sector as a source of gainful employment and to empower households to have resources for accessing adequate nutritious food. The irony is that Kenya is undertaking this strategy to revitalise agriculture in the face of liberalisation.

The church therefore opined that if EPAs are to contribute to Kenya's economic development they must be designed specifically to complement the national development strategies and should not be allowed to pressurize the government to adopt new or different approaches that are not in consonance with the national development plans. This statement relevant to the study because it concerns Kenya and it reflects key issues that Kenya experiences. It fails however to discuss the effects on EPAs on the economic rights of Kenyans.

The literature review discussed above clearly demonstrates that there is limited literature on the effects of EPAs to socio-economic rights in Kenya. This study intends to bridge that gap by discussing the socio-economic effects of EPAs.

1.8 RESEARCH METHODOLOGY

Both primary data and secondary data shall be used in this study. Primary data is necessary in order to answer questions that are unique to the study and which may have not been documented.

⁵³ Church Leaders' Statement on Economic Partnership Agreements in Kenya, Available at: <http://www.traidcraft.co.uk/OneStopCMS/Core/CrawlerResourceServer.aspx?resource=D15A7AD7-D80C-4A6C-A42B-13BCB3DA4F3D&mode=link&guid=aeb066ad55f34368823f7bb4eec688cb>. Accessed 11 September 2009.

Data Sources

Data sources shall be both primary and secondary.

Primary data sources shall include government reports, agreements, international conventions and correspondence.

Secondary data sources shall include library (text books, journals, magazines, newspapers, articles, reports from research organizations) and the internet. University of Nairobi and Parklands Campus law library shall be accessed for further materials. Various websites shall also be accessed.

1.9 Chapter Breakdown

Chapter one

Introduction

This chapter highlights that historical background of the problem, statement of the problem, research questions, hypothesis, conceptual and theoretical frameworks, and justification of the research, literature review and methodology.

Chapter Two

The Legal philosophy underpinning the Research on Economic Partnership Agreements

Under this Chapter the legal philosophy underpinning the research has been highlighted and the legal theoretical framework has been largely elaborated.

Chapter Three

The Economic Partnership Agreement Framework

Chapter two dissects the EPA framework and highlights the areas of major concern to Kenya. The discussion in this chapter is laid on the WTO pillars of non-discrimination and transparency and the need for differential treatment of less and least developed countries. The main question

that will be answered is whether Kenya gains more under a free trade arrangement or preferential and differentiated trade mechanism.

Chapter Four

The Effects of the EPA Framework on Kenyans' socio-economic rights

This chapter discusses Kenya's obligations under EPAs and the various effects on her socio-economic rights. It will focus on the right to work, right to education and right to food. (How were these rights selected. You will need to advise on the choice as our constitution covers the first, second and third generation rights)

Chapter Five

Conclusions and recommendations

Chapter Five provides the conclusion and recommendations.

CHAPTER TWO

2.0 LEGAL PHILOSOPHY UNDERPINNING THIS RESEARCH

2.1 Introduction

The aim of EPAs is to establish a regime that is compatible to international trade principles as envisaged within the WTO framework. The WTO framework gives minimal consideration for human rights hence a WTO compliant EPAs may see EAC countries enjoying less social and economic rights than they are currently.⁵⁴ This study therefore interrogates the effects of the EPAS on the social economic rights of Kenyans in light of liberalized trade and based on the fact that Kenya and its EAC counterparts have a lesser bargaining power as compared to the EU.

This Chapter shall explore the legal philosophy underpinning the research and therefore, in essence the legal theoretical framework that underscores the research questions.

2.2 The Utilitarian Theory

Developed by John Stuart Mill and Jeremy Bentham in the mid-1800s, utilitarian theory bases the moral worth of an action upon the number of people it gives happiness or pleasure to. It is used when making social, economic or political decisions for the "betterment of society". In utilitarianism, an action is considered to have utility only to the extent that it contributes to the overall good. That is, an action is morally right if, and only if, it produces at least as much utility as any alternative action when the utility of all is counted equally.⁵⁵

Utilitarian theory developed and evolved in a symbiotic relationship with the evolution of the modern state; that is, from the formation and maturation of the mercantilist nation-states through

⁵⁴ Debates have been going on the extent to which WTO promotes human rights with some scholars arguing that there is no relationship between human rights and trade and other arguing that there is such a linkage. Refer to the following literatures: Caroline Dommen (2002) 'Raising human rights concerns in the World Trade Organization - actors, processes and possible strategies,' *Human Rights Quarterly*, Vol. 24, p. 1-50 and Gabrielle Marceau (2002) 'WTO Dispute Settlement and Human Rights,' *European Journal of International Law*, Vol. 13, No. 4, <http://ejil.org/forum_tradehumanrights>.

⁵⁵ Donald C. Hubin (2003). Utilitarian Theories Of Justice. *Philosophy* 230

the Industrial Revolution to the rise of the modern capitalist economy.⁵⁶ It is generally viewed as the dominant political philosophy or ethical theory over the last century, if not the last two.⁵⁷ Bentham⁵⁸ and Mill⁵⁹ and assumes that the objective of any policy should be the attainment of the greatest good for the greatest number; that is, taken to economic extremes, utilitarianism can allow for some to suffer so that the masses can benefit.⁶⁰

Adam Smith is noted as the founder of how the utilitarian way of thinking justifies a free market. The concept of a capitalistic society and the notion of private property are key tenants to the views associated with utilitarianism.⁶¹ It is the concept of utilitarianism, or the greatest net benefit outcome for all participants, which has inspired many of the aspects which laid the foundation a free market and trade. The utilitarian argument states that an unregulated market provides for the greatest net benefit to all the participants in the market, specifically the buyers and sellers.⁶²

As some state, there is an “invisible hand” that fosters the welfare of all participants. First, buyers of goods and services seek after the things they want and or need at the lowest price they are able to find. This demand of the goods by buyers provides desire for producers to supply the goods. This supply and demand, coupled with little government intervention, provides for the lowest possible prices of the products that consumers want and need. Producers, in order to keep costs down seek after ways to use resources more efficiently and thus economically. If a resource is scarce, and therefore expensive, a producer finds ways to extend the resources available, or innovate other ways to use alternative resources. The result of this free market is a situation in which all involved receive the greatest net benefit or greatest utility.⁶³

⁵⁶ Hurt and Schuchman (1966), ‘The Economic Rationale for Copyright’, *56 American Economic Review*, 421-432.

⁵⁷ (Brown, 1986; or S en, 1999).

⁵⁸ Bentham’s theory of utility is based on three central features: The greatest happiness principle (or utility principle); Egoism and Artificial identification of one’s own interests with those of others

⁵⁹ Mill defines utilitarianism as a theory based on the principle that "actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness."

⁶⁰ Simon Blackburn *Utilitarianism* in the Oxford Dictionary of Philosophy, (Ed.) (OUP, 1996)

⁶¹ Iain McLean, *Adam Smith, Radical and Egalitarian: An Interpretation for the 21st Century* (Edinburgh University Press, 2004)

⁶² John Hospers, *Utilitarianism in An Introduction to Philosophical Analysis*, 4th edition, (Routledge, 1997)

⁶³ John Stuart Mill, *Utilitarianism*, (Oxford University Press, 1998)

In this situation government intervention and regulation should be negligible. The purpose of governmental interaction would solely be to protect the continuance of a free market and the pursuit of happiness and the right to private property. It is believed that any interaction or regulation above this would only impede the natural and efficient flow of a free market. Many economists also believe that government action is usually ineffective because it is often “after the fact” or that actions are based on limited information and is therefore less successful.⁶⁴

The theory of utilitarianism has been criticized for many reasons. Critics hold that it does not provide adequate protection for individual rights, that not everything can be measured by the same standard, and that happiness is more complex than reflected by the theory. It is nearly impossible to objectively measure the benefit of an action from one person to another, or on a large group of people.⁶⁵

Utilitarianism can justify making decisions that violate a person’s human rights; what may be considered good for some people can violate rights of others. It requires an impartial decision maker. Total impartiality does not allow special relationships like friends or family. The decision makers naturally consider the good of people close to them before more distant stakeholders. But utilitarianism forces the decision maker to weigh the overall good. Utilitarianism answers the question “what decision is right?” by answering “what decision brings about the most good, pleasure or happiness?” But the questions are not the same. It does not necessarily and logically follow the answer to one question will be the answer to the other. The argument is especially pertinent when applying utilitarianism and thinking only of the consequences in the immediate future.⁶⁶ For example, a pharmaceutical company using utilitarianism to justify lying to the public on the consequences of a medicine released to the public to avoid immediate negative consequences of public panic. But if no one ever provides truthful answers to tough questions adverse long-term consequences can result. The deception leads to further bad decisions made from ignorance or bad information, leading to far more dire consequences.

⁶⁴ Annie Lundy (2009). Applying Utilitarianism to Business Ethics: The Ford Pinto Case. *Bizcovering*, February 6, 2009

⁶⁵ Driver, Julia. “The History of Utilitarianism.” *Stanford Encyclopedia of Philosophy*. 27 Mar. 2009.

⁶⁶ Shaw, William H. *Business Ethics*. Australia: Thomson Wadsworth, 2008.

Under the utilitarian theory is argued that manufacturers may dump hazardous waste into the air and sea without having to incur the costs associated with cleanup, or health and environmental issues. It could be said that the sludge of industrial activity slips through the fingers of the “invisible hand.” However, as time progresses and information distribution becomes more efficient and easily obtained, it becomes more difficult for manufactures to hide their actions. The consumers are knowledgeable and will place value (utility) on the issues they feel to be of the most import. If the general public discovered that their favorite company was polluting the environment they could choose (in a free market) whether they receive greater satisfaction (utility) from the product, or the environment being polluted. A close parallel to this is that even though the entire population has information regarding the effects of smoking, millions choose the satisfaction they receive from the product over the pollution of their bodies.

Some critiques opine that the utilitarian defense of views are based on assumptions that are impractical, improbable, and idealistic. For example, utilitarian arguments assume that there are multitudes of suppliers and a plethora of alternative products. Unfortunately, this isn't always the case. In many situations there may be an oligopoly, or even a monopoly that may adversely effect the normal market processes of supply and demand. Example is Kenya Power and Lightening Company that increases the electricity bill but consumers can hardly do anything about it; this situation does not provide for ultimate utility for all participants (consumers). While this claim is valid in the short run, it does not take into effect the true idea of utilitarianism in that the benefits and costs must be evaluated not only immediately, but for the entire foreseeable future. If a monopolistic entity took advantage of its position there would undoubtedly be initial negative implications. Fortunately the market, in the long run, would correct this problem. This would as competitor(s) would find a way to enter the market in order to claim “a piece of the action”; and, consumers would attempt, and finally discover alternatives.⁶⁷

2.2.1 Underpinning Utilitarian Theory to the Research

The theme of this paper, therefore, is to interrogate the content of the EPAs, Kenya's obligations under EPAS and establish whether they indeed violate the socio-economic rights of developing countries, particularly Kenya. The study further proposes possible alterations that will see

⁶⁷ Baumol, W., 1962. The Doctrine of Consumer Sovereignty – Discussion. American Economic Review 52, 289

preservation of social-economic rights of Kenyans. In doing so, the utilitarian theory shall underpin my study noting that the theory underscores the maxim of an action having utility only to the extent that it contributes to the overall good. The Constitution of Kenya has an elaborate Bill of Rights under Chapter Four which rights mainly espouse the socio-economic rights which I will expound on in Chapter three. It is this utilitarian theory which will largely underpin my study and demonstrate the limitations that Kenya will suffer if we sign the Economic Partnership Agreement and more particularly on the socio-economic rights which are the focus of this study.

2.3. Social Planning/ Socialist Theories

The term *sociological theory* refers to logically interconnected sets of propositions from which empirical uniformities can be derived.⁶⁸ The theory projects to the efforts of a government to create regulations that *advance a vision of a just and attractive culture*.⁶⁹ It looks to a desirable society, which sweeps broader than concepts of social welfare. According to this theory, factors other than economics drive the policy, including consumer welfare, artistic tradition, respect, and consumers being active participants in shaping the world of ideas and symbols.

2.4 Legal Conceptual Framework

As outlined in the first chapter this study is based on the concept of **human rights** and the **concept of justice**.

The concept of human rights has evolved through different phases in human history. A general definition of human rights is that they are the "rights and freedoms to which all humans are entitled". Philosophers and thinkers advocating the concept of human rights are of the view that everyone is endowed with certain entitlements merely by reason of being human.⁷⁰ The Human Rights concept is egalitarian and universal. It is worth noting that human beings cannot be

⁶⁸ Robert K. Merton, "On Sociological Theories of the Middle Range," pp. 39-53 from Robert K. Merton, *Social Theory and Social Structure* (New York: Simon & Schuster, The Free Press, 1949).

⁶⁹ Fisher, *Supra* note 3.

⁷⁰ The Evolution of Human Rights: A retrospect: Available at, <http://factoidz.com/the-evolution-of-human-rights-a-retrospect/> accessed on 10th October 2011

treated on unequal terms in the application of human rights norms. These rights can be in the form of shared norms of actual human moralities, as justified norms or natural rights. They can also be in the form of **legal rights either in the local legal system or in the international law**. In spite of the development of the human rights concept over ages through historical phases, there are no precise or specific norms to suggest what constitute human rights and what do not. In consequence, the incidence of heated debates in human rights issues is increasing in resonance and was perceived as a formulation of the underlying principle on which all ideas of citizens rights and political and religious liberty were based.⁷¹ There were many important people throughout history that contributed to the notion and understanding of human rights.

Following from this, it may be concluded that there are probably two ways to mainstream human rights in the trade-related aspects of the ACP-EU partnership. The first is the negative/sanction based-approach, which allows the EU to use restrictive measures under Article 96 of the Cotonou Agreement to promote human rights. In this regard the EU may withhold financial or technical assistance from any ACP country that it deems to be in violation of labour rights protected under the core ILO conventions.⁷² Regardless of the denial issued by EU officials that the non-execution clause will not be used to impose trade sanctions, it is not difficult to construe that given its record under the Lome/Cotonou regimes, the EU will not hesitate to wield the big stick on any erring ACP State. The second approach is progressive and positive. ACP countries may rely on Article XX of GATT to derogate from their trade obligations under the Cotonou Agreement/EPA in order to protect public order or morals, human life, and health. Although the provisions of GATT Article XX do not address human rights per se, it is not improbable that they could form the platform for using human rights considerations as a ground for trade restrictions.⁷³

These rights are protected by various national and international instruments. At the national level, **The Constitution of Kenya** provides for economic and social rights under **Article 43**,

⁷¹ Available at <http://www.hrweb.org/history.html> accessed on 9th October 2011

⁷² Available at http://www.germanlawjournal.org/pdf/vol06No10/PDF_VO1_06_No_10_1381_1406_Development_Nwobikefina.pdf accessed on 10th October 2011

⁷³ Ibid

which states that every person has the right to health, education, food social security, housing and work.⁷⁴ At the international level, the Universal Declaration of Human Rights and International Covenant on Economic, Social and Cultural Rights (ICESCR) are some of the Conventions that recognize these second generation rights. For example, article 23 and 26 of the Universal Declaration of Human Rights provide for the right to work and education respectively. This section must reorganized and summarized. It is not necessary to capture each of the scholars as the study does. What is important is to concisely identify and discuss the concept of human rights as it underpins the study.

The Concept of Justice has three facets - interpersonal adjudication,⁷⁵ law based on fault⁷⁶ and an emphasis on procedures.⁷⁷ **Interpersonal adjudication** is an aspect of the concept of justice that is based upon the rights and duties of the individual person. Inter-personal adjudication is practical and realistic. By its very nature it deals with the real problems which arise between individuals, instead of those problems which arise solely in the minds of ideologues. **Law based on standards and faults** is the second facet of the liberal concept of justice that is that a person should not be disadvantaged or punished except for fault (intentional, reckless or negligent wrong doing, strict liability applying in exceptional circumstances). The idea of fault is the golden thread that runs through the fabric of the legal order. But the whole of the common law relating to crimes, civil obligations and property rights is characterised by the notion that fault underlies punishment or deprivation. A system of sanctions based on fault presupposes known and pre-existing standards of conduct which bind the community.⁷⁸ **Due process** is the third feature of the liberal concept of justice that is the emphasis on procedures. The liberal does not believe in the possibility of achieving equality, democracy, justice, the public good and other ideals through legislative and prescriptive action. The rules of procedure, evidence and natural justice also protect individuals from arbitrary governmental action and illegal deprivation of

⁷⁴ The Constitution of Kenya, 2010-Kenya Gazette Supplement No.55 (The Constitution of Kenya) dated 27th August 2010.

⁷⁵ The Concept of Justice by Dr.Mark Mooray, available at [http://ourcivilization.com.cooray/ibof/Chap182 htm](http://ourcivilization.com.cooray/ibof/Chap182.htm), accessed on 11th October 2011

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Ibid

private rights. They are essential to the protection of individual rights of personal freedom and private property.⁷⁹

Rawls presents a more compassionate view of human rights, one with the greatest degree of individual liberty and equality while maintaining these rights for all. The state should distribute everything including benefits equally, unless an unequal distribution would benefit the poorer classes. He sees human rights as being constructed by reasonable people living together in a society. This view lends itself to cultural relativism, because western industrialized principles might not be appropriate elsewhere.⁸⁰

At a meeting by SEATINI⁸¹ held in Uganda in 2008, it was noted that EPAs' implication on the health sector has the following negative consequences with regard to equity and following liberalization; increase of the "cream skimming" practice by private sector, increase in inequalities as the wealthy are favoured at the expense of the poor, draws personnel away from public health services, decrease in support for universal public health program and undermining public health systems by denying the basic principles of cross-subsidization and risk pooling. It was also noted that there shall be a risk of domination by transnational corporations to the exclusion of domestic development, a risk compromising the quality of health care delivery and liberalization of other sectors: water, sanitation, education, environment. It was further noted that through EPAs, liberalization will also lead to shrinking of Policy space available to promote developmental objectives such as health equity and food security. The presentation also noted that the parties are negotiating Intellectual Property rights, areas with serious implications for access to medicines as well as food security.⁸²

2.5 Conclusion

Utilitarianism is a normative ethical theory. It is the most well-known and prevalent forms of consequentialism. In a broad sense, most government policies aim for the betterment of a large group of people, if not the overall population. Since utility is not directly observable, if the

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ Available at www.seatini.org and www.equinetafrica.org Conference report by SEATINI, meeting held at Munyonyo, Kampala, Uganda, 2008

⁸² Available at <http://www.seatini.org/workshop/Uganda%20Equinet.html> accessed on 11th October 2011

theory is to be used for the evaluation of economic and trade policies, it is necessary to specify the factors on which it depends. Although it does not follow logically from the theory of utilitarianism, most utilitarianists from Bentham to Mill, believed in the diminishing marginal utility of income.

Hence noting that African States negotiating the Economic Partnership Agreement negotiating EPAs are all parties to the African Charter on Human and Peoples' Rights (ACHPR), it is worth noting that this Charter protects all human rights, be they civil and political or economic, social and cultural, ranging from the right to work, the right to health, to the right to education.

Various African Union organs have adopted decisions or instruments relative to human rights such as the African Charter on Democracy, Elections and Governance.⁸³ The difference of economic development between EU and ACP states is one of the main reasons why EPAs threaten the ACP countries' development and the human rights of their populations. Indeed, such fragile economies in countries with often weak institutions face potentially disastrous competition from the industrialized countries of the EU. If these economies, already stricken by poverty, collapse and their national and per capita incomes further decrease, it is the human rights of millions which are threatened. Furthermore, in sectors where ACP countries do not have any comparative advantage, protections for workers who are affected by restructuring are clearly insufficient. There is no developed social security system with substitution incomes in case of inactivity.

