SELECTED LEGAL AND STRUCTURAL CHALLENGES FACING ECONOMIC PARTNERSHIP AGREEMENT (EPA) NEGOTIATIONS WITH THE EUROPEAN UNION (EU): A CASE STUDY OF THE EASTERN AND SOUTHERN AFRICA (ESA) CONFIGURATION

Thesis submitted in partial fulfilment of the requirements for the Masters degree (LLM) International Trade and Investment Law, in the Faculty of Law, University of Nairobi

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Declaration

I, ROSE MAKENA MUCHIRI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Works of others cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

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

Signed: .....

Dr. Kithure Kindiki

Date: 16/11/2012

Dedication

To my lovely children Wangari, Muthoni and Njenga who walked with me along this journey and who are always the source of my inspiration and to my parents for giving me a good foundation in life.

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List of Abbreviations and Acronyms

AAMS	Associated African and Malagasy States
ACP	African Caribbean and Pacific
CAP	Common Agricultural Policy
CEMAC	Central Africa Monetary Union
CET	Common External Tariff
COMESA	Common Markets for East and Southern Africa
CPA	Cotonou Partnership Agreement
DFQF	Duty Free Quota Free
DSB	Dispute Settlement Body
EAC	East African Community
EBA	Everything But Arms
EC	European Commission
ECOWAS	Economic Commission of West African States
EEC	European Economic Community
EPA	Economic Partnership Agreement
ESA	Eastern and Southern Africa
EU	European Union
FTA	Free Trade Area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preference
IDS	Institute for Development Studies
IGAD	Inter Governmental Agency for Development
IMF	International Monetary Fund
IOC	Indian Ocean Commission
LDC	Least Developed Country
MFN	Most Favoured Nation
NDTPF	National Development and Trade Policy Forum
NT	National Treatment
RIA	Regional Integration Agreements

RNF	Regional Negotiation Forum
RTA	Regional Trade Agreements
S&D Treatment	Special and Differential Treatment
SACU	Southern Africa Customs Union
SADC	Southern Africa Development Community
SPS	Sanitary and Phytosanitary measures
TBT	Technical Barrier to Trade
UN	United Nations
UNECA	United Nation Economic Commission for Africa
WTO	World Trade Organisation

Chapter - one

Introduction

1.1.0. Background

This study is done against the background of the ongoing negotiations regarding Economic Partnership Agreements (EPAs) between the African, Caribbean, Pacific Countries (ACP) collectively in regional groups or individually, with the European Union (EU). It focuses on the Eastern and Southern Africa (ESA) countries as a configuration in the negotiation to enter into an EPA with the EU.

EPAs are new trading arrangements agreed upon by the ACP countries and the EU under the Cotonou Partnership Agreement (CPA).[1] Parties to the CPA agreed to negotiate and conclude alternative trading arrangements (EPAs) to replace the trade chapters of the CPA when the trade preferences enjoyed under the agreement expire in December 2007.[2] The main reason for negotiation and conclusion of the new trading arrangements is the need to ensure that trade relationship between ACP and EU comply with the World Trade Organisation (WTO) regulations.[3]

After conclusion of the negotiations, and the subsequent entering into force of EPAs, reciprocal trade agreements will replace the non-reciprocal trade preferences which the ACP Countries have hitherto enjoyed under the four successive Lomé Conventions (1975-2000), and their successor, CPA, where preferences were extended for eight years (until December 2007).[4] The WTO waiver granted to enable the ACP countries to

1 The CPA was signed on 23 June 2000.

2 The discriminatory preferences enjoyed by the ACP countries under the CPA, are allowed under WTO waiver sought by the EU and ACP members. The waiver comes to an end on 31st December 2007. See also, CPA Article 95 (1) Duration of the agreement and revision clause "[the] Agreement is concluded for a period of twenty years, commencing on 1 march 2000".

3 CPA Article 36(1).

4 CPA Article 36(2) 'In order to facilitate the transition to the new trading arrangements, the non-reciprocal trade preferences applied under the fourth ACP-EU Convention shall be maintained during the preparatory period for all ACP countries…' .

continue enjoying preferential and discriminatory market access to the EU will be coming to an end on 31st December 2007 thereby, necessitating;

a) The ACP countries and the EU to bring into conformity their trade relationship with the WTO regulations, whereby the ACP countries would liberalise their markets to the EU by progressively removing barriers to trade through the formation of WTO compliant trading blocs[5], or
b) The ACP countries to revert to the Generalised System of Preferences (GSP)[6] provided by the EU under the multilateral trading system, or
c) The ACP countries and the EU could seek an extension of the WTO waiver for a period of time.[7]

Currently, the ACP and the EU have set their efforts on the long term solution that would involve making their trade relationship comply with the WTO regulations. Consequently, the process of EPA negotiations is ongoing, and is structured in two phases. The first phase is the negotiations at ACP-EU level that kicked off in September 2002.[8] The negotiations at the ACP-EU level were to draw out the objectives and the principles of the EPAs as well as the issues of common interest to all ACP states.

The second phase carried out at national and regional levels began in 2003 and is ongoing. This phase deals mainly with tariff negotiations, and other negotiations and commitments at national or regional levels. It is after the conclusion of the second phase and building of consensus between the specific regions and countries