As set out in the WTO rules on Special and Differential Treatment, EPAs must take into account the respective development levels of the parties. Article 34 of the Cotonou Agreement takes that into consideration. Despite these declarations on special and differential treatment, in many sectors, signing EPAs may have prejudicial consequences for the human rights of a large portion of the population of ACP countries.

The necessary tax regime reforms to compensate loss, added to the reduction of custom revenues in the aftermath of market liberalization will lead to an extremely important fall in the ACP

⁸³ Kenya Nation Human Rights Commission Website: <http://www.knchr.org/>. accessed on 27 October 2009.

countries' budgets. Their capacity to finance public policies may decrease dramatically. The competitiveness of local formal sectors might also be harmed as they will certainly support new taxes and will have to face the competition of multinationals who can negotiate favorable conditions to implant their activity threatening not to invest or to relocate their investments. Hence, governments might have to chose between renouncing to funding social policies (education, health) due to decreasing incomes, and having difficulty to attract foreign investors if fiscal conditions are not as beneficial to investors as those proposed by other countries.⁸⁴

⁸⁴ Sacha Silva, (2008), Impact of the Economic Partnership Agreement on Tax Systems in CARICOM, Prepared for the Meeting of Caribbean Organization of Tax Administrators (COTA) Belize City, Belize July 21-24, 2008.

CHAPTER THREE

3.0 THE FRAMEWORK OF ECONOMIC PARTNERSHIP AGREEMENT

3.1 Introduction

The Economic Partnership Agreements (EPAs) to be negotiated between the European Union and six different ACP⁸⁵ regions under the Cotonou Agreement are required to be formulated in conformity with the World Trade Organization (WTO). WTO conformity⁸⁶ requires that barriers to trade be dismantled between the EU and ACP states, hence introducing an element of reciprocity into trade relations. There is concern that extensive opening of the markets in these countries to the EU could create strong adjustment pressures, while European suppliers would presumably be only marginally affected by free market access for ACP products.

This chapter will examine the compliance of the EPAs framework with the WTO requirements. The chapter also presents an historical analysis of the EPAs framework by tracing its footsteps through its historical development from LOME I-IV, Cotonou Agreements until the now EPAs. Each historical epoch in the evolution of EPAs shall be examined under the common thread of the impact on socio-economic rights on the citizens of affected nations. The change in the global environment shall be reviewed as each of the regimes is examined. As the negotiations and demand to sign EPAs intensifies, debates are emerging surrounding its contents, advantages and disadvantages and whether or not if at all ACP countries should sign them. This Chapter is an analysis of the EPAs framework in the historical context of human rights.

3.2 The African Caribbean and Pacific (ACP)

⁸⁵ The six regional configurations are the: Economic Community of West African States, East African Community, Pacific Region, Southern African Development Community, Caribbean Community and Dominican Republic and La Communauté économique et monétaire de l'Afrique centrale (indicate source of this info?)

⁸⁶ Alex Borrmann, Harald GroBmann & Georg Koopmann, The WTO Compatilby of the Economic Partnership Agreements between the EU & ACP countries available at [http:// www.intereconomics.eu/downloads/getfile](http://www.intereconomics.eu/downloads/getfile) accessed on 13th October 2011.

The African, Caribbean and Pacific states⁸⁷ (ACP) as an entity, were created by the Georgetown Agreement in 1975. It is composed of African, Caribbean and Pacific States signatories to the Georgetown Agreement or the Partnership Agreement between the ACP and the European Union, officially called the "ACP-EC Partnership Agreement" or the "Cotonou Agreement".⁸⁸

The objectives of the ACP Group, as defined by the Georgetown Agreement, were to: Promote a new, fairer and more equitable world order ; Promote and strengthen solidarity among ACP States, and understanding between ACP peoples and governments ; Contribute to the development of important and close economic, social and cultural relations among developing countries and develop cooperation among ACP States in the areas of Trade, Science and Technology, Industry, Transport, Education, Training and Research, Information and Communication, the Environment, Demography and Human Resources ; Contribute to the promotion of regional, inter-regional, and effective intra-ACP cooperation among ACP States, generally among developing countries, and strengthen the regional organisations of which they are members ; Define common positions of ACP States vis-à-vis the EEC in areas covered by the Lome Convention and on relevant issues debated in international fora, which may influence the implementation of the Lome Convention ; Ensure achievement of the objectives of the Lome Convention ; and Coordinate the activities of ACP States in the framework of the application of the Lome Convention⁸⁹.

⁸⁷ List of ACP Countries :Angola - Antigua and Barbuda - Belize - Cape Verde - Comoros - Bahamas - Barbados - Benin - Botswana - Burkina Faso - Burundi - Cameroon - Central African Republic - Chad - Congo (Brazzaville) - Congo (Kinshasa) - Cook Islands - Cte d'Ivoire - Cuba - Djibouti - Dominica - Dominican Republic - Eritrea - Ethiopia - Fiji - Gabon - Gambia - Ghana - Grenada - Republic of Guinea - Guinea-Bissau - Equatorial Guinea - Guyana - Haiti - Jamaica - Kenya - Kiribati - Lesotho - Liberia - Madagascar - Malawi - Mali - Marshall Islands - Mauritania - Mauritius - Micronesia - Mozambique - Namibia - Nauru - Niger - Nigeria - Niue - Palau - Papua New Guinea - Rwanda - St. Kitts and Nevis - St. Lucia - St. Vincent and the Grenadines - Solomon Islands - Samoa - Sao Tome and Principe - Senegal - Seychelles - Sierra Leone - Somalia - South Africa - Sudan - Suriname - Swaziland - Tanzania - Timor Leste - Togo - Tonga - Trinidad and Tobago - Tuvalu - Uganda - Vanuatu - Zambia - Zimbabwe (source of info?)

⁸⁸ Secretariat of the African, Caribbean and Pacific Group of States, available at, http://www.acpsec.org/en/about_us.htm accessed on 13th October 2011

⁸⁹ Ibid

The ACP's composition consists of 79 Member-States, all of them, save Cuba, signatories to the Cotonou Agreement which binds them to the European Union: 48 countries from Sub-Saharan Africa, 16 from the Caribbean and 15 from the Pacific.⁹⁰

Walter Rodney⁹¹ portrays the view that a combination of power politics and economic exploitation of Africa by Europeans led to the poor state of African political and economic development evident in the late 20th Century. Written in 1973, the book was enormously influential in the study of African history. This book was groundbreaking in that it was among the first to bring a new perspective to the question of underdevelopment in Africa. Rodney observes....

“The element of subordination and dependence is crucial to an understanding of African underdevelopment today, and its roots lie far back in the era of international trade. It is also worth noting that there is a type of false or pseudo integration which is a camouflage for dependence. In contemporary times, it takes the form of free-trade areas in the formerly colonised sections of the world. Those free-trade areas are made to order for the penetration of multi-national corporations. From the 15th century onwards, pseudo integration appeared in the form of the interlocking of African economies over long distances from the coast, so as to allow the passage of human captives and ivory from a given point inland to a given port on the Atlantic or Indian Ocean. For example, captives were moved from Congo through what is now Zambia and Malawi to Mozambique, where Portuguese, Arab or French buyers took them over. That was not genuine integration of the economies of the African territories concerned. Such trade merely represented the extent of foreign penetration, thereby stifling local trades.”

⁹⁰ Ibid

⁹¹ Walter Rodney 1973, How Europe Underdeveloped Africa, Chapter Four. Europe and the Roots of African Underdevelopment — to 1885. Published by: Bogle-L'Ouverture Publications, London and Tanzanian Publishing House, Dar-Es-Salaam 1973, Transcript from 6th reprint, 1983

Power is the ultimate determinant in human society, being basic to the relations within any group and between groups. It implies the ability to defend one's interests and if necessary to impose one's will by any means available. In relations between peoples, the question of power determines maneuverability in bargaining, the extent to which a people survive as a physical and cultural entity. When one society finds itself forced to relinquish power entirely to another society, that in itself is a form of underdevelopment.⁹²

3.3 Lomé Conventions

3.3.1 Lomé 1

The origin of the partnership between the European Communities and the ACP countries dates back to the Treaty of Rome that established the European Economic Community (EEC) in 1957. In that Treaty, the signatories expressed solidarity with the colonies and overseas countries and territories and committed themselves to contribute to their prosperity. The first EEC-ACP association was the “Yaoundé Agreements” which were in effect between 1963 and 1975. The basis for the agreements was economic co-operation. The largest share of the resources was directed towards francophone Africa to build up infrastructure in the wake of decolonization. In 1973 the United Kingdom joined the EEC. This led to the signing of the wider Lomé I Agreement, which was in force between 1975 and 1980 and included 46 ACP countries and the EEC Member States. At the same time, the ACP countries formally joined together to form the ACP with the completion of the Georgetown Agreement.⁹³

The signing of Lomé I on February 28, 1975⁹⁴ by the EEC and the ACP States marked an important change in their relationship. The first Lomé Convention was promoted by the EEC as a pioneering model of cooperation between equal partners. Three factors led to the negotiations for the first Lomé Convention. First, the EEC wanted to establish trade relations with the British Commonwealth countries. Second, the EEC wanted to establish a new form of relationship with the Associates' because of their dissatisfaction with the results of the Yaoundé Conventions.

⁹² Ibid

⁹³ Western Africa SIA Civil Society Consultation Workshop, Dakar, 4& 5 November 2003, From Lome to Cotonou, Available at http://www.sia-acp.org/acp/download/wa_sccw_brief_2_-_from_lome_to_cotonou.pdf accessed on 13th October 2011

⁹⁴ And expired on 1 March 1980

Third, the EEC's comprehensive development policy led the Community to 'expand its relations with developing countries.' The partnership between the EEC and the ACP began with a number of significant gains for the ACP States. The parties agreed to discontinue reciprocal trade preferences, create the Centre for Industrial Development (CID),⁹⁵ and establish a commodity price stabilization plan.⁹⁶

During the negotiations, the ACP States insisted that reciprocal trade preferences be eliminated from the relationship between the EEC and the ACP, because these preferences were bearing in mind the inequality in the trade relationship between the two organizations. The ACP also reminded the Community that the General Agreement on Tariffs and Trade (GATT)⁹⁷ had recognized that developing countries should not be required to grant reciprocal trade preferences to developed countries.⁹⁸ These arguments and the ACP States' strong bargaining position caused the EEC to agree to eliminate reciprocal trade preferences.

⁹⁵ Article 36 states: A Centre for Industrial Development shall be set up. It shall have the following functions:

(a) to gather and disseminate in the Community and the ACP States all relevant information on the conditions of and opportunities for industrial cooperation;

(b) to have, at the request of the Community and the ACP States, studies carried out on the possibilities and potential for industrial development of the ACP States, bearing in mind the necessity for adaptation of technology to their needs and requirements, and to ensure their follow-up;

(c) to organize and facilitate contacts and meetings of all kinds between Community and ACP States' industrial policy-makers, promoters, and firms and financial institutions;

(d) to provide specific industrial information and support services;

(e) Help to identify, on the basis of needs indicated by ACP States, the opportunities for industrial training and applied research in the Community and in the ACP States, and to provide relevant information and recommendations.

⁹⁶ The commodity price stabilization plan, which is popularly known as Stabex, stabilizes ACP export earnings

⁹⁷ The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 5, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1950). Its purpose was to reduce tariffs and other barriers to trade and to eliminate discriminatory treatment in commerce.

⁹⁸ Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development, Feb. 8, 1965, 17 U.S.T. 1977, T.I.A.S. No. 6139, 572 U.N.T.S. 320 art. 36 (1965) caused the EEC to agree to eliminate reciprocal trade preferences.

WTO conformity requires that barriers to trade be dismantled on both sides, introducing an element of reciprocity into trade relations between the EU and the ACP states for the first time. There was concern that extensive opening of the markets in these countries to the EU could create strong adjustment pressures, while European suppliers would presumably be only marginally affected by free market access for ACP products. The WTO provides a range of mechanisms for dealing with possible asymmetries in trade liberalization in the form of Special and Differential Treatment (SDT) for developing countries and specific groups of developing countries. In addition to these country-related exceptions to the Most-Favored-Nation (MFN) principle, there are also functional exceptions, prominent among them the regional exception for free trade areas and customs unions for goods (GATT Article XXIV), and integration agreements for trade in services (GATS Article V).

However, a link between the two categories of exceptions, introducing a development dimension into the regional exception, is only explicit in the service sector, and not for trade in goods. The question arises whether a similar link should be established in the goods sector. In other words, should special and differential treatment, concerning the breadth and depth of trade liberalization between developing and developed countries, as well as its timing, be explicitly incorporated into Article XXIV, in order to enhance the development impact of North-South agreements such as the ACP-EU EPAs and ensure their compatibility with the multilateral trading system?⁹⁹

The second major gain to the ACP from Lomé I was the establishment of the CID to promote industrial development in the ACP States.¹⁰⁰ CID¹⁰¹ gathers and disseminates, in the Community and the ACP States, information on opportunities for industrial cooperation.

⁹⁹ In this context, it is held that the European Union must truly treat EPAs as instruments of development, subordinating its commercial interests to Africa's development needs and effectively coordinating trade and development assistance, in order to realize their potential development benefits. Cf. Lawrence E. Hinkle, Richard S. Newfarmer: *Risks and Rewards of Regional Trading Arrangements in Africa: Economic Partnership Agreements between the European Union and Sub-Saharan Africa*, Washington DC 2006.

¹⁰⁰ Lomé I Article 26

¹⁰¹ The Centre carries out studies on the potential for industrial development in ACP States and organizes meetings and contacts between the Community and the ACP States' industrial policy-makers, promoters, firms, and financial institutions.

The third achievement of Lomé I was a price stabilization plan, popularly known as Stabex¹⁰², for the ACP States' commodity exports¹⁰³ to the Community. One of the ACP States' major exports to the EEC are commodities¹⁰⁴ and the ACP had been adversely affected by the full force of world market price fluctuations. The purpose of Stabex is to remedy the harmful effects of instability of export earnings on the ACP States' economies.¹⁰⁵ An ACP State was eligible to apply for a transfer of funds, in the form of aid or loans, when the state's actual earnings for an export product represented 7.5% or more of its total export earnings¹⁰⁶ and the price for the product falls 7.5% below the reference level established by Stabex.¹⁰⁷

Lomé I also contained two features that the ACP States perceived as obstacles to their development goals. These features, **the rules of origin** and **the safeguard clause**, were objectionable to the ACP States because they discouraged investment by third countries in ACP States. The rules of origin defined which products would be designated as originating in an ACP State for the purpose of granting preferential tariff access to the EEC. Originating products were those whose value was added entirely in one or more ACP States or in the Community¹⁰⁸. According to the rules, a third country investor¹⁰⁹ in an ACP State that imported non-EEC or non-ACP intermediary materials for finishing in an ACP State did not receive tariff preferences

¹⁰² Arts. 16-19.

¹⁰³ Art. 17. The Stabex plan is applicable to the products listed in article 17 of Lomé I, which includes varieties of groundnuts, cocoa, coffee, cotton, coconuts, palm and kernel products, and wood. Id. The list also includes raw hides, skins and leather, fresh bananas, tea, raw sisal, and iron ore.

¹⁰⁴ See K. FOCKE, FROM LOMÉ I TOWARDS LOMÉ II 13 (1980). During the period between 1975 and 1978, 30.6% to 41.6% of the ACP's exports to the Community were foodstuffs

¹⁰⁵ Lomé I, Art. 16. The ACP States suffered from external trade deficits as a result of the deterioration in commodity prices, because their gross national products (GNP) were highly dependent on commodity exports. See OECD, WORLD ECONOMIC INTERDEPENDENCE AND THE EVOLVING NORTH-SOUTH RELATIONSHIP (1983).

¹⁰⁶ Lomé I, Art. 17 (2). The Stabex requirement is different for the least developed ACP States listed in article 48 of Lomé I. Id. The product had to represent 2.5% of a least developed ACP States' total earnings from exports in order for it to qualify to apply for a fund transfer.

¹⁰⁷ Art. 19(2). The reference level was the average of an ACP State's export earnings for a product for the prior four years. Least developed ACP States had to experience a 2.5% fall in actual earnings for the product below the reference level in order to qualify for a fund transfer

¹⁰⁸ Protocol 1, art. 1(a)-(b). Originating products also included those that did not originate in an ACP State, but which had undergone sufficient working or processing, as defined in article 3 of Protocol 1 in an ACP State.

¹⁰⁹ For the purposes of this Note, a third country investor is an investor who is not from an ACP or a Member State of the EEC.

when it shipped its goods to the EEC¹¹⁰. Thus, under the rules of origin, the investor from a third country was at a competitive disadvantage with EEC investors in an ACP State.¹¹¹

The safeguard clause discouraged third country investment in ACP States. In essence, the EEC reserved the right to take measures to safeguard the economy of the Community or of a Member State, or to safeguard a sector of the economy of the Community or of a Member State, from serious disturbances¹¹² caused by Lomé I's trade provisions. The EEC did not elaborate on what would constitute a serious disturbance. This ambiguity made it difficult to determine when the Community would invoke the clause to limit ACP exports to the Community. The safeguard clause discouraged investment in ACP enterprises, because investors had to raise funds for capital expansion from sales to developed countries. While Stabex helped to protect the ACP States' economies from fluctuations in export earnings from commodities, the ACP States exports to the EEC dropped below their pre-Lomé I level.¹¹³ This development was attributed in part by the ACP States to the institution of the EEC's Generalized System of Preferences¹¹⁴ (GSP) in 1971, which lessened the tariff advantage of ACP States¹¹⁵ over other less developed countries.

The main characteristics of LOME I are: the non-reciprocal preferences for most exports from ACP countries to EEC; equality between partners, respect for sovereignty, mutual interests and interdependence; the right of each state to determine its own policies; security of relations based

¹¹⁰ Lomé I Protocol 1, art. 1.

¹¹¹ EEC exporters from ACP countries are exempt from the rules of origin.

¹¹² Lomé I, art. 10.

¹¹³ See J. Moss, *THE LOME CONVENTIONS AND THEIR IMPLICATIONS FOR THE UNITED STATES* 8 (1982), before Lomé I, 45.6% of the ACP's exports went to the Community. During Lomé I, only 38.4% of the ACP's exports went to the EEC. ACP exports of manufacturers increased by only 30%, not the 106% claimed by the EEC. The reason for the discrepancy is the Community's classification of natural uranium and its composites as manufactured products. Sixty percent of these ACP exports to the EEC came from only five or six ACP States. Thirty-two of the ACP States contributed less than one percent of the ACP's exports to the Community.

¹¹⁴ The Generalized System of Preferences (GSP) extends preferential customs treatment to a limited number of agricultural products from less developed countries (LDCs). Their manufactures and semi-manufactures are not subject to the EEC's Common External Tariff. See E. FREY-WOUTERS, *THE EUROPEAN COMMUNITY AND THE THIRD WORLD: THE LOME CONVENTION AND ITS IMPACT* 13 (1980).

¹¹⁵ See *Rewriting Lomé I*, *ECONOMIST*, and Sept. 23-29, 1978, at 93. Ninety-nine and two-tenths percent of the ACP's exports to the Community enter free of duty

on the achievements of the cooperation system.¹¹⁶ Socio-economic rights were not given any preference while negotiating this Convention.

3.3.2 Lomé II

Lomé II¹¹⁷ was signed in 1979, in Lomé, Togo.

Trade - The ACP benefit from easier access to the Community market than that offered to any other IDC group. Apart from the EEC Most Favoured Nation (MFN) status, they do not have to offer tariff preferences to EEC exporters.¹¹⁸

Aid - The ACP receive over three-quarters of all Community-level financial aid — this however remains small in relation to the aid which EEC member states spend through other channels. Most of the aid under the convention is tied to development projects, but a fixed amount is allocated to finance the Stabex mechanism for stabilizing agricultural commodity earnings. Another part of the aid budget is set aside to finance a new scheme, nicknamed alternatively 'Minex' or 'Sysmin', to maintain production of certain minerals in the event of adverse circumstances.¹¹⁹

Industrialization - Private sector industrial investments in the ACP — particularly in Africa - were disappointingly small during Lomé I, despite the creation of a CID in Brussels to stimulate such transactions, partly because of European investors' fears of expropriation or nationalization. Under Lomé II, the CID continued with increased financial support, and the ACP countries had agreed (subject to safeguards) to offer investment guarantees on a non-discriminatory basis to investors from all EEC member states, provided that discriminatory agreements concluded prior to 1980 are not prejudiced. The convention aims to stimulate investment in mineral and energy production.¹²⁰

¹¹⁶ Development and Cooperation –EuropeAid,,European Commission available at http://ec.europa.eu/euopa/where/acp/overview/lome-convention/lomeitiiv_en.htm accessed on 13th October 2011

¹¹⁷ Like its predecessor, it covered four main areas which include trade, aid, industrialization and institutions

¹¹⁸ The Special issue of “The Courier” ACP-EEC No.58 Available at <http://www.acpsec.org/en/conventions/LomeII dossier.pdf> accessed on 13th October 19, 2011

¹¹⁹ Ibid

¹²⁰ Ibi

Institutions — the new convention perpetuated the joint EEC-ACP consultative institutions - Council of Ministers, Committee of Ambassadors, Consultative Assembly, but the Committee for Industrial Development which managed the CID remained the only executive institution which was jointly run.¹²¹

Lomé II's trade provisions were very similar to those of Lomé I. They were based on the principle of duty-free access without quantity restrictions for ACP manufactures and for tropical agricultural products which did not compete directly with temperate domestic production in Europe. The rules of origin governing the eligibility of ACP exports for duty-free unnecessarily inhibited ACP industrialization.¹²²

It is worth noting that socio-economic rights were not the priority under LOME II, but more emphasis was laid on the SYSMIN system (help to the mining industry of those ACP countries strongly dependent on it).¹²³

3.3.3 Lomé III

Lomé III was signed in Lome, Togo, in 1984 and came into force in March 1985 with the trade provisions being concluded and in May 1986 the aid provisions were concluded. The Lomé Convention incorporated: preferential treatment for ACP exports and non-reciprocity in their trade relations; an operational mechanism for stabilizing a major part of the ACP states' export earnings, reinforced by a commitment to transform, into at least quasi-industrial economies, the economies of the ACP states.¹²⁴

This relationship, the basic principles and objectives of which the Lomé III Convention carefully and clearly spells out, aimed to promote the economic, cultural and social development of the ACP states, by consolidating their relations in a spirit of solidarity and mutual interest. This exercise in ACP/EEC cooperation rests on the fundamental principles of equality between partners, respect of each state's individual sovereignty, and regard for their mutual interest and

¹²¹Ibid

¹²²Ibid

¹²³ Development and Cooperation –EuropeAid,,European Commission available at http://ec.europa.eu/europaid/where/acp/overview/lome-convention/lomeitiiv_en.htm accessed on 13th October 2011

¹²⁴ Special issue of “The Courier” ACP-EEC, No, 58, Available at, <http://www.acpsec.org/en/conventions/LomeIIIdossier.pdf> accessed on 13th October 19, 2011

interdependence. In line with these principles, this Lomé Convention provides for ACP States to determine their own development strategies and models for their economies and societies; it places emphasis on their self-reliant and self-sustained development based on their own cultural and social values, their human capacities, their natural resources and their economic potential. The progress marked by the Lomé Conventions is not limited entirely to the North/South aspects of the relationship, but includes also support for the ACP's south/south cooperation.

*As regards the substantive areas of cooperation, the Lomé III Convention essentially reiterates the trade regimes of earlier Conventions and upholds the special arrangements on sugar and bananas found in them. Regarding the treatment of agricultural products generally, there are two facets to the improvement brought about by the Lomé III Convention. The first relates to the procedure for granting preferential access to ACP agricultural products in the Community market, where the Community must now respond within a maximum of six months to all ACP requests for more favourable treatment. In so doing, it is also committed to taking into account both concessions granted to other developing countries as well as the possibilities of exporting in the off-season.*¹²⁵

The second facet of the improvement relates to the request by the ACP to purchase available agricultural products in the Community at preferential prices. One of the areas of greatest progress in ACP/EEC Cooperation in Lomé III is the key sector of financial and technical cooperation where the record for the past eleven years called for significant improvement. That the aid procedures needed to be streamlined to attain the objectives of the Third Convention was evident. Both sides therefore agreed to revise in the Lomé III Convention the procedures as regards the scope and management of projects and program in ACP states, and their joint evaluation, with a view to greatly reducing bureaucratic red-tape and leading to more effective implementation of financial and technical cooperation in all areas including Stabex, Sysmin, national indicative and regional program.¹²⁶

In line with these principles, the Lomé Convention provides for the ACP States to determine their own development strategies and models for their economies and societies; it places

¹²⁵Special issue of "The Courier" ACP-EEC, No. 58, available at,

<http://www.acpsec.org/en/conventions/LomeIII dossier.pdf>, accessed on 13th October 2011

¹²⁶ Ibid

emphasis on their self-reliant and self-sustained development based on their own cultural and social values, their human capacities, their natural resources and their economic potential. In consequence, with the overriding central place given to man and his development, the preamble to the Convention requires that both sides "adhere to the principles of the Charter of the United Nations" and reaffirms their faith in fundamental human rights, an adherence which condemns discrimination on grounds of race, colour, sex or religion and deems apartheid an affront to human dignity which they would work effectively to eradicate. Apart from these clearly stated fundamental objectives and principles, the *approach* to arriving at this relationship, namely, group to group and genuine negotiations, rather than gratuitous conferment of a beneficial entitlement from one group to the other, is unique as a method of establishing an equitable relationship between the developed and the developing worlds. Lomé III supported economic, social and cultural values.¹²⁷ See the observation above regarding human rights.

3.3.4 Lomé IV

On December 15th 1989, Lomé IV was signed in Lomé, Togo. This is the first Convention to cover a ten-year period, with great emphasis put on: the promotion of human rights, democracy and good governance; strengthening of the position of women; the protection of the environment; decentralized cooperation; diversification of ACP economies; the promotion of the private sector; and increasing regional cooperation. The main features of Lomé IV included:

Environment¹²⁸: The negotiators reached an agreement on a more horizontal and preventive approach embracing all the sectors directly concerned by Community aid. Evident here is the ACP and EEC efforts to ensure that economic and social development is based on a sustainable balance between economic objectives, management of natural resources and enhancement of human resources. An example of this is provision in the new Convention for a ban on movement of hazardous and radioactive waste between the Community and the ACP States.

¹²⁷ The Lomé Convention: Its significance and Relevance to the Agenda for International Economic Cooperation, Edwin Carrington, Available at, http://www.trocaire.org/site/trocaire/files/pdfs/tdr/DR1987_theLOMEConvention.pdf accessed on 13th October 2011

¹²⁸ Special issue of "The Courier" ACP-EEC, No. 58, available at, <http://www.acpsec.org/en/conventions/LomeIVdossier.pdf>, accessed on 13th October 2011

Agricultural cooperation and food security¹²⁹: A number of aspects received new emphasis in this area. The regional dimension of food security policies were clearly set out in the new Convention, as was the key role of women in rural development. The interaction between agricultural development and the preservation of ecological balances was also given particular attention.

Development of services¹³⁰: It carried a new chapter on services that support economic development (support for foreign trade, for the business sector and for regional integration) and expanded provisions on tourism, communications and information technology. The provisions on shipping, however, have been retained as they stood.

Industrial development¹³¹: Specific provisions on enterprise development have been added to this title, which has been improved to reflect better the ACP States' development priorities, The objectives of the Centre for the Development of Industry (CDI) have been better defined and its supervisory structure clarified.

Cultural and social cooperation¹³²: The new Convention enlarged the scope of this cooperation to cover new themes such as nutrition and population and demography. The partners' common desire to achieve a better balance between population and resources would be carried out in compliance with the choices of individuals, with local cultural, social and economic conditions and with the policies and programmes of ACP countries. Also noteworthy was the strengthening of the provisions on health and of those on the role of women in development, and the stress placed on the promotion of cultural identities and intercultural dialogue with the aim of stimulating exchanges between the ACP countries themselves and between ACP countries and the Community. The development of ACP capacity in this sphere remained a priority objective, particularly in the realm of information and communication. Another important aspect was the recognition of the role of the Foundation for ACP-EEC Cultural Cooperation in implementing jointly-decided cultural cooperation objectives.

¹²⁹ Ibid

¹³⁰ Ibid

¹³¹ Ibid

¹³² Ibid

Regional cooperation¹³³: This title was reworked, notably to take better account of the objective of promoting and stepping up regional economic integration. The themes of functional cooperation were extended and the opportunities for cooperation between the ACP countries and the overseas countries and territories highlighted. The procedures for implementing regional cooperation were clarified and strengthened, notably as regards programming and monitoring, and the role of regional organizations.

Finance -terms of financing¹³⁴: The terms of financing under the Convention, already flexible under Lome III, were further improved. Apart from the funds managed by the EIB, all financing under the new Convention will be in the form of grants. In the case of the Bank's own resources, the interest-rate subsidy has been raised to 4 % and the interest rate borne by the borrower will be in the range of 3 % to 6 %. The interest rate on risk capital is limited to 3 % and exchange-rate risks will, under certain conditions, be partially borne by the Community.

Finance- Structural adjustment support¹³⁵: The main innovation in the development financing title and indeed in the whole Convention, was structural adjustment support. (See the description of this new instrument in Commissioner Marin's article). Structural adjustment support would be given following a joint assessment by the Community and the country concerned.

Debt: The Convention also contains a new chapter on debt, a major innovation in relations between the Community and the ACP States. With three aspects terms of aid: under the new Convention there are no longer special loans nor any requirement to replenish Stabex; Sysmin operations are subject to a two-stage procedure grants for countries, loans for the final borrowers; Community support for the indebted ACP countries: this may take the form of technical assistance for debt management and, through structural adjustment support, for tackling the imbalances that are the root cause of indebtedness; ACP debt to Member States: in a declaration annexed to the Convention the Community reiterates its readiness to hold exchanges

¹³³ Ibid

¹³⁴ Ibid

¹³⁵ Ibid

of views with the ACP countries on the debt issue in the context of international talks without prejudice to specific talks within relevant forums.¹³⁶

Lome IV boldly spelt out support for socio-economic rights as one of its pillars in the Convention. By the 4th Lomé Convention, additional elements were introduced including respect of human rights, democratic principles and the rule of law, viewed by some as “conditionalities”.

The respect for human rights, democratic principles and the rule of law become essential elements of the Convention.

3.4 The Conflict over Bananas

The European Union set up a Market Organisation permitting preferential access for bananas from ACP countries to the Community market through import quotas (857,000 tons) that are not subject to tariffs (the banana protocol). This organisation of the European banana market penalized non-ACP exports. Under pressure from American multinational banana corporations, the United States, Ecuador and Guatemala were among the countries that lodged a complaint to WTO. The Market Organisation for bananas has been condemned twice, in 1997 and again in 1999. As a result, the banana Protocol was abolished in 2006 and replaced by a tariff-only system.¹³⁷

Despite preferential access to EU markets, the Lomé Convention did not stop the exclusion of ACP countries from international trade: the share of ACP exports on the European market did not stop decreasing, dropping from 6.7% of all European imports in 1976 to 4% in 2000. The trend was the same for agricultural products. Above all losses concern traditional agricultural products, such as oleaginous products, cocoa and coffee. Exports were not diversified sufficiently and continued to centre mainly on primary commodities. Agricultural raw materials made up almost half of ACP exports if oil-producing countries were excluded. Agricultural products accounted for more than 50% of total exports in countries such as Madagascar, the Ivory Coast, Burkina Faso, Kenya, Malawi, Mali, Uganda, Tanzania or even in banana

¹³⁶ Ibid

¹³⁷ Weastern Africa-SIA Civil Society Consultation Workshop, Dakar, 4&5 Nov 2003, From Lome to Cotonou, Available at http://www.sia-acp.org/acp/download/wa_sccw_brief_2_-_fromlome_to_cotonou.pdf accessed on 13th October 2011

producing Caribbean countries. Yet the specialisation of exports in agricultural raw materials offered little prospect of expansion: consumption raised little and international prices of these products did not stop decreasing compared to the prices of manufactured goods.¹³⁸

3.5 WTO Compatibility

EPAs are the latest WTO compliant agreements between European Union (EU) and African, Caribbean and Pacific (ACP) countries.¹³⁹ For the agreements to be WTO compatible, this means that GATT Article XXIV and GATS Article V must be satisfied.¹⁴⁰ WTO law sets minimum requirements covering free trade in goods.¹⁴¹ It does not require the inclusion of liberalization 'multiplier' clauses, such as MFN or standstill clauses. It also does not require progression to full EPAs or the inclusion of other trade related issues, such as services or investment. The WTO Transparency Decision¹⁴² imposes a procedural requirement to notify the WTO of any agreement under which preferences are granted - before the agreement enters into force.¹⁴³ For this purpose, an initialed text should be sufficient. This logic is reflected in the EPA Regulation under which the EU grants tariff preferences to any ACP country that has initialed an interim or full EPA.¹⁴⁴ The purpose of this Regulation is to ensure the WTO-legality of tariff preferences granted under an interim or full EPA, and to enable these agreements (once initialed) to be notified to the WTO. Given this treatment, it makes no sense for the European Commission now to claim that these agreements can only be notified to the WTO once they have been signed. Moreover, the WTO Transparency Decision specifically provides for the possibility of

¹³⁸ Ibid

¹³⁹ Alex Borrmann, Harald GroBmann & Georg Koopmann, *The WTO Compatibility of the Economic Partnership Agreements between the EU & ACP countries* available at [http:// www.intereconomics.eu/downloads/getfile](http://www.intereconomics.eu/downloads/getfile) accessed on 13th October 2011.

¹⁴⁰ Ibid

¹⁴¹ Article XXIV GATT

¹⁴² WTO General Council, *Transparency Mechanism for Regional Trade Agreements*, Decision of December 14 2006, WT/L/671.

¹⁴³ Paragraph 3 of the WTO Transparency Decision states that '[t]he required notification of an RTA by Members that are party to it shall take place as early as possible. As a rule, it will occur no later than directly following the parties' ratification of the RTA or any party's decision on application of the relevant parts of an agreement, and before the application of preferential treatment between the parties.'

¹⁴⁴ Article 26 of the VCLT.

renegotiating an already-notified agreement.¹⁴⁵ This has been done on five occasions to date. The only requirements are that the renegotiated agreement be re-notified to the WTO and that it remains WTO-legal. This leaves a great deal of scope for renegotiating aspects of the agreements which are not required for WTO-legality (for example, the MFN clause and the standstill clauses could be removed without compromising WTO legality).

The WTO provides a range of mechanisms for dealing with possible asymmetries in trade liberalization in the form of Special and Differential Treatment (SDT) for developing countries and specific groups of developing countries. In addition to these country-related exceptions to the most-favoured-nation principle, there are also functional exceptions, prominent among them the regional exception for free trade areas and customs unions for goods (GATT Article XXIV), and integration agreements for trade in services (GATS Article V).¹⁴⁶ However, a link between the two categories of exceptions, introducing a development dimension into the regional exception, is only explicit in the service sector, and not for trade in goods. The question arises whether a similar link should be established in the goods sector. In other words, should special and differential treatment, concerning the breadth and depth of trade liberalization between developing and developed countries, as well as its timing, be explicitly incorporated into Article XXIV, in order to enhance the development impact of North-South agreements such as the ACP-EU EPAs and ensure their compatibility with the multilateral trading system?¹⁴⁷

The first issue to be addressed in this context concerns the adjustment costs of trade liberalization. A point requiring particular consideration here is the conditions which must be present in the developing countries and the economic policy measures which must be taken to deal with the adjustment problems. At the same time, the impact of trade liberalization has been the subject of numerous theoretical and empirical studies. The simple basic models of trade

¹⁴⁵ Paragraph 14 of the Transparency Decision.

¹⁴⁶ Alex Borrmann, Harald GroBmann & Georg Koopmann, The WTO Compatibility of the Economic Partnership Agreements between the EU & ACP countries available at [http:// www.intereconomics.eu/downloads/getfile](http://www.intereconomics.eu/downloads/getfile) accessed on 13th October 2011.

¹⁴⁷ Ibid

theory largely emphasize the benefits to be expected from trade liberalization, while largely neglecting the fact that opening domestic markets also involves adjustment costs.¹⁴⁸

Various empirical studies examine the impact of openness on economic growth by using cross-country regressions. **David Dollar**¹⁴⁹ estimates a growth equation with data for 95 developing countries between 1976 and 1985. He shows that countries in which prices of traded goods were higher or less stable grew more slowly, and concludes that developing countries could increase their economic growth through greater outward orientation. **Sachs and Warner**¹⁵⁰ arrange individual countries into two groups, one of which has an "open" trade regime and the other of which is classified as closed". According to their estimates, countries that were open grew faster than countries that were closed. They conclude that the opening of domestic markets is the decisive element in the economic reform process of developing countries. **Frankel and Romer**¹⁵¹ find that international trade (share of imports and exports in GDP) has a positive effect on per capita income. **Rodriguez and Rodrik**¹⁵² express doubt about the value of the three studies cited (and several others). In their view, the indices used by Dollar are inappropriate for measuring the openness of markets or the extent of trade liberalization. They criticise the Sachs-Warner index because it is almost entirely determined by criteria that do not really capture trade interventions. They also argue that the study by Frankel and Romer fails to demonstrate a positive effect of trade liberalization on income in developing countries because it is concerned with the connection between trade volumes and income and not with the effects of trade policy. For this reason, no statement is possible about the causality of trade policy and income. More recent studies indicate that the impact of trade liberalization must be judged in the light of the institutional framework.

¹⁴⁸ Ibid

¹⁴⁹ David Dollar: Outward –Oriented Developing Economies Really Do Grow More Rapidly:Evidence from 95 LDCs 1976-1985, In:Economic Development and Cultural Change, Vol.40, No.3pp-523-524

¹⁵⁰ Jeffrey D. Sachs, Andrew Warner: Economic Reform and the Process of Global Integration, in: Brooking Papers on Economic Activity Vol.1, pp1-95

¹⁵¹ Jeffrey A. Frankel, David Romer:Does Trade Cause Growth?in:Americam Economic Review,Vol 89, No.3pp379-399

¹⁵² Francisco Roderiguez Dani Rodrik:Trade Policy and Economic Growth :A sceptics Guide to the Cross-National Literature,in:Ben Bernanke, Kenneth S.Rogoff-(eds).;NBER Macro economics Annual 200

To cope with structural adjustment problems, institutions are needed which enforce property rights and ensure the rule of law (market-creating institutions), which intervene to correct market failures (market-regulating institutions), contribute to price stability, smooth economic fluctuations and prevent possible financial crises (market-stabilizing institutions), and which (e.g. by establishing social safety nets) preserve and shape the economic system (market legitimating institutions). As it takes time to develop the necessary institutions, a trade policy is needed which takes into account the institutional quality of the developing countries,¹⁵³ conceivable in terms of development policy and are being discussed in the Doha Round. The WTO's regional exception covers trading arrangements between individual countries – from a single region or from different regions – as well as between regional country groupings like the EU or associations of ACP states and such trade regimes are classified under the heading “Preferential Trade Agreements” (PTAs). In order to make sure that market opening in the bilateral and regional framework of PTAs proceeds faster and is also broader and deeper than multilateral liberalization, the WTO specifies a number of conditions that must be fulfilled.¹⁵⁴

For trade in goods, the conditions of the regional exception as stipulated in Article XXIV GATT – basically the trade” within “*a reasonable length of time*” – *apply in principle to all parties to a PTA*. Preferential treatment for developing countries is, accordingly, solely a matter for the *discretion of the partner countries*. The “*Understanding on the Interpretation of Article XXIV*”, reached in the *Uruguay Round*, *has not fundamentally changed this situation*. The *Understanding* merely sets the “reasonable length of time” for completing a full customs union or free trade area at ten years, and creates the possibility of exceeding this standard in “exceptional cases”. However, it does not specify these cases in any more detail.¹⁵⁵

¹⁵³ Alex Borrmann, Harald GroBmann & Georg Koopmann, The WTO Compatibility of the Economic Partnership Agreements between the EU & ACP countries available at [http:// www.intereconomics.eu/downloads/getfile](http://www.intereconomics.eu/downloads/getfile) accessed on 13th October 2011.

¹⁵⁴ Ibid

¹⁵⁵ Ibid

For services, by contrast, a specific distinction is made based on the state of development of the partner countries. GATS Article V requires “flexibility” in the application of the conditions in economic integration agreements “in accordance with the level of development of the countries concerned”. Flexibility is required with regard to the breadth of liberalization (“substantial sectoral coverage”) and in particular the depth (“absence or elimination of substantially all discrimination”) and speed (“reasonable time frame”) of liberalization. The pros and cons of exempting developing countries from disciplines imposed by the system of multilateral trade between the partners in the North-South PTAs have long been a matter of debate. In the process, there has been a clear shift of emphasis from excluding to “accommodating” these agreements. Whereas GATT Article XXIV was to be reformed in the 1960s and 1970s with the aim of excluding “incomplete” (i.e. not sufficiently reciprocal) PTAs from its scope, exactly the opposite is currently being called for. For North-South agreements, the requirements of the regional exception are to be relaxed, with further differentiation depending on the level of development of the partner countries. The aim of this is to make it possible to structure a liberalization process in, for example, the ACP states which is adapted to the capability and development policy priorities of the countries and at the same time meets WTO requirements.¹⁵⁶

The practice of review of PTAs by GATT Working Parties and the WTO Committee on Regional Trade Agreements (CRTA) 13 reveals a high degree of uncertainty. While GATT Working Parties concluded in only “elimination” of trade barriers for “substantially all the trade” within “a reasonable length of time” – apply in principle to all parties to a PTA. Preferential treatment for developing countries is, accordingly, solely a matter for the discretion of the partner countries. The “Understanding on the Interpretation of Article XXIV”, reached in the Uruguay Round, has not fundamentally changed this situation. The Understanding merely sets the “reasonable length of time” for completing a full customs union or free trade area at ten years, and creates the possibility of exceeding this standard in “exceptional cases”. However, it does not specify these cases in any more detail. For services, by contrast, a specific distinction is made based on the state of development of the partner countries. GATS Article V requires “flexibility” in the application of the conditions in economic integration agreements “in accordance with the level of development of the countries concerned”. Flexibility is required

¹⁵⁶ Ibid

with regard to the breadth of liberalization (“substantial sectoral coverage”) and in particular the depth (“absence or elimination of substantially all discrimination”) and speed (“reasonable time frame”) of liberalization.¹⁵⁷ There is also uncertainty about the permissibility and scope of infant industry protection to ease structural adjustment pressures. The regional exception is under consideration in the Doha Round. The Doha Declaration’s mandate to the Rules Negotiating Group was to clarify and improve the disciplines and procedures applying to PTAs within the WTO.¹⁵⁸

In addition, the special adjustment problems facing developing countries from forced market opening in this context need to be taken into account. Several WTO members have submitted reform proposals from the development policy point of view, including the EU and ACP states. The ACP proposal of April 2004 relates directly to the economic partnership agreements and seeks to grant Special and Differential Treatment for developing countries “formally and explicitly” in North-South agreements. With regard to the breadth of liberalization, they should be allowed to set lower limits than their partner countries; with regard to the depth of liberalization they should be granted extensive freedom of action in using safeguard measures; and in terms of the speed of liberalization there should be an upper limit of “not less than 18 years”.¹⁵⁹ Thus, WTO law does not require signature of an interim or full EPA prior to notification, and expressly foresees the possibility of renegotiating and re-notifying an already-notified agreement, so long as the end result remains in conformity with WTO.

3.6 The Cotonou Agreements

Negotiations to conclude an agreement to replace the Lomé Conventions began in 1998 and were concluded with the signing in June 2000 in Benin of the Cotonou Agreement. The Cotonou Agreement between the EU and the 77 ACP state were slated to be valid for 20 years.¹⁶⁰

The central objectives of ACP-EU co-operation as set out in the Cotonou Agreement are poverty reduction and ultimately its eradication; sustainable development; and progressive integration of the ACP countries into the world economy” (Article 19). The Agreement proposes a

¹⁵⁷ Ibid

¹⁵⁸ Ibid

¹⁵⁹ Ibid

¹⁶⁰ Ibid

comprehensive and integrated approach to achieving its central objectives and is based on five pillars: a political dimension, a focus on participatory approaches, a strengthened focus on poverty reduction, reform of financial cooperation, and a new framework for economic trade cooperation, of which EPAs are the central component. The three main areas of support identified are: economic development (including, for instance, support for structural adjustment), social and human development (including, for instance, promotion of social dialogue) and regional integration and cooperation (an area where the EC has developed an expertise and comparative advantage). Gender, environment and institutional development are 'thematic or crosscutting issues', to be promoted in all development initiatives. There is a comprehensive programme of action to support the private sector.¹⁶¹

The incorporation of the political dimension to the Agreement gave expression to the partners' preparedness to openly discuss reason and cause of poverty as much as the institutional and political prerequisites for sustainable development. In its new form, the political dimension is the first pillar of the Cotonou Agreement. Provisions relating to this pillar shall expire in 2020. The pillar sets out the framework of the political relations between the parties, which are determined by political principles, political dialogue and support in certain political areas.¹⁶²

The development cooperation is the second pillar of the Cotonou Agreement. The development cooperation takes the form of financial and technical assistance and is implemented at regional and national level.¹⁶³ The Cotonou Agreement merely provides the general framework of the development cooperation. It sets out the objectives, which in compliance with the agreements overall objective, focus on poverty reduction. It outlines the general principles of development

¹⁶¹ *ibid*

¹⁶² Lipset, Seymour Martin, 1959, some social requisites of democracy: Economic development and political legitimacy, in: *American Political Science Review*, 53, 69-105

¹⁶³ Persson, M. (2007) Trade facilitation and the EU-ACP Economic Partnership Agreements –

Who has the most to gain? *Paper presented at the GTAP conference, Purdue University, US,*

cooperation, defines the approach to be pursued and lists the priority areas of support jointly agreed upon by the partners. Provisions relating to this pillar shall expire in 2020.¹⁶⁴

Trade is the third and strongest pillar of the Cotonou Agreement, as it is conceived as the engine of sustainable development. The Agreement provides for the negotiation of new trading arrangements with a view to liberalizing trade between the two parties, putting an end to the system of non-reciprocal trade preferences from which the ACP States currently benefit.¹⁶⁵ For more than 25 years the ACP-EU trade relations have been characterised by non-reciprocal trade preferences. The preferences grant duty free access to the EU market for nearly all products originating in the ACP countries, excluding the obligation to open the ACP markets to the EU in return. Under the Cotonou Agreement trade relations experience a fundamental change. The non-reciprocal trade preferences are in the process of being replaced by a reciprocal trade regime, negotiated as Economic Partnership Agreements (EPAs).¹⁶⁶ EPAs aim to create reciprocity, through the establishment of free trade areas (FTA), which conform to the regulations of the World Trade Organization (WTO) and build on regional integration processes in the ACP countries.¹⁶⁷

3.7 Economic Partnership Agreements (EPAs)

Despite the fact that the Agreement was completed in 2000, its trade provisions (the EPAs) were not slated for negotiation until 2002. The Agreement only sets out the framework of future negotiations. The geographical coverage, the products concerned, the liberalization process and supporting measures are to be defined under the actual regional agreements. Negotiations towards the development of the EPAs began on schedule in September 2002 and were expected

¹⁶⁴ Ibid

¹⁶⁵ Wilson, J., Mann. C and T. Otsuki (2004), *Assessing the Potential Benefits of Trade*

Facilitation: A Global Perspective, Policy Research Paper 3224, World Bank.

¹⁶⁶ Ibid

¹⁶⁷ Ibid

to last between five and six years. In the meantime, pre-existing non-reciprocal tariff preferences that apply throughout the ACP were maintained until 31 December 2007.¹⁶⁸

Under the Cotonou Trade Agreement, as of 2008 EPAs would be introduced between Europe on the one hand and ACP countries grouped together into regional blocs on the other. Starting in 2008, the EPAs would replace the tariff preferences with provisions to promote liberalization that is reciprocal and WTO-compatible and cover "essentially all trade". The EPAs mainly involve introducing reciprocity into EU-ACP trade relations through free-trade agreements. Those ACP countries that choose to negotiate EPAs must do it as part of regional blocs. Trade provisions contained in the prospective EPAs will be implemented over a period of 10 to 12 years. Although free-trade agreements are encouraged, they are not compulsory. For ACP countries that do not enter into EPAs, the new agreement provides different treatment for LDCs and non-LDCs.¹⁶⁹

Ends the non-discrimination principle. For LDCs, in March 2001 Europe introduced the "everything but arms" initiative amending the Community's Generalized System of Preferences (GSP). For non-LDCs in the ACP, access to the European market will be governed by an alternative system that is still to be defined. The effects of competition on other developing countries should be much higher than gains in terms of access.¹⁷⁰

Introduces Tax Adjustment: A Provision is made for tax adjustment and payment balance costs incurred by the liberalization process to be partially offset. Support is also provided in other areas of trade: services, competition, intellectual property, sanitary and phytosanitary measures, trade and environment, etc. This is mainly support for national legislation to be brought into line with multilateral rules.¹⁷¹ The state of the negotiations: As provided by the Cotonou agreement, the negotiations began in September 2002. It was decided to divide the negotiations in two phases: a first one with all ACP countries to deal with sanitary and phytosanitary measures, services, technical assistance and a second one with ACP regions to continue in parallel the

¹⁶⁸ From Lome to Cotonou: Business as Usual, by Olufemi Babrinde and Gerrit Faber, Prepared for the 8th Biennial conference of the European Union Studies Association, March 27-29, 2003, Hilton Suites, Nashville, Tennessee, Available at: <http://aei.pitt.edu/2817/1/084.pdf> accessed on 13th October 2011

¹⁶⁹ Ibid

¹⁷⁰ Ibid

¹⁷¹ Ibid

discussions on issues of phase I that have not yet been resolved. EU and ACP countries also need to decide how to achieve the transition between the first and the second phase.¹⁷²

The European mandate traces the content and scope of what the EU understands by the EPAs. EPAs will extend beyond trade in goods to cover services and possibly issues such as standards, SPS measures, procurement, intellectual property rights, competition, investment, environment and others. There appears to be some agreement among ACP countries that since any future trading arrangement is an integral part of the overall Cotonou Agreement it should be subject to Cotonou's objectives of poverty reduction and sustainable economic and social development.¹⁷³

3.7.1 Fundamental principles that underpin EPAs¹⁷⁴

a) Instruments of development:

The EPAs should serve as instruments of development that contribute to the promotion of gradual and smooth integration of the ACP states in world economy while respecting their political options and development priorities, promoting thereby their sustainable development and contributing to the eradication of poverty in the ACP states and not an end in themselves. In this context, the European and ACP parties agreed that the EPAs contribute directly to the development of the ACP states while helping them to expand their markets and improving the predictability and transparency of the legal framework governing trade, creating thereby suitable conditions for investment growth and the mobilization of private sector initiatives in order to improve the supply capacity of the ACP States. To this end, the EPAs should take account of the economic, social, environmental and structural constraints specific to each ACP state and region concerned, as well as their capacity to adapt their economies to the EPA process. The EPAs

¹⁷² Ibid

¹⁷³ Ibid

¹⁷⁴ EUBusiness, Economic Partnership Agreement, Principles and Objectives, 31st October 2007, Available at <http://www.eubusiness.com/topics/trade/epa-principles/> accessed on 13th October 2011

should also take on board the development guidelines of the countries and regions concerned. Besides, they should be economically and socially sustainable.¹⁷⁵

b) Regional integration:

The EPAs should support the existing regional integration initiatives in the ACP states and not compromise them. They should therefore be based on the integration objectives of the ACP regions concerned. They should also contribute to the reinforcement of regional integration while promoting, among other things, the harmonization of the regulations at regional level. In this perspective, the EPAs should first of all help to consolidate the ACP markets before promoting commercial integration with the EC¹⁷⁶.

c) Maintenance of preferential access:

The two sides agreed that the EPAs maintain and improve upon the current level of preferential access of ACP exports to the European market. As regards the commodity protocols, the two sides agreed to re-examine them in the context of the new trade agreements especially from the viewpoint of their compatibility with the WTO rules, in order to safeguard the advantages accruing thereto in the light of the special legal status of the sugar protocol. As regards the non-LDC ACP states which will not be in a position to conclude EPAs, both sides have agreed that the EC assess the situation of such countries and explore all the possible avenues in order to provide them with a new framework equal to their existing situation and compatible with the WTO rules¹⁷⁷.

d) Compatibility with WTO rules:

An agreement has been reached on the fact that the EPAs should be compatible with the WTO rules in force at the time of their conclusion and that they should take into account the evolutionary nature of the relevant rules especially in the framework of the Doha Programme for Development. The two sides have agreed to cooperate closely in the framework of the WTO

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Ibid

negotiations with a view to defending the agreements concluded especially as regards the degree of flexibility obtained for that moment¹⁷⁸.

e) Special and differential treatment:

The two sides agreed that a special and differential treatment be accorded all-ACP States,

3.8 Kenya –The Economic Partnership Agreements

In October 2007, the EAC Partner States in a bid to preserve their Customs Union, agreed to form EAC EPA configuration to enable them to negotiate with EU as a bloc. The EAC as a Customs Union therefore initialed the Framework Agreement for establishing an Economic Partnership Agreement (FEPA) with the European Communities (EC) on 27th November 2007 in Kampala , Uganda.¹⁷⁹

For Kenya, the primary aim of initialling the framework agreement was to secure export market access in the EU after 31st December 2007, when the ACP/EU preferential trade arrangement was set to expire. The significance of the EU market as the second most important destination for Kenyan exports after the Common Market for Eastern and Southern Africa (COMESA) is underscored, having accounted for 26.4% of exports in 2008, and being Kenya's leading market for horticultural products. This trade has contributed immensely to the economic development of the country which has translated into creation of over 1.5 million jobs and over KShs.70 billion worth of investments in the horticulture and fisheries sectors.¹⁸⁰

In signing the FEPA, EAC offered to liberalize 82.6% of her trade with the EU, 65.4% of which is already zero rated under the EAC Customs Union leaving a mere 17.2% of total trade for effective liberalization to be done on a phase down basis within a period of 25 years. 17.4% of

¹⁷⁸ Ibid

¹⁷⁹ Republic of Kenya, Ministry of Trade, 11th February 2010, Press Release on Economic Partnership Agreements, available at <http://www.trade.go.ke/>, accessed on 13th October 2011.

¹⁸⁰ Ibid

the Products are classified as sensitive to protect agriculture and infant industry.¹⁸¹

The EPA negotiations are not between the European Community (EC) and Kenya. The negotiations are between the EC and the EAC as two regional blocs. Kenya, therefore like other EAC countries is bound by the EAC Customs Union Protocol to negotiate all trade deals under the EAC. This is primarily because EAC is a Customs Territory, and therefore, for trade agreements to be legally binding, they must be concluded under the EAC framework. Kenya is bound by the Protocol and will not break ranks with EAC Partner States on EPAs or any other trade negotiation. It is also important to note that other EAC Partner States which are all Least Developed Countries (LDCs) have never considered the everything but Arms (EBA) initiative as an option to EPA.¹⁸²

3.8.1 East African Community -EPAs

Members of the East African Legislative Assembly (EALA), have urged the East African Community (EAC) partner states to prioritize regional integration and development over the removal of trade barriers in relation with Europe. This was disclosed in a positional paper presented by the committee on communications, trade and investments on the Economic Partnership Agreement (EPA) during the EALA meeting. According to recommendations, it is imperative for the EAC to prioritize regional integration and development ahead of EPA with the European Union (EU). This is critical for the EAC economies for industrial upgrading, export, diversification, food security, region-wide employment creation and ultimately for the countries' peace, stability and security. It has been suggested that only when the Common Market has been firmly established and EAC countries have gained more strength, can they consider negotiating the EPAs with EU.¹⁸³

¹⁸¹ Ibid

¹⁸² Ibid

¹⁸³ Cross Border Trade Deal COMESA funded by the EU, EAC to prioritize Regional Integration ahead of EPA, 5th January 2011, available at <http://www.cbtcomesa.com/>, accessed on 13th October 2011.

The EAC bloc would like to ensure that much emphasis is placed on all those areas that are fundamental to its regional economic growth in its endeavour to industrialize..Partner states will negotiate a favourable deal which promotes growth of the regional development.EPA is currently being negotiated between the European Union and the East Africa Community but the high level of liberalization demanded by EU has slowed the negotiations. promised.¹⁸⁴

3.8.2 The Caribbean -EU Economic Partnership Agreement

The Caribbean-EU EPA negotiations were opened on 16 April 2004 in Kingston, Jamaica. The negotiations were organized in four stages: (i) the first phase would focus on measures to accelerate CARIFORUM integration and establish guidelines for an EPA to be implemented no later than January 1, 2008; (ii) the second phase would focus on meetings of technical negotiating groups; (iii) the third phase would serve to consolidate the discussions and points of common understanding into a draft EPA agreement; and (iv) the final phase would be the finalization of the agreement. The second phase was launched in Barbados on 12 November 2004. On 30 November 2006, in the framework of the third EPA Ministerial in Brussels, the EU Trade Commissioner and the Caribbean Ministers concluded Phase III of the negotiations while providing guidance to conclude the negotiations as agreed in the joint Plan and Schedule for CARIFORUM-EC Negotiations of an Economic Partnership Agreement.¹⁸⁵

CARIFORUM Heads of State and EU Commissioners for Trade and Development met in Montego Bay, Jamaica for a special meeting from 4-5 October 2007. The parties initialled the full EPA in Barbados on 16 December 2007, and the final text was later made available on 22 February 2008. The European Union and 14 countries of the Caribbean region signed the Economic Partnership Agreement (EPA) in October 2008 aiming at strengthening existing

¹⁸⁴ Ibid

¹⁸⁵ SICE, Foreign Trade Information systems,OAS:SED:DEDTT, available at, http://www.sice.oas.org/TPD/CAR_EU/CAR_EU_e.ASP, accessed on 13th October 2011

relation between the Parties and promoting regional integration between the Parties and in the CARIFORUM region. Guyana signed the CARIFORUM-EU EPA on 20 October 2008. On 10 December 2009, Haiti signed the CARIFORUM-EU Economic Partnership Agreement.¹⁸⁶

Not surprisingly, several Caribbean businesses have lamented the benefits to them of the EPA so far. For example, Guyana earns much of its revenue on traditional exports, including rice and sugar, both of which are not covered by the EPA's duty- and quota-free. Thus, the private sector has its reservations about the economic opportunities available under the EPA. The experience of sugar, rum and bananas indicates that the EC now takes the Caribbean for granted. After all, they already have a signed full EPA with the region, so why would they overly concern themselves about the Caribbean?¹⁸⁷

The EC also controls the purse strings. They have knotted those strings on the purse of the 8th European Development Fund (ED) from which money for restructuring and marketing the rum industry should have come. Its daunting bureaucratic procedures halt many Caribbean countries in their tracks from getting money to implement the EPA under the 10th EDF. Undoubtedly, the global financial crisis - as well as the failures of regional financial institutions - has battered Caribbean governments. All Caricom countries have been preoccupied with saving their economies from shocks, including worsening terms of trade especially with the EU - even though Guyana had 3.3 per cent growth in 2009.¹⁸⁸

The implementation of the EPA and the procuring of benefits from it have not been evident so far, and the EC has not been helpful to the Caribbean in the process. When Caribbean leaders

¹⁸⁶ Ibid

¹⁸⁷ Has the Caribbean benefited from EPA with Europe after a year, 2nd Caribbean Article, by Town Crier, April 18, 2010, available at, <http://bangoonline.igloocommunities.com/blogs/caricom/hasthecaribbeanbenefitedfromepawitheuropeafterayeaa>, accessed on 13th October 2011.

¹⁸⁸ Ibid

meet their EU counterparts they should be fully briefed and prepared to tell European leaders of their dissatisfaction and propose means of making the EPA deliver on the 'partnership'.¹⁸⁹

3.8.3 Globalization and China

China has learnt many lessons and accumulated rich experiences in dealing with globalization from its practice of reform and opening-up. In 2003, China was the 6th largest economy and the 5th largest trading nation in the world. More than 200 million people had been lifted out of poverty. The average life expectancy reached 71.8 years in 2002, close to that of a medium-level developed country. The above accomplishments were achieved against the backdrop of a volatile international situation. The reason why China can achieve so much in such a short span of time and in a constantly changing international environment is because **China has found its own road of development, suitable to its national conditions, namely building socialism with Chinese characteristics**. While sticking to the basic system of socialism, reforms are being carried out to solve the problems of incompatibility between the productive forces and the relations of production, and between economic base and the superstructure, so as to achieve self-perfection of socialism. Every country is different from the other. While it is important to learn from other countries in the world, no country should simply copy other countries' model.¹⁹⁰

To adopt opening-up policy. China's opening to the outside world is comprehensive. It opens not only to developed countries, but also to developing countries, not only in economic field, but also in all areas of social development. At the same time, it is not a blind opening, but a self-conscious one, not a disorganized opening but a systematic one. China's opening proceeds and deepens in a gradual and step by step fashion. It started from the 4 special economic zones, to coastal cities, then to capital cities of inland provinces and now it has reached an unprecedented stage of all-round opening demonstrated by China's accession to the World Trade Organization.

¹⁸⁹ Ibid

¹⁹⁰ China and Globalization, Speech by H.E. Ambassador Zha Peixin At Chinese Economic Association Annual Conference (14 April, 2003), available at <http://www.chinese.embassy.org.uk/eng/dsjh/t27161.htm> accessed on 13th October 2011

During its opening-up, China paid special attention to give full play to its comparative advantages to actively conduct international cooperation and competition. For instance, China has fully exploited its advantages of low cost of labour to attract foreign investment and technology to push economic development and better efficiency and quality of economic growth. These measures have brought the Chinese economy increasingly integrated with the world economy. For instance, with the accession to the WTO, China is faced with growing pressure from international competition. China's enterprises have to cope with fiercer competition not only at international market, but at home market as well.. China is committed to opening still wider to the outside world in an all-directional and multi-tiered way, with an even more active approach.¹⁹¹

The rapid emergence of Chinese infrastructure financiers in Africa has raised a variety of concerns among international financial institutions, non-governmental organizations, and Western governments. This report examines and discusses the impacts that Chinese financiers – and particularly China Exim Bank – have regarding debt creation, good governance, and environmental protection. It measures China's efforts not by Western standards, but by international standards which China has signed or helped to bring about. The impacts of Chinese financiers on debt creation, good governance and environmental protection are generally more complex than presented in Western media. It finds that gaps indeed exist between China's commitment to international standards regarding good governance and environmental protection and actual practice on Chinese projects. It also finds that China is currently undertaking efforts to close these gaps in important areas. China now has a self-interest in Africa's longer-term stability, prosperity and development, and that paying more attention to governance and environmental problems is in line with this self-interest.¹⁹²

The emergence of China as a donor not willing to peg any conditionalities to aid and grants has affected the EPAs framework by changing the equation. The EPAs are ridden with conditionalities which vigilant blocs are negotiating on.

¹⁹¹ Ibid

¹⁹² International Rivers Network, China's Role in Financing African Infrastructure, by Peter Bosshard, Policy Director IRN, May 2007, available at, <http://www.internationalrivers.org> accessed on 13th October 2011

3.9 Conclusion

While negotiating the EPAs, Kenya and the East African bloc as a whole will preserve upstream support for political, economic, administrative and institutional reforms to create an enabling environment; Capacity-building to assist in ongoing policy analysis and policy formulation -- in industrial policy-making and macroeconomic policy making for example; Specific support for the finance sector to increase financial sector efficiency, encourage the mobilization of savings, and develop capital markets to develop an investor-friendly climate; Increase in the focus on economic cooperation over development aid in different ACP countries as the specific circumstances of the country concerned may warrant; Assistance in projecting a more positive image of the ACP vis-a-vis the EU business community. ¹⁹³

The preservation and protection of socio-economic rights by Kenya is crucial, noting that with the Constitution of Kenya 2010, Article 43 and 44 provide for the socio-economic rights and the language and cultural rights which the Government of Kenya has to provide. The government will need to stable economic base in order to deliver these rights to its citizenry.

¹⁹³ Investment protection and promotion in the ACP- EU context, *Rundheersing Bheenick*, Paper prepared for Summit Heads of State and Government, available at <http://www.acpsec.org/summits/gabon/bheenick.htm>, accessed on 13th October 2011

CHAPTER FOUR

4.0 THE EFFECTS OF EPAS TO KENYA'S SOCIO-ECONOMIC RIGHTS

4.1 Introduction

ACP countries view EPAs as a necessary evil. Although they need them to maintain their preferred trading position, they are also concerned that they will place strong competitive pressure on their economies. It therefore follows that as the date of conclusion rapidly approaches, many countries are starting to doubt whether the financial benefits from the preferred position cover the substantive adjustment costs that come from increased competition. Furthermore, all ACP-countries tend to agree that the new trade arrangements benefit the EU more than it does to them.¹⁹⁴

A second concern of ACP countries is that the emphasis on trade will reorient the focus of aid or perhaps make aid conditional on market access for EU products, as funds may have to be shifted to achieve the goal of trade adjustment – if and when the EU accepts to do so. Although the reciprocity of trade will entail costs of adjustment, the EU has not yet formally agreed to significantly increase the Economic Development Fund (EDF) that supplements the EU-ACP agreements. Also, in the future, difficult discussions on increasing the EDF are foreseen, as new member states of the EU miss the cultural ties with mostly former French and British colonies.

4.2 The Constitution of Kenya: Basis of Human rights in Kenya

The Constitution of Kenya 2010 has an extremely robust and greatly hailed Bill of Rights. It clearly elaborates on the first, second and third generation rights. The division of human rights into three generations was initially proposed in 1979 by the French jurist Karel Vasak at the

¹⁹⁴ Karel van Hoestenbergh and Hein Roelfsema, 2006, Economic Partnership Agreements between the EU and groups of ACP countries: Will they promote development? UNU-CRIS Occasional Papers 0-2006/27 United Nations University.

International Institute of Human Rights in Strasbourg¹⁹⁵. It is worth noting that his division follows the three great watchwords of the French Revolution:

1. Liberté,
2. Égalité &
3. Fraternité.¹⁹⁶

The Universal Declaration contains three distinct sets or generations of human rights.¹⁹⁷ The first generations of human rights deal essentially with liberty. These are fundamentally civil and political in nature and serve to protect the individual from excesses of the state. First-generation rights include, inter alia, freedom of speech, the right to a fair trial, and freedom of religion and they are perceived to be negative rights. For many years, the dominant position was that only these rights were genuine human rights.¹⁹⁸ They were first enshrined at the global level by the 1948 Universal Declaration of Human Rights. The reason they are referred to as negative rights is because they are rights from certain things, usually freedoms from abuse or coercion by others, as opposed to positive rights which are the rights or guarantees to certain things.

One example of a negative right is the 1st Amendment of the Constitution of the USA, which prevents free speech from being reduced by laws. Other negative rights include the right to security in private property, freedom of speech, freedom of the press, freedom of religion, freedom from violent crime and freedom from involuntary servitude¹⁹⁹. Under Article 20 (2)²⁰⁰, the Constitution of Kenya 2010 states that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

¹⁹⁵ Three Generations of Human Rights Available at: <http://www.scribd.com/doc/35773292/Three-Generations-of-human-Rights>: Accessed on 8th October 2011

¹⁹⁶ Ibid and en.wikipedia.org/wiki/Liberté,_égalité,_fraternité Logo of the **French** Republic showing the "Liberté, égalité, **fraternité**" motto with liberty as the aim, equality as the principle and fraternity as the **means**.

¹⁹⁷ Elizabeth Reichert, Journal of Comparative Social Welfare Vol.22, No. 1, April 2006, pp.23-26, available at <http://www.socialwork.siuc.edu/resource> accessed on 11th October 2011

¹⁹⁸ Steiner, HP Alston & R Goodman, (Eds), 2008, International Human Rights in context: Law Politics and Morals (Third Edition); Oxford, Oxford University Press

¹⁹⁹ Ibid

²⁰⁰ The Constitution of Kenya 2010, promulgated on the 27th August 2010

Article 29²⁰¹ spells out the issue of freedom and security of the person and it states that “every person has the right to freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without just cause. Article 30²⁰² touches on Slavery, servitude and forced labour: Article 32 on Freedom of conscience, religion, belief and opinion; Article 33 on freedom of expression and Article 34 on freedom of the media.²⁰³

The second generation rights are related to equality. They are fundamentally social, economic, and cultural in nature. In social terms, they ensure different members of the citizenry equal conditions and treatment as well as grant people the right to work and to be employed, thus securing the ability of the individual to support a family. They are mostly positive rights, representing things that the State is required to provide to the people under its jurisdiction.²⁰⁴

These rights concern how people live and work together and the basic necessities of life. They are based on the ideas of equality and guaranteed access to essential social and economic goods, services, and opportunities. They became increasingly a subject of international recognition with the effects of early industrialization and the rise of a working class. These led to new demands and new ideas about the meaning of a life of dignity. People realized that human dignity required more than the minimal lack of interference proposed by the civil and political rights. Social rights are those that are necessary for full participation in the life of society. They include, at least, the right to education and the right to found and maintain a family but also many of the rights often regarded as ‘civil’ rights: for example, the rights to recreation, health care and privacy and freedom from discrimination. Economic rights are normally thought to include the right to work, to an adequate standard of living, to housing and the right to a pension if you are old or disabled.²⁰⁵ The economic rights reflect the fact that a certain minimal level of material security is necessary for human dignity, and also the fact that, for example, a lack of meaningful employment or housing can be psychologically demeaning. Cultural Rights refer to a

²⁰¹ Ibid

²⁰² Ibid

²⁰³ Ibid

²⁰⁴ Three Generations of Human Rights Available at: <http://www.scribd.com/doc/35773292/Three-Generations-of-human-Rights>: Accessed on 8th October 2011

²⁰⁵ The Evolution of Human Rights, Background information on Human Rights, Available at http://www.evc.int/compass/en/pdf/4_2.pdf accessed on 9th October 2011

community's cultural "way of life" and are often given less attention than many of the other types of rights. They include the right freely to participate in the cultural life of the community and, possibly, also the right to education. They distinctively illustrate rights or guarantees to certain things, as opposed to negative rights which are the rights from certain things, usually freedoms from abuse or coercion by others.²⁰⁶

The Constitution of Kenya 2010 provides that the State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43, that is, the Economic and social rights of every Kenya.

Article 43 (1) Every person has the right-

- (a) To the highest attainable standard of health, which includes the right to health care services, including reproductive health cares
- (b) To accessible and adequate housing, and to reasonable standards of sanitation;
- (c) To be free from hunger, and to have adequate food of acceptable quality
- (d) To clean and safe water in adequate quantities
- (e) To social security
- (f) To education

Article 43 (3) states that the State shall provide appropriate social security to persons who are unable to support themselves and their dependants²⁰⁷

The third generation human rights focus essentially on fraternity and, in generic terms, can be seen as rights of solidarity. They cover group and collective rights: the right to self-determination, to economic and social development, and to participate in the common heritage of mankind. These rights are predicated not only upon the affirmative and negative duties of the State but also upon the behaviour of each individual. Rights in this category include self determination, right to development, right to peace, right to a healthy environment and right to intergenerational equity. The right to a healthy environment requires a healthy human habitat, including clean water, air, and soil that are free from toxins or hazards that threaten human health. The right to a healthy environment entails the obligation of government to refrain from interfering directly or indirectly

²⁰⁶ Ibid

²⁰⁷ The Constitution of Kenya 2010, promulgated on the 27th August 2010

with the enjoyment of the right to a healthy environment; to prevent third parties such as corporations from interfering in any way with the enjoyment of the right to a healthy environment and to adopt the necessary measures to achieve the full realization of the right to a healthy environment.²⁰⁸ Article 41 of the Constitution of Kenya 2010 provides that everyone has the right to a clean and healthy environment while Article 69 touches on obligations in respect of the environment and these obligations shall be fulfilled and enforced as provided in Article 70.²⁰⁹

The realization of the socio economic rights of Kenyans is an obligation that the State must fulfill and this is explicitly provided for under Article 21 (2) which states that the implementation of the rights and fundamental freedoms as provided in the Bill of Rights, Chapter of the Constitution must be realized by the State taking legislative, policy and other measures including the setting of standards to achieve the progressive realization of the rights guaranteed under Article 43 which touches on economic and social rights. Article 22 (1) of the Constitution of Kenya 2010 states that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed or is threatened.²¹⁰

4.2.1 The right to work

The threat to ACP agricultural sectors could affect a large portion of the ACP countries' populations. The right to work, enshrined in Article 15 of African Charter on Human and Peoples' Rights and article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. State parties have to take steps to achieve the full realization of this right. The ICESCR also guarantees workers just and favorable conditions of work which ensure a decent living for themselves and their families. Yet, States will not have many opportunities to protect employment in the agricultural sector once EPAs enter into force.

²⁰⁸ Three Generations of Human Rights Available at: <http://www.scribd.com/doc/35773292/Three-Generations-of-human-Rights>: Accessed on 8th October 2011

²⁰⁹ The Constitution of Kenya 2010, promulgated on the 27th August 2010

²¹⁰ Ibid

The Kenya Institute for Public Policy Research and Analysis KIPPRA report posits that 65 per cent of Kenyan industries will face unfair competition from EU industries.²¹¹ These vulnerable industries include food processing, textiles, paper and printing firms. The report notes that food and beverages sourced from the EU will increase by KES 3 billion from KES 1.6 billion to KES 4.6 billion. From the institute's analysis, the EU will become the main supplier of food and beverages accounting for 67 per cent of all food and beverages imported into the country. This in turn would affect food processing exports to regional markets which account for KES 1 billion. These industries employ over 100,000. In the Agricultural sector, milk and milk products will also face unfair competition from heavily subsidized dairy products from the EU. The dairy sector in Kenya is produced by over 625,000 smallholders; the sector supports over 3 million people. As noted above, the maize sub sector will also be affected by the EPAs. The sub sector provides livelihoods to over 4 million farmers who are directly involved in production.

Over 100,000 people are employed in agro processing and another 200,000 in distribution channels. In the case of wheat, the sub sector employs over 20,000 farmers; over 4,000 people are employed in agro processing and a further 200,000 people are employed in the distribution chain.

According to the Kenya National Bureau of Statistics Report of 2011, the labour market reported 520.1 thousand new jobs compared to 498.6 thousand new jobs in 2010. However, average nominal earnings increased by 5.3 percent in 2011 while the real average earnings declined by 8.1 per cent due to inflation.

4.2.2 Right To Housing

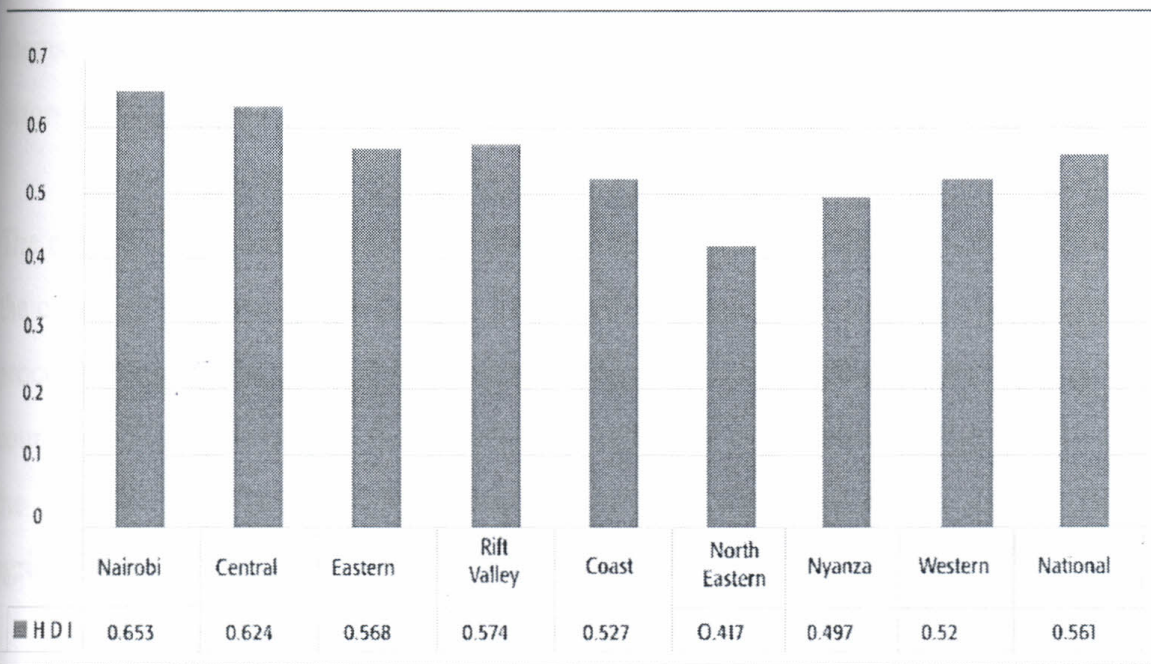
Every person has the right to accessible and adequate housing, and to reasonable standards of sanitation: Article 43 (1) (b). Article 53 (c) complements this provision with the more imperative provision that children have the right to basic shelter. Persons with disabilities have the right "to reasonable access to all places, public transport and information": Article 54 (1) (c).

²¹¹ KIPPRA, 'The Potential Impact of the Economic Partnership Agreements (EPAs) on the Kenyan Economy' carried out on behalf of the Ministry of Trade and Industry September 2005.

However, its provisions are not broad enough to cover slum dwellers' rights in terms of adequate housing or protect them from arbitral evictions. The Act sets limits and restrictions on arbitral increment of rent, penalty for accepting excessive rent and restriction on distress for rent.²¹²

The data says housing demand in urban areas stands at 150,000 units annually with a supply of about 35,000 units. A survey done by the World Bank in 2011 June said cumulative housing demand stood at around two million units. (See table below)

Figure 1: Human Development Index with regards to House Inadequacy²¹³



The access to decent housing is limited due to the fact that a bigger portion of the population cannot afford to buy or rent decent housing due to the dwindling economies of scale which are informed by high poverty levels, unemployment and poor economic infrastructure associated with a struggling economy. Kenya is among the developing countries in the world with a low Gross Domestic Product. The restrictions imposed by EPAs could make the situation worse due to increased inflation and the net effect would affect the access to decent housing by the people of Kenya a distant right to access.

²¹² Section 9-16 of Rent Restriction Act

²¹³ UNDP (2012). Human Development Index-Kenya

The right to adequate food

The loss of incomes of agricultural workers seriously compromises the right to an adequate standard of living, including adequate food, clothing and housing guaranteed by article 11 of the ICESCR. Under Article 11 of the International Covenant on Economic, Social and Cultural Rights, every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger. The obligations of the State are threefold: to respect, protect and fulfill the human right to food. The State is obliged to refrain from infringing on individuals' and groups' ability to feed themselves where such an ability exists (respect), and to prevent others - in particular private actors such as firms - from encroaching on that ability (protect).

The right to adequate food is defined by the Committee on Economic Social Cultural Rights as the capacity to have physical and economic access at all times to adequate food or means for its procurement. Paradoxically, prices of agricultural products are going to decrease for ACP countries consumers, yet the price drop will not contribute to the fulfillment of this right since the reduction of prices will harm the large proportion of the population which depends on agriculture.²¹⁴

The liberalization of agriculture, in conformity with structural adjustment programs and WTO agreements, has already had negative impacts on food security and on the right to adequate food of the developing countries' most vulnerable populations. Hunger is an affront to human dignity and human rights. Extreme hunger afflicts more than 800 million people and is a fundamental constraint to development. At the 1996, World Food Summit, representatives of 185 countries and the European Community (EC) vowed to achieve universal food security, the access of all people at all times to sufficient, high quality, safe food to lead active and healthy lives. However, despite this pledge current data indicates that the number of undernourished is falling at a rate of

²¹⁴ Jean Ziegler, Report of the Special Rapporteur on the right to food, March 2006, E/CN.4/2006/44
See: FIDH, *Mexico, The North American Free Trade Agreement (NAFTA): Effects on Human Rights, Violations of Labour Rights*, Fact-Finding Mission, n°448/2, April 2006.

8 million each year, which is far below the average rate of 20 million per year. In acknowledging the dire need to end hunger worldwide, the United Nations Millennium Development Goals (MDGs), which were endorsed by all UN member states, outlined the critical need to end poverty and hunger.

In March 2009, The United States Department of Agriculture and Food Security stated that as a result of the Food Crisis, the Government of Kenya in 2009 would temporarily “zero rate” (eliminate) ad-valorem tariffs (ranging from 35-to-70 percent) on imports of all agricultural commodities and food items. In addition, Kenya indicated that it would temporarily eliminate non-tariff barriers, such as very low moisture content restriction, that are not health related in an effort to permit commodity imports. These actions will help ensure corn, wheat and rice availability for Kenyans. Factoring in the potential trade-enhancing effects of the GSM-102 credit guarantee program for Kenya, U.S. producers would be in position to help Kenyans traverse the very difficult food-insecurity period.

The KIPPRA report states that if the EPAs are concluded with current EU Subsidies and with the Non Tariff Barriers (NTBs) in place, staple foods such as maize, rice, dairy and wheat will experience decreased production and exports. Maize is the staple food for Kenyans; it is grown and consumed by more than 90 per cent of Kenyan households. Wheat is the third most important staple food after maize and potatoes.

The impact of the EPAs in these sectors would mean small scale farmers, majority of whom are women, would lose their livelihoods due to flooding of cheap and heavily subsidized agricultural products from the EU. Loss of livelihoods and continued dependency on imported food would mean massive hunger for many. This would be especially so for vulnerable and marginalized groups like women.

1.2.3 Liberalization of water supply and the right to water

Liberalization of water supply, which is very lucrative for transnational corporations, can have very important consequences on developing countries: indeed, privatization and liberalization often lead to an increase of the water tariffs and to partial water distribution on the national

...ory. The UN Special Rapporteur on the right to food observes that privatization very often
...ns higher prices which the poorest cannot afford. In numerous ACP countries, the situation is
...dy alarming and is worsened by privatization and the water supply monopoly of
...sational corporations which, in the absence of national rules, provide services only to the
...est and in the areas where it.²¹⁵

...ght to water is guaranteed by the International Covenant on Economic, Social and Cultural
...hts and it means that everyone has the right, without discrimination, to sufficient, safe,
...ceptable, physically accessible and affordable water in the best condition for personal and
...mestic uses.

...e Committee on economic, social and cultural rights reasserts that this right also creates
...ernational obligation for States: to respect, protect and fulfill the right to water in third
...untries.

...e obligation to protect implies ensuring that non-States actors which fall under their
...isdiction, notably corporations, do not infringe this right in other countries. Thus, the
...uropean Union countries should make sure corporations are not responsible for violation of this
...ht in the countries where they operate.

...operation efforts in this field have recently started: African ministers committed to carry out
...ter supply management in conformity with human rights⁴⁰, and the European Union Council
...ided in March the 22nd, 2004, that part of the European Development Fund will be used to
...velop access to water in ACP countries.

4 Liberalization of health services and the right to health

...eralization of water supply not only has consequences on the right to water, it also may affect
...right to health enshrined in article 12 of the International Covenant on Economic, Social and
...tural Rights and defined as the right of everyone to the enjoyment of the highest attainable

...ean Ziegler, Report of the Special Rapporteur on the right to food, March 2006, E/CN.4/2006/44

standard of health. This right implies the duty of states to take all necessary measures to ensure the access to health facilities and the highest attainable standards of physical and mental health to their populations. Article 16 of the African Charter on Human and Peoples' Rights also provides that state parties shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.²¹⁶

The liberalization sought by the EU could have disastrous consequences on health facilities and, as a consequence, on the right to health of the ACP countries' populations. Indeed, if the increase of trade may increase available resources and improve the health situation in certain countries, it could also easily lead to its decline. The UN Special Rapporteur on the right to health has reminded that according to his experience a higher degree of privatization tends to be negative for the access to health of the most vulnerable populations, who usually suffer from discriminations.

Privatization in this sector, added to the decrease of state incomes mentioned above, risks damaging the state's capacity to achieve its obligations with regard to the right to health. If these consequences are, currently, only conjecture, the Committee on ESCR reminds that states have to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services.”²¹⁷ “The fact that State does not pay attention to its judicial obligations concerning the right to health when they conclude bilateral or multilateral agreements with other States, with international organizations or any other entities such as transnational corporations constitutes an infringement to their obligations to respect the right to health.

Republic of Kenya in the High Court of Kenya at Nairobi, Petition No. 409 of 2009, Patricia Asero Ochieng & Two others –VS- The Attorney General and Aids Law Project.

²¹⁶ Hunt Paul, WTO Mission report, UN Special Rapporteur on the Right to health, E/CN.4/2004/49/Add. 1st March 2004.

²¹⁷ General Comment n°14, Committee on Economic, Social and Cultural Rights, 22nd session, Geneva, 25th April 12th May 2000.

The petition addresses critical issues informed by provisions of Chapter Four of the Constitution with regard to the Right to life; Respect for Life and Human Dignity and Economic and Social Rights of the People. The petitioners who identify themselves as Persons Living with HIV/AIDS (PLWHA) are challenging the enactment of the Anti-Counterfeit Act whilst arguing that certain provisions of the Act violate their fundamental rights as enshrined under the Constitution.

By this petition they therefore sought a declaration that enforcement of the Act is a breach of their rights and further conservatory orders against implementation of the Act with particular reference to the provisions of Sections 2, 32 and 34 of the Act which prohibit the manufacture, importation and/or usage of generic drugs defined as counterfeit goods. Indeed on 16th September 2009, the petitioners were granted stay of application of Sections 2, 32 and 34 of the Act as relates to the importation of generic drugs and medication and further restraining the Anti-Counterfeit Agency from enforcing Sections 2, 32 and 34 of the Act pending hearing and determination. At the hearing, it was noted for record that the petitioners have been taking HIV drugs for the last 10 years since generic anti-retroviral (ARV) HIV drugs became widely available (following enactment of the Industrial Property Act 2001) with most accessing medication free of charge. And as such, the petitioners made known their apprehension that if the Anti-Counterfeit Act should be enforced it would deny them the right to enjoy the highest attainable standard of health as they would then be forced to purchase drugs more costly than the more affordable generic drugs which had notably sustained them for years.

By use of generic drugs, as stated, the petitioners claimed that they were guaranteed the right to life and therefore sought to reclaim their special status as recognized under the HIV AIDS Prevention and Control Act, 2006 whose object as posited is to extend to persons affected by HIV, full protection of their Human Rights and Civil Liberties. The petitioners pleaded in this context, that the HIV Act requires the Government to ensure availability of resources to ensure access to HIV drugs which has since been guaranteed through supply of generic drugs(in most cases free of charge). They argued that the Government should in fact exempt generic drugs and medicines from the definition of counterfeit goods by taking into account the provisions of the HIV Act and their accruing rights under the Constitution. They further questioned the

Government's failure to clarify the application of the Industrial Property Act which allows for exceptions necessary to make generic drugs available in Kenya.

The petitioners submitted that the Counterfeit Act would result in the imposition of undue and unnecessary burden on the consumers of generic drugs and medicines even in proving that the said drugs are not counterfeit goods as defined by the Act and ultimately would result in restriction to access thereby endangering their lives.

The petitioner's position is further argued against International law and specifically the Agreement on trade and related aspects of Intellectual property Rights (TRIPS) against the backdrop that TRIPS limits the use of the term "counterfeit" to counterfeit trademark goods. Hence that the term "counterfeit": as used in the Counterfeit Act goes beyond its internationally accepted legal meaning. While emphasizing on their rights as enshrined under Chapter four of the Constitution, the petitioners argue that the State has a duty to take cognizance of human dignity, noting that rights can only be limited to the extent that they do not derogate from their core and essential content.

Seeking to ensure that the petitioners and all other PLWHA are not denied access to drugs the petitioners further sought a clearer interpretation to Section 2 that would not create uncertainty about access to generic drugs so that any legislation passed is not contradictory of the State's positive obligations towards persons living with HIV. Quoting Article 23 of the Constitution, the petitioners invoked the aspect of appropriate remedy asking the Court to consider granting appropriate relief that recognizes invalidity of the law in as far as it denied and infringed or violated their rights as posited.

The petitioner's case was further supported with the argument that the Counterfeit Act violates the right to equality for persons with HIV and the claim that generic drugs offer the most effective intervention for survival of PLWHA. THAT based on Article 27 and 43 of the Constitution, right to equality includes the full and equal enjoyment of all rights and freedoms including equal rights to dignity, life and access to health care services. In relation to laws, policies and practices, the Special Rapporteur to the Human Rights Council observed that the

right to health and in turn the right to life as guaranteed by the Constitution and International Treaties was a violation which cannot be justified on basis of any international obligations.

According to the respondents however, they argued that the State enacted the Counterfeit Act in response to its duty to ensure that the people attain the highest standard of healthcare and ultimately enjoy the right to life. They argued that the Act is intended to protect citizens by affording them best care and does not intend to bar generic drugs but seeks to prohibit trade in counterfeits hence the submission by the respondents that the definition of generic is not the same as counterfeit. They contended that the definition is clear and raises no ambiguity positing that in the event of a conflict in interpretation, the provisions of the Industrial property Act should prevail particularly with regard to all essential goods, including medicines(a position that was later refuted by the Judge who observed that the latter published Act would take precedence of the Industrial Property Act).

The Respondents further countered that the risk posed by the counterfeit nonetheless was even greater for PLWHA hence that the Act sought to protect their interests and that of the public from harm of using risky drugs (including drugs for profit) and should thus be embraced with good objective. They nonetheless maintained that the interpretation of the contentious sections within the Act would not lead to violation of the rights of the petitioners as the Act also provides sufficient safeguards for users of anti-retroviral drugs against those who make counterfeit goods.

The Court in considering the socio-economic context alluded to the serious threat HIV AIDS causes to health and life and the Government's commitment under the Kenya national Aids Strategic Plan, to combat the scourge .And in light of the statistics available acknowledged that without medical intervention PLWHA would ultimately succumb. The Court further noted that before the passing of the Industrial property Act 2011, it was not possible for poor people to access anti-retroviral drugs and medication and that Section 58(2) of the Industrial property Act has since allowed the parallel importation of generic drugs hence greatly enhancing the life and health of PLWHA by ensuring access to drugs and against this context ruled that any legislative measure that would affect accessibility and availability would need to be reviewed.

The Court affirmed that the right to health, life and human dignity are inextricably bound and that there is no argument that without health, the right to life is in jeopardy. The Hon Judge pointed out the ambiguity that would nonetheless arise as to what constitutes right to health and reading through the Constitutional and International provisions on the meaning of right to health concluded that the centrality of this right vis-à-vis other rights cannot be dispensed. That the socio-economic factors that promote conditions in which people can lead a healthy life imply that if the State fails to put conditions that guarantee access to medication then it has violated or is likely to violate the right to health of its citizens. She further ruled that the States obligation with regard to right to health encompasses not only the positivity to ensure its citizens have access to health care services and medication but must also encompass the negative duty not to do anything that would in any way affect access to such health care services and essential medicine.

Despite the respondents affirmation that the terms did not raise any ambiguity she noted the danger the petitioners saw in the possibility of the terms “generic” and “counterfeit” being used interchangeably as being borne out of the fact that there have been instances in other jurisdictions in which generic medication has been seized as counterfeit.

A detailed discussion of **South Africa’s constitutional history** reveals that very first Constitution was adopted after the formation of the South African Union in 1910, the second was adopted in 1961, the third in 1983 and the last two in 1993 and 1996 respectively. All the three constitutions before the 1993 Interim Constitution contained no bill of rights. As such, human rights were constitutionally alien to South Africa and therefore any talk of human rights, let alone socio-economic rights would have been meaningless. It was only during the multi-party negotiations that led to the new constitutional dispensation that consideration was given to the inclusion of socio-economic rights in the constitution. This resulted in the inclusion of these rights initially in the 1993 Interim Constitution and later in the 1996 ‘final’ Constitution.

(what is the relevance of this paragraph? It does not tie up with discussion of the concept for the purpose of the study).

The inclusion of socio-economic rights in the South African Constitution has to be seen in the context of the unique history of the country – a history that was characterized by gross human rights violations, denial of access to social goods and services to the majority of the people and lack of access to economic means and resources. It also has to be seen in the context of the level of widespread poverty occasioned by a historically unfair and unjust political and socio-economic system – a system that created a society of gross inequality described more than a decade ago as a society of ‘poverty amidst.’²¹⁸

The **Constitutional Context** of the South African Bill of Rights contains a number of socio-economic rights which appear in no particular order and no particular sequence. They include: rights dealing with Labour relations, Environmental rights; Property rights; The rights of access to adequate housing; The rights of access to health care, sufficient food and water; the right to social security and the right to basic and on-going education.²¹⁹ Courts can protect socio-economic rights by playing two important roles. Firstly, through their law-making powers of interpreting legislation and developing the rules of the common law, and secondly, by adjudicating constitutional and other challenges to state measures that are intended to advance those rights. It is through the latter role that the South African courts, particularly the Constitutional Court, have mainly demonstrated their ability to protect socio-economic rights.

Soobramoney v Minister of Health, KwaZulu-Natal was the first case concerning socio-economic rights to be taken to the Constitutional Court. The case involved an application for an order directing a state hospital to provide the appellant with ongoing dialysis treatment and interdicting the respondent from refusing him admission to the renal unit. The Constitutional Court held that the applicant could not succeed in his claim and found that the denial of the required treatment did not breach the section 27(1) right of everyone to have access to health care services, and the section 27(3) right to emergency medical treatment. This decision ‘represents the low water-mark in relation to the application of socio-economic rights by the court.’ Indeed several criticisms have been leveled at the judicial reasoning and approach of the Court with some commentators arguing that from the standpoint of judicial precedent,

²¹⁸ Ibid

²¹⁹ Ibid

Soobramoney did not contribute much to the understanding of socio-economic rights, nor did it really 'lay down any guidelines that could be followed when interpreting socio-economic rights so as to illuminate and indigenize jurisprudence on socio-economic rights.'²²⁰

In the case of *Van Biljon v Minister of Correctional Services*,³² the applicants were HIV-infected prisoners who sought, *inter alia*, a declaratory order that their right to adequate medical treatment entitled them to the provision of expensive anti-retroviral medication. It was contended on behalf of the applicants that because the right to adequate medical treatment was guaranteed in the Bill of Rights, prison authorities could not on the basis of lack of funds, refuse to provide treatment which was medically indicated. This argument was accepted by the court. In the view of the court, the lack of funds could not be an answer to a prisoner's constitutional claim to adequate treatment. A prisoner had a constitutional right to that form of medical treatment which was 'adequate'. The applicants' order was granted and the respondents were ordered to supply them with the combination of anti-retroviral medication which had been prescribed for them for as long as such medication continued to be prescribed. Although the *Van Biljon* case was decided in the context of prisoners and their constitutional right to adequate medical treatment (under section 35(2)(e)) it has important ramifications for everyone's right to health care services (under section 27(1)).²²¹ These ramifications were reflected in the Constitutional Court's decision in *Minister of Health and Others v Treatment Action Campaign and Others*.

Ghana's Constitution provides for the traditional civil and political (first generation) rights and some economic, social and cultural (second and third generation) rights. These are contained in Chapter 5 entitled 'Fundamental Human Rights and Freedoms.' This constitutional Bill of Rights provides the fundamental legal framework for the protection of human rights in Ghana. Although the Ghanaian Constitution does not provide for socio-economic rights as extensively as the South African Constitution does, the similarity however, is that most of the socio-economic rights protected are contained within the body of the Bill of Rights and not as policies or principles as in the case of other African countries.²²²

²²⁰ Ibid

²²¹ Ibid

²²² Ibid

In the Kenyan situation, the Constitution guarantees every person the right to the highest attainable standard of health. This right includes the right to health care services, including reproductive health care. In addition, denial of emergency medical treatment is prohibited: Article 43 (1) (a) and Article 43 (2). This provision intersects with Article 42 which provides that every person also has the right to a clean and healthy environment.³⁶ Under Article 53 (1) (c), children have the right to basic health-care. The right to the protection of the health of consumers is also listed specifically in Article 46 (1) (c).

Selected Indicators on Health KENYA NATIONAL BUREAU OF STATISTICS 2012

Indicator	2010	2011	% Change
No. of Health Institutions	7,111	8,006	12.6
No. of Registered Medical Personnel	100,411	106,086	5.7
No. of medical students(University)	5,381	6,546	21.7
No. of medical students (MTC)	6,471	7,074	9.3
Full Immunization Coverage	81.0	80.0	-1.0

The right to adequate health provision can be realized if the Government allocation to the social sector increases to accommodate the rising demand. The EPAs will threaten the realization of these rights due to the increased inflation associated with prohibitive trade policies.

What all these cases demonstrate is that the courts, particularly the Constitutional Court can and have played an important role in the judicial enforcement of socio-economic rights in South Africa.

4.2.5 The Right to education

The right to education is also threatened by service liberalization foreseen by EPAs. Here too, privatization and the decrease of public resources risks preventing states from respecting the right to education of each person, as set out in article 26 of Universal Declaration on Human Rights where education shall be free, at least in the elementary and fundamental stages and in article 13 of the ICESCR or article 17-1 of African Charter on Human and Peoples' Rights. The UN Committee on ESCR in its General Comment on the right to education states that in relation to the negotiation and ratification of international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to education.²²³

The UN Special Rapporteur on the right to education has expressed concern about the consequences of the growing perception of education as a paid service and denounced situations where only those who can afford it have access to quality education systems²²⁴.

Selected Indicators on Educations by KENYA NATIONAL BUREAU OF STATISTICS 2012

Indicator	2010	2011	% change
No. of Primary Schools	27,489	28,567	3.9
No. of Secondary Schools	7,268	7,297	0.4
Total Enrollment in Primary	9.38M	9.86M	5.1
Total Enrollment in Secondary	1.65M	1.77M	7.3
Enrolment in University	177,618	198,260	11.6

²²³ General Comment n°13, Committee on Economic, Social and Cultural Rights, 21st session, 15th November – 3rd December 1999.

²²⁴ Katarina Tomasevski, special Rapporteur's report on the right to education, at the Commission on Human Rights, 15th January 2004, .E/CN.4/2004/45.

The Kenya National Bureau of Statistics 2012 report shows a percentage increase of 11.6% regarding enrollment of primary, secondary and university schools. This encouraging trend could be threatened by EPAs due to a decrease in the public resources. (See Table Below)

4.2.6 Violation of the right to self determination

Kenya, like other African states, was coerced to initial the EPA by the EU. The EU threatened Kenya and other African states that their exports would enter the EU market under the unfavourable Generalized System of Preferences (GSP); this would in turn make exports of vital products such as horticulture far too expensive and thus uncompetitive in the European market. Threats such as these forced the African Union (AU) to issue a strong worded declaration expressing their concern regarding the political and economic pressures that was exerted by the EU.

The result of this would be that developing countries would be unable to give special concessions to their growing small and medium enterprises (SMEs). However, despite the fact that these issues were rejected at the multilateral level, Kenya has been forced to open negotiation on these contentious issues.

4.2.7 Violation of the right of participation and right to information

The Cotonou Agreement underlines the principle of participation of all stakeholders in the EPA negotiations. The agreement reads Participation: apart from central government as the main partner, the partnership shall be open to different kinds of other actors in order to encourage the integration of all sections of society, including private sector and civil society organizations, into the mainstream of political, economic and social life.

However, despite the right to participation being guaranteed in the Agreement, Civil Social Organizations (CBOs) were removed from the negotiation process. In regard to right to information, the Agreement under Article 5 makes provisions for cooperation in information sharing between state and non state actors. It has been noted by CSOs that the country

negotiators have relayed documents pertaining to the negotiations at the last minute denying CSOs the chance to review the positions adopted by the negotiators.

4.2.8 Intellectual Property Rights and Economic Partnership Agreements

Intellectual property should balance different interests: the need to support and finance research and creation on the one side, and on the other the necessity to give access to innovation and culture to all. Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees the right of everyone to enjoy the benefits of scientific progress and its application.

Intellectual property rules have been defined by the WTO, since 1994, by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). According to this agreement, a minimum level of protection to intellectual property must be guaranteed, as set out in the main World Intellectual Property Organization's conventions.

On December 6, 2005, an endorsement was adopted to incorporate in the agreement on TRIPS a waiver obtained in 2003 which allowed manufacturing and exports under compulsory licence of generic medicines to developing countries without any production capacities in the pharmaceutical sector. Compulsory licence enables the production of medicines in the absence of agreement of the patent-holder.

The Cotonou Agreement, in its article 46, recognizes the need to ensure an adequate and effective level of protection of intellectual, industrial and commercial property rights, and other rights covered by TRIPS and underline the importance, in this context, of adherence to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to the WTO Agreement and the Convention on Biological Diversity.

Experience shows that the Agreement on TRIPS is an important obstacle for the respect of the right to health, especially as regards access to medicine in poor countries. Even if the Doha

Declaration introduced important flexibilities²²⁵ pressures, world trade policies and several bilateral trade agreements, restricting these flexibilities, actually reduced the capacities of the poorest countries to respect the right to health. So far, it has been difficult to know what EPAs will rule in this aspect. Intellectual property rules, if they are too restrictive and go beyond the protections enshrined in the ICESCR²²⁶, could have negative impacts on several economic, social and cultural rights. Patents on living, especially on plant seeds, could also be very harmful in societies where agriculture is of great importance. The General Comment of the Committee on Economic, Social, and Cultural Rights (ESCR) dealing with intellectual property states that the *right of authors to benefit from the protection of the moral and material interests resulting from their scientific, literary and artistic productions cannot be isolated from the other rights recognized in the Covenant. The private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration.* Furthermore, the Committee clearly expresses the states' obligation to *prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production, or for schoolbooks and learning materials, from undermining the rights of large segments of the population to health, food and education*²²⁷.

4.2.9 Right against Gender Discrimination

Gender is a key factor in the complex relationship among trade, growth and development, yet there is a widespread assumption that trade policies and agreements are class, race and gender neutral.²²⁸ Although trade can be a catalyst for gender equality, the effects of trade liberalization and economic globalization on women, in particular, so far have been mixed. For example, while in a large number of cases trade in general has improved women's empowerment and

²²⁵ We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. (...), we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all. Declaration on the TRIPS agreement and public health, Adopted on 14 November 2001

²²⁶ Article 15, ICESCR, The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author

²²⁷ Committee on Economic, Social and Cultural rights, General Comment No. 17 (2005): The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant) 12/01/2006, E/C.12/GC/17

²²⁸ Sheila Kiratu and Suryapratim Roy, 2010, The Gender Implications of Trade Liberalization in Southern Africa, International Institute for Sustainable Development.

livelihoods; in some other cases the benefits gained by women from trade liberalization have been marginal, and relatively lower than those gained by men. In some other cases, however, trade liberalization has actually exacerbated gender inequalities and women's economic and social status.²²⁹

The primary criticism leveled against international trade agreements from a gender perspective is that the measurement of international trade in terms of a net economic benefit and market-based criteria has largely ignored societal imbalances, which in turn results in long-term trade inefficiencies. This criticism is supported by the fact that Article XX of the GATT, which allows for the reconciliation of trade- and non-trade-related norms in the trade context, is silent on the issue of women's rights. Trade agreements like EPAs have also been criticized for reducing the policy space afforded to national initiatives in general, and the same may well apply to the empowerment of women and their participation in formal economic activities. But these very agreements can be used to streamline the reduction of inequalities at all stages of the economic process and we proffer suggestions on the necessity and means of doing so.²³⁰

Choudhury has succinctly summarizes why trade should be concerned with gender by arguing that the object and purpose of many trade agreements is to raise standards of living and to fulfill the objective of sustainable development. As gender inequality has been recognized as an impediment to the promotion of economic development, it must also negatively impact opportunities to increase living standards and sustainable development. Accordingly, if trade agreements are to meet their stated objectives, gender inequality must be addressed.²³¹

²²⁹ UNCTAD (UN Conference on Trade and Development). 2009. *Mainstreaming gender in trade policy: Considering women in the design and implementation of trade policy*. Geneva: UNCTAD. Available at: <<http://www.unctad.org/Templates/WebFlyer.asp?intItemID=4760&lang=1>>. Accessed on 12 of August 2010.

²³⁰ Ulmer, K. 2004. 'Are trade agreements with the EU beneficial to women in Africa, the Caribbean and the Pacific?' *Gender and Development* 12(2), July.

²³¹ Choudhury, B. 2008. 'The façade of neutrality: Uncovering gender silences in international trade.' *William and Mary Journal of Women and the Law* 15: 113–59. Available at: <<https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=15+Wm.+%26+Mary+J.+of+Women+%26+L.+113&srctype=smi&srcid=3B15&key=014bfd297955b2eec637153bf4ac8385>>. Accessed on 12 August 2010.

Gender has been construed as an issue that can be dealt with substantially within national boundaries by such processes as national legal instruments, microeconomic decisions (such as labour valuation), local governance reform and structural changes to social practices. Even from a macroeconomic perspective, suggestions have been made on including gender while framing national budgets and devising long-term plans.²³² This is however, an illusion since these national measures have been undertaken for a long time without clear change. There is need for external intervention through trade and other means to bring about through change in gender inequality. EPAs should include a gender perspective to ensure that there are actual benefits for women.

4.3 EPAs effect on socio-economic rights

The effect of the integration of services in EPA negotiations on economic development and socio-economic rights are still widely unknown, but ACP countries have firmly urged that due respect must be given to the right of members of the ACP Group to regulate trade in services and liberalize according to their national policy objectives. This services liberalization will reduce the ability of governments to govern these fields, and restrict their capacity to choose the most adapted service suppliers to satisfy the needs of their populations. Consequences on Human Rights are potentially very important, particularly if it concerns essential services, such as water supply, education or health.

The majority of ACP countries are committed to respect both 1966 Covenants on Human rights. Among the 76 ACP States negotiating EPAs with the EC, 52 are parties to the International Covenant on Economic, Social and Cultural rights (ICESCR) and 54 have ratified the International Covenant on Civil and Political rights (ICCPR).

The African States negotiating EPAs are all parties to the African Charter on Human and Peoples' Rights (ACHPR). This Charter protects all human rights, be they civil and political or economic, social and cultural, ranging from the right to work, the right to health, to the right to

²³² Villagomez, E. 2004. 'Gender responsive budgets: Issues, good practices and policy options.' Paper presented at a regional symposium on Mainstreaming Gender into Economic Policies, Geneva, 28–30 January.

education. Furthermore, in the 2004 Pretoria Declaration, the African Commission on Human and Peoples' Rights urged States to “*ensure that economic, social and cultural rights take primacy in the negotiations of bilateral and multilateral trade and economic agreements.* African States are also members of the African Union, whose Charter 5 recognizes in its principles and objectives, the importance of respecting, defending and promoting human rights. Finally, various African Union organs have adopted decisions or instruments relative to human rights such as the African Charter on Democracy, Elections and Governance.²³³

The 76 ACP States, among them 40 Least Developed Countries (LDC), are situated at a much lower level of development than their negotiating partner. The EU, according to the Human Development Index of the United Nation Development Program (UNDP) has a very high level of Human development and is one of the richest regions in the world in contrast, ACP countries, even within regional unions, still have weak economies.²³⁴ This difference of economic development between EU and ACP states is one of the main reasons why EPAs threaten the ACP countries' development and the human rights of their populations. Indeed, such fragile economies in countries with often weak institutions face potentially disastrous competition from the industrialized countries of the EU. If these economies, already stricken by poverty, collapse and their national and per capita incomes further decrease, it is the human rights of millions which are threatened. Furthermore, in sectors where ACP countries do not have any comparative advantage, protections for workers who are affected by restructuring are clearly insufficient. There is no developed social security system with substitution incomes in case of inactivity.

As set out in the WTO rules on Special and Differential Treatment, EPAs must take into account the respective development levels of the parties. Article 34 of the Cotonou Agreement takes that into consideration. Despite these declarations on special and differential treatment, in many

²³³ Kenya Nation Human Rights Commission Website: <http://www.knchr.org/>. accessed on 27 October 2009.

²³⁴ In 2004, EU's part in world trade in goods was 18,1% and at 26,4% of the world trade in services. (European Commission, *EU trade in the world*, 18th February 2005, DG TRADE-H3 SLG/CG/DS, Available on: http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_122531.pdf). Accessed on the 24 October 2009.

sectors, signing EPAs may have prejudicial consequences for the human rights of a large portion of the population of ACP countries.

The necessary tax regime reforms to compensate loss, added to the reduction of custom revenues in the aftermath of market liberalization will lead to an extremely important fall in the ACP countries' budgets. Their capacity to finance public policies may decrease dramatically. The competitiveness of local formal sectors might also be harmed as they will certainly support new taxes and will have to face the competition of multinationals who can negotiate favorable conditions to implant their activity threatening not to invest or to relocate their investments. Hence, governments might have to chose between renouncing to funding social policies (education, health) due to decreasing incomes, and having difficulty to attract foreign investors if fiscal conditions are not as beneficial to investors as those proposed by other countries.²³⁵

These important changes in the budgetary structures, already precarious in numerous ACP States, may infringe upon the countries' right to economic development, guaranteed by article 22 of the African Charter on Human and Peoples' Rights, and upon other economic, social and cultural rights. Indeed, the very capacity of the states in question to lead public policies, particularly in essential services (health, education) might be very limited by this lack of income.

The Constitution of Kenya 2010 provides that the State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43, that is, the Economic and social rights of every Kenya.

Article 43 (1) Every person has the right-

- (a) To the highest attainable standard of health, which includes the right to health care services, including reproductive health cares
- (b) To accessible and adequate housing, and to reasonable standards of sanitation;
- (c) To be free from hunger, and to have adequate food of acceptable quality
- (d) To clean and safe water in adequate quantities

²³⁵ Sacha Silva, (2008), Impact of the Economic Partnership Agreement on Tax Systems in CARICOM, Prepared for the Meeting of Caribbean Organization of Tax Administrators (COTA) Belize City, Belize July 21-24, 2008.

(e) To social security

(f) To education

Article 43 (3) states that the State shall provide appropriate social security to persons who are unable to support themselves and their dependants²³⁶

4.4 Loss of Public Revenues

4.4.1 Loss of revenue through elimination of tariffs

The KIPPRA report notes that Government revenues will be lost in the post EPA regime.

It has been estimated that the Kenya State stands to lose potential revenue of KES 9.5 billion. Stimulations carried out by the institute indicate that total revenue as a share of Gross Domestic Product (GDP) would decline from 21 per cent to 19 per cent, while import duty share in total revenue would decline from 8 per cent to 6 per cent.²³⁷

4.4.2 Loss of revenue generated by the agricultural sector

In the case of the agricultural sector, sub sectors such as maize and wheat will suffer decreased production and exports due to dumping of heavily subsidized products from the EU. In the case of maize, marketed produce fetched KES 3.3 billion in 2004 and wheat produce generated KES 1.2 billion. In a post EPA regime, the Government is likely to receive less revenue from these key agricultural sectors due to decreased production.

ACP countries currently benefit from a non-reciprocal preference system with the EU thanks to the Cotonou Agreement and the WTO waiver. The advantages of this agreement are very important: around 97% of ACP exports to EU countries are exempt of any tax or benefit from lower rates, even if many exports are blocked by non-tariff barriers such as sanitary and phyto-sanitary measures which restrict the access to European market for other motives.

The WTO Agreement on Agriculture (AoA) is framed by articles 13 and 14 of Doha Declaration, which recognizes the necessity for developing countries to effectively take account of their

²³⁶ The Constitution of Kenya 2010, promulgated on the 27th August 2010

²³⁷ Supra footnote 44.

*development needs, including food security and rural development.*²³⁸ However, AoA reinforces market access thanks to conversion of non-tariff barriers (quotas) into customs barriers, reductions of, with a view to phasing out, export subsidies and substantial reductions in trade-distorting domestic support.²³⁹

EPAs will deeply modify the ACP-EU agricultural trading regime. Indeed, the EU is trying to implant a free trade zone between these two regions. Negotiations are currently focused on several points: the establishment of customs union with the creation of a common external tariff, improvement of access for ACP countries exports to the EU market, and liberalization of European agricultural and food products imported to these countries.²⁴⁰

Trade liberalization of agricultural and food products create an important risk for the ACP countries' agriculture. Competition with European agricultural products could be harmful for them for several reasons: the difference of productivity, due to the use of pesticides, industrial fertilizers and better technology, and the existence of important public subsidies – despite their prohibition in principle formulated in the WTO AoA. All these elements reinforce the competitiveness of European products and facilitate their penetration of ACP markets. This is even more true as a majority of products imported from the EU are directly in competition with ACP sectors of production of the food of local populations (cereal, milk, meat, processed products).²⁴¹

4.4.3 Loss of revenue generated through regional trade

The EAC and the Common Market for Eastern and Southern Africa (COMESA) markets are the key destinations of Kenya's exports. Exports to the COMESA region accounted for 34 per cent of total exports with Uganda receiving the bulk. In 2003, the total exports to the COMESA region amounted to KES 61.4 billion. These exports comprise manufactured goods in the form of

²³⁸ WTO, Doha ministerial declaration, 14th November 2001, WT/MIN(01)/DEC/1, paragraph 13: www.wto.org/french/thewto_f/minist_f/min01_f/mindecl_f.htm. accessed on 6 September 2010.

²³⁹ See report « *understanding Global trade and Human Rights* », FIDH, July 2005

²⁴⁰ Economic partnership agreement between eastern and southern African countries on one part and the European Community and its member states on the other part, 4th Draft EPA/8th RNF/24-8-2006/

²⁴¹ See Oxfam-France campaign, *Exportations de poulets : La France plume l'Afrique*, October 2004.

petroleum and oil products, dairy, medicaments, paper and paper products, fertilizers, footwear and cement. Petroleum and oil exports to the COMESA market fetched KES 15.7 billion which translated to 25.6 per cent of total exports. Light oils and preparations generated approximately KES 8.2 billion and had export share of 13.3 per cent.

The KIPPRA report sends a warning bell on loss of traditional markets that Kenya has dominated in the post EPA regime. Kenyan manufacturers will face competition from more experienced and efficient producers from the EU. The potential impact of loss of public resources generated from the above sectors would gravely affect critical sectors such as education and healthcare which are usually the first sectors to experience budget cuts due to limited resources. This would negate the Government's current efforts to provide quality free primary education for all.

Loss of revenues would also impact the Government's commitment to realize the right to healthcare. In an effort to bridge loss of revenues in the post EPA regime, the Government may be forced to increase taxes such as Value Added Tax, a tax that affects the poor and vulnerable groups in society.

4.5 Investments under EPAs and Human Rights

Discussions on investment at the WTO are included in the Singapore issues²⁴² (which are investment, competition policy, transparency in government procurement and trade facilitation. Since the Ministerial Conference in Cancun, only trade facilitation is still subject to negotiation. On the three other issues, negotiations were suspended on demand of developing countries. However, investment issues are still brought up in other WTO agreements such as GATS which deals with foreign investments in the field of services, one of the four modes of service supply.

Investment is a sensitive issue in the current EPAs negotiations. The European Commission firmly insists that investment rules be introduced in the agreements (there will be no agreement

²⁴² On entend par thèmes de Singapour : l'investissement, la politique de concurrence, les marchés publics, et la facilitation des échanges. Ces questions ont été introduites dans les négociations à l'OMC lors de la conférence interministerielle de Singapour du 9 au 13 décembre 1996.

without rules on investments and total reciprocity)²⁴³. This ultimatum is an answer to the African Union ministers' declaration of April 2006 in which they stated that obligations which go beyond WTO rules should be kept outside the ambit of EPA negotiations²⁴⁴. The EU demands this sector be liberalized in order for minimum restrictions to be applied to foreign investors, which is deemed necessary to encourage the Foreign Direct Investments (FDI) flows to ACP countries and stimulate their economic growth.

Nonetheless, the consequences of an agreement on investment are not that clear. The World Bank recognizes that countries that have investment agreements are no more likely to receive additional investment flows than countries without such a pact²⁴⁵. Indeed, primary disincentives for investors are concerns about political stability, security, unreliable electricity supply etc., rather than a lack of a investment agreement. A 2003 report of the United Nations Development Program, *Making Global Trade Work for People* (2003), found that there is *no clear correlation between the volume of foreign direct investment and development success*²⁴⁶. But whereas these agreements do not guarantee FDI flows, and do not constitute a necessary or sufficient condition for development, they restrict the states' capacities to control and select foreign investors (mainly in primary sectors and especially in the extractive activities fields). States may lose their capacity to effectively protect the human rights of every person under their jurisdiction. Without any possible discrimination between foreign and domestic investors, ACP countries will not be able to encourage national industry or even a foreign company which would propose a more productive plan for their development and the achievement of their populations' human rights. Finally, foreign investors may be able to repatriate all profits realized in the country where they operate to their home state, without any obligation of local reinvestment.

²⁴³ Karl Falkenberg, Karl Falkenberg, Deputy Director-General of Trade at the European Commission, Accra, Ghana, 29 June 2006. See: Oxfam International, *Unequal Partners: How EU-ACP Economic Partnership Agreements (EPA) could harm the development prospects of many of the world's poorest countries*.

²⁴⁴ Nairobi declaration on Economic Partnership Agreements, African Union Conference of ministers of Trade 4TH Ordinary Session 12-14 April 2006 Nairobi, Republic of Kenya

²⁴⁵ Banque mondiale, *Global Economic Prospects And Developing Countries 2003: Investing to Unlock Global Opportunities*, Washington DC, 2003. See: Oxfam International, *Unequal Partners: How EU-ACP Economic Partnership Agreements (EPA) could harm the development prospects of many of the world's poorest countries*.

²⁴⁶ Friends of the earth, *Privatization*, N°107, January 2005.

States which are under the obligation to protect rights enshrined in the *International Covenant on Economic, Social and Cultural Rights* have the duty to protect, that is to say to control all the non state actors under their jurisdiction. Thus, ACP countries have to control corporations operating in their territory and EU members States have to ensure that European companies respect human rights wherever they work.

4.6 Conclusion

Despite the many benefits that EPAs bring to Kenya it poses several negative effects. As Kenya moves on with the complete signing of the EPAS, there is need for a full evaluation of the effects of EPAs to the socio-economic rights of Kenyans. It is clear that Kenya does not fall in the same economic footing with members of EU and therefore unless it's less economic position is considered, it stands to lose.

CHAPTER FIVE

5.0 SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1 Summary of Findings

It is clear from the discussions in proceeding chapters that signing the EPAs will liberalize trade *of the* subject goods. This will fundamentally increase competition from major economies. Such increased competition will injure young and developing economies since they will not have comparative advantages over their counterparts.

The impacts of the integration of services in EPA negotiations on economic development and socio-economic rights are still widely unknown, but ACP countries have firmly urged that due respect must be given to the right of members of the ACP Group to regulate trade in services and liberalize according to their national policy objectives. This services liberalization will reduce the ability of governments to govern these fields, and restrict their capacity to choose the most adapted service suppliers to satisfy the needs of their populations. Consequences on Human Rights are potentially very important, particularly if it concerns essential services, such as water supply, education or health.

The majority of ACP countries are committed to respect both 1966 Covenants on Human rights. Among the 76 ACP States negotiating EPAs with the EC, 52 are parties to the International Covenant on Economic, Social and Cultural rights (ICESCR) and 54 have ratified the International Covenant on Civil and Political rights (ICCPR).

The African States negotiating EPAs are all parties to the African Charter on Human and Peoples' Rights (ACHPR). This Charter protects all human rights, be they civil and political or economic, social and cultural, ranging from the right to work, the right to health, to the right to education. Furthermore, in the 2004 Pretoria Declaration, the African Commission on Human and Peoples' Rights urged States to “*ensure that economic, social and cultural rights take primacy in the negotiations of bilateral and multilateral trade and economic agreements.*”

African States are also members of the African Union, whose Charter⁵ recognizes in its principles and objectives, the importance of respecting, defending and promoting human rights. Finally, various African Union organs have adopted decisions or instruments relative to human rights such as the African Charter on Democracy, Elections and Governance.²⁴⁷

The 76 ACP States, among them 40 Least Developed Countries (LDC), are situated at a much lower level of development than their negotiating partner. The EU, according to the Human Development Index of the United Nation Development Program (UNDP) has a very high level of Human development and is one of the richest regions in the world in contrast, ACP countries, even within regional unions, still have weak economies.²⁴⁸ This difference of economic development between EU and ACP states is one of the main reasons why EPAs threaten the ACP countries' development and the human rights of their populations. Indeed, such fragile economies in countries with often weak institutions face potentially disastrous competition from the industrialized countries of the EU. If these economies, already stricken by poverty, collapse and their national and per capita incomes further decrease, it is the human rights of millions which are threatened. Furthermore, in sectors where ACP countries don't have any comparative advantage, protections for workers who are affected by restructuring are clearly insufficient. There is no developed social security system with substitution incomes in case of inactivity.

As set out in the WTO rules on Special and Differential Treatment, EPAs must take into account the respective development levels of the parties. Article 34 of the Cotonou Agreement takes that into consideration. Despite these declarations on special and differential treatment, in many sectors, signing EPAs may have prejudicial consequences for the human rights of a large portion of the population of ACP countries.

²⁴⁷ Kenya Nation Human Rights Commission Website: <http://www.knchr.org/>. accessed on 27 October 2009.

²⁴⁸ In 2004, EU's part in world trade in goods was 18,1% and at 26,4% of the world trade in services. (European Commission, *EU trade in the world*, 18th February 2005, DG TRADE-H3 SLG/CG/DS, Available on: http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_122531.pdf). Accessed on the 24 October 2009.

The necessary tax regime reforms to compensate loss, added to the reduction of custom revenues in the aftermath of market liberalization will lead to an extremely important fall in the ACP countries' budgets. Their capacity to finance public policies may decrease dramatically. The competitiveness of local formal sectors might also be harmed as they will certainly support new taxes and will have to face the competition of multinationals who can negotiate favorable conditions to implant their activity threatening not to invest or to relocate their investments. Hence, governments might have to choose between renouncing to funding social policies (education, health) due to decreasing incomes, and having difficulty to attract foreign investors if fiscal conditions are not as beneficial to investors as those proposed by other countries.²⁴⁹

These important changes in the budgetary structures, already precarious in numerous ACP States, may infringe upon the countries' right to economic development, guaranteed by article 22 of the African Charter on Human and Peoples' Rights, and upon other economic, social and cultural rights. Indeed, the very capacity of the states in question to lead public policies, particularly in essential services (health, education) might be very limited by this lack of income. The rights that may be adversely affect include the right to work, the right to adequate food, liberalization of water supply and the right to water, Liberalization of health services and the right to health, The Right to education, Violation of the right to self determination, Violation of the right of participation and right to information, Intellectual Property Rights and Economic Partnership Agreements, *right against Gender Discrimination*.

5.2 Conclusions

The negotiation of EPAs has been one tedious process with countries trading various concerns. The negotiations have been compounded by the fact that they are taking place between groups of countries with divergent views. Opening up of markets without a clear structure of operation and transition may cause Kenya numerous human rights violations. To ensure fair Economic Partnership Agreement some Kenya should consider several issues identified in this study and some of them are highlighted below.

²⁴⁹ Sacha Silva, (2008), Impact of the Economic Partnership Agreement on Tax Systems in CARICOM, Prepared for the Meeting of Caribbean Organization of Tax Administrators (COTA) Belize City, Belize July 21-24, 2008.

The implications for ACP countries of negotiating the *Singapore Issues* have not been systematically analyzed, but there is enough evidence to worry ACP policy makers. A pragmatic concern is the sheer cost of implementation. The costs of implementing new laws on competition would be substantial and developing countries are still struggling to implement the WTO obligations on customs reform, intellectual property rights, and SPS agreed during the Uruguay Round.²⁵⁰

A more strategic concern is that ACP countries would be entering binding agreements with the EU in key areas of trade and industrial policy. They have relatively little experience or technical expertise in these areas, and it is not clear which type of policy will best suit their economies, either now, or crucially, as they develop in the future. For this reason it is imperative that ACP governments retain sufficient flexibility to adapt policies as needs require.

Investment is a case in point. The EU argues that by entering a binding investment agreement, ACP countries would benefit from an influx of foreign direct investment, which would stimulate economic growth.²⁵¹ To date, this appears to be little more than conjecture. There is a large body of evidence which led the World Bank to conclude that countries that have investment agreements are no more likely to receive additional investment flows than countries without such a pact.²⁵² Surveys suggest that the primary disincentives for investors in sub-Saharan Africa are concerns surrounding political stability, security, and unreliable electricity supply, rather than a lack of binding investment agreements.²⁵³

²⁵⁰ *Unequal Partners*, Oxfam International Briefing Note, September 2006

²⁵¹ Joint Report On The All ACP-EC Phase Of EPA Negotiations, Brussels, 2/10/2003

²⁵² *Global Economic Prospects And Developing Countries 2003: Investing to Unlock Global Opportunities* World Bank, Washington DC, 2003.

²⁵³ *World Development Report 2005: A Better Investment Climate for Everyone*, World Bank 2004.

Regional integration is a central plank of the Cotonou Agreement²⁵⁴ and a key part of the development strategies of ACP countries. For the ACP, regionalism can promote the pooling of resources, the expansion of markets, increased trade and investment, and greater diversification and value addition, and in turn reduce dependency on a small number of developed country markets. The EU has also recognized in its EPA negotiating mandate that ‘economic and trade integration shall build on regional integration initiatives of ACP states’³⁶ and ‘shall take into account the regional integration processes within the ACP’.²⁵⁵ However, if regional markets are opened to EU imports before they have been consolidated; it will undermine, rather than reinforce, the regional efforts currently under way.

The EPA negotiations are splintering existing regional alignments and forcing ACP countries to choose the body through which they will negotiate with the EU. Within each EPA regional body, there are problems of overlapping membership. This is particularly the case in Southern and Eastern Africa, where parties to the Southern Africa Development Community (SADC) Trade Protocol have split into three groups. Sixteen of the member states of SADC and COMESA are negotiating with the EU under the banner of the Eastern and Southern Africa (ESA) Group; the Democratic Republic of Congo is negotiating in the Central African Group; while the remaining members of SADC (Southern African Customs Union members Botswana, Lesotho, Namibia, and Swaziland, together with Angola, Mozambique, and Tanzania) are negotiating a completely separate EPA in the SADC Group. In addition, the three East Africa Community (EAC) states (Uganda, Kenya, and Tanzania) are split between the SADC and ESA groupings.

Because ACP countries have different priorities regarding the sectors they wish to protect from import competition and to preserve for the generation of tariff revenues, it is possible that each member of an EPA will select different products on which to liberalize. If regional groupings are not sufficiently harmonized before an FTA is launched, the EPAs will create new barriers to intra-regional trade.

²⁵⁴ The Agreement states that ‘economic and trade co-operation shall build on regional integration initiatives of ACP States, bearing in mind that regional integration is a key instrument of ACP countries into the world economy’ (Article 35 (2)), and that negotiations will take ‘into account the regional integration process within the ACP’ (Article 37 (5)).

²⁵⁵ EC EPAs Negotiating Guidelines, Article 35 (2), 2002.

For example, if Kenya chooses not to liberalize flour and maintains its tariff levels but Ethiopia removes all duties, traders may circumvent Kenya's restrictions by transporting cheap (and possibly dumped) goods imported from the EU across the border from Ethiopia.²⁵⁶ In order to prevent this type of transshipment, rigorous border controls would have to be maintained to differentiate between goods originating regionally and goods originating from the EU. The imposition of these time-consuming customs procedures and costly rules-of-origin checks would reinforce barriers to intraregional trade rather than reduce them.

The presence of both LDC and non-LDC countries within EPA negotiating groups is also likely to produce difficulties for regional integration initiatives. Under the EBA arrangement, LDCs already have duty-free access to the European market for 'everything but arms', and therefore have little incentive to sign a further free trade agreement.

5.3 Recommendations

5.3.1 Negotiation Strategies

The mid-term review of EPAs by Kenya provides an opportunity for negotiators to strengthen the legitimacy of the EPA process by improving the quality of information available, expanding participation, and increasing transparency and accountability between EU and Kenyan negotiators. To make the most of this opportunity, the review should ensure that:

- a. The quality and scope of impact assessments is substantially improved, to examine not only the immediate adjustment implications of EPAs, but also their impact on future development policy.
- b. A range of alternatives to EPAs is examined, in compliance with Article 37.6 of the Cotonou Agreement. This must include arrangements without reciprocal market liberalization, without Singapore Issues, and without WTO plus provisions, particularly in relation to TRIPs. The expected impacts of the different arrangements must be

²⁵⁶ C. Stevens (2006) 'The EU, Africa, and Economic Partnership Agreements: unintended consequences of policy leverage', *Journal of Modern African Studies*, 44 (3) pp.1-18.

assessed, so that all parties can judge what arrangement would best contribute to sustainable development and poverty reduction in the ACP countries.

- c. There is full disclosure of information to the public, including the findings of independent impact assessments, and transparency on the content and process of the negotiations.
- d. The process includes parliamentary debate and stakeholder consultation with unions, NGOs, the private sector, the media, and other key actors in ACP countries.
- e. Sufficient financial and technical assistance is provided to ensure that transparent, structured, and participatory consultation and debate can take place at both national and regional levels. Funding for this process should not come with conditions attached or involve outside influence from EU donors.
- f. Sufficient time is allowed beyond the date of the next Joint ACP–EU Ministerial in the first half of 2007, if the review process is to ensure quality analysis on the implications of EPAs, and for it to be genuinely comprehensive and inclusive.
- g. There is coherence and consistency with national development strategies, by involving in the review process relevant ministries as well as donors that support those development strategies.
- h. The EU does not exert disproportionate pressure on Kenya to conclude negotiations by the end of any period, if negotiating texts do not adequately serve the objectives of promoting development and reducing poverty.

2012 KENYA NATIONAL BUREAU OF STATISTICS ON TRADE

Trade Indicator	Period	Figure
Merchandise exports	Current US\$ (2010)	5,150,654,000.00
Merchandise imports	Current US\$ (2010)	12, 090,249,000.00
Balance of merchandise trade	Current US \$million (2010)	-6,939,595,000.00
Foreign direct investment, net inflows	(BoP, current US\$ (2010)	185,793,189.9

According to the 2012 report by the Kenya National Bureau on Statistics, the Economic Outlook for 2012, projects the global economy to record slower real GDP growth rate of 3.4% in 2011. The impact of EPA on economic growth could have serious ramifications in terms of the general GDP growth rate which could slump due to the trade restrictions imposed by EPAs.

5.3.2 Policy Space and National Sovereignty

If EPAs are to be implemented in their present form they would restrict our government's ability to pursue its own development strategies. EPA negotiations should therefore be aligned to national democratic processes such as parliamentary ratification.

Kenya as a signatory to the International Covenant on Economic, Social and Cultural Rights and is therefore duty-bound under international law to respect, protect and fulfill the human right to food, education, shelter and adequate standards of living for its citizens. By signing of EPAs without further consultation with the various stakeholders and without comprehensive analysis of the social and environmental impacts, the state will fail in its obligations to respect and protect the rights of its citizens. If the state signs this agreement our government will be bound to abet the violation of the right to adequate sustainable of living of its citizens.

Trade should be at the service of people and not for profit. Hence trade policies should enhance people's livelihoods through the protection of human rights. It is for this reason that the principles of justice, equity and protection of human rights should guide the process. These principles should guide any trade policy making and agreements.

5.3.3 Inclusiveness

Majority of the citizens and the lawmakers do not have sufficient information and understanding of the implications of the agreements and have also not been provided with the opportunity to participate in the decision-making processes. It is imperative therefore that more time should be allowed for discussion before the conclusion of the negotiations.

The current negotiators have largely included the European Commission and government negotiators leaving out other crucial stakeholders such as the citizens and their members of parliament. For EPAs to be legitimate we appeal for the inclusion of all stakeholders in the negotiations.

5.3.4 Evaluation and Monitoring

Economic Partnership Agreement in Kenya may be important and a way forward towards achieving the goals and targets set by the government. Notwithstanding the interim nature of the Agreement, good monitoring and Evaluations need to be put in place to monitor and evaluate any achievements accruing from the initiative. This cannot be the sole responsibility of government alone as all other economic operators, civil society and the entire business community can contribute towards the attainment of this noble objective initialed between the Government and the European Union in a bid to booster trade between ACP countries.

Proposal have already been set to put a monitoring and Evaluation mechanism at regional levels but concrete measures have not yet been set to implement such a laudable programme.

While waiting on the regional body and/or mechanism to see the day of light, member countries of the ACP who initialed the Agreement could begin to the exercise by setting up local monitoring and evaluation committees or organs that would measure gains or loss from the Agreement. Like all projections, important intercontinental initiatives of this magnitude need proper checks and balances by parties to such agreements to measure the implementation and impact of the Agreement to their economies and standard of live. To further buttress the point, Kenya which is fairing very well in International trade and general economic salvation programmes needs to begin to count its successes in order to know its failures and to correct them in due time to meet up the purpose for which the government endorsed the EPA to achieve for its people. Monitoring is only good for accountable purposes but a guide to good policy formulation and proper policy implementation to continue in the path of economic growth and general regional and international trade participation.

Economic Stakeholders are not peripheral actors in this bid to evaluate interim gains accruing from the endorsement of the EPA. Their support in the process contributes to general awareness. It would also be interesting to note that, they are main vehicles to government policy to business community that are precursors to any such Agreement that governments engage their people. It is said government do not trade but corporations do. While proper control mechanisms would

inform government of any deviations, derogation, difficulties and problems encountered in the discharge of their activities, it would guide to consider the option to either or not initial a Full EPA in the future as per the wishes of the European Union, main initiators of the intercontinental Plan.

From the beginning of discussions to initial such a huge Agreement certain important considerations were not taken on board satisfactorily to address major concerns of developing countries. These concerns keep surfacing in all circles of discussions among stakeholders in these countries. Development related issues are primordial if any further negotiations to keep going the trade bond are to last. Kenya would need to quantify its gains in terms of what the countries can achieve from the EPA. Governments and other stakeholders-main vehicles of trade need to measure the impact to make sure the agreement stand the purpose for which is was signed. In doing this, development concern need to be updated, revalorized to answer to the exigencies of various countries. To consider the case of Kenya-diversifying its production base in sensitive areas would be a sure way to measure their gains from the agreement-sugar, tourism, textile and clothing and food processing among others that need to be developed to meet up international competition challenges from regional and other competitors. To address food security needs, increase the per capita income of its population to better their living stand. There are lots of reasons to support the thesis on monitoring and evaluating the Economic Partnership Agreement which properly address would guide countries to know how they can negotiate their ways out of poverty and into the multilateral trading system and all other trading arrangements that they may get into. Development being of cardinal importance cannot be under looked as previous strides to bail most developing economies out of poverty have not yielded desired fruits from various one-solution-fit all approach adopted by some donor communities. Trade can be and has been identified to be the only way through which this concern can be addressed. To address this concern various mechanisms need to be put in place to monitor and evaluate how the implementation of terms of the agreement supports their concerns.

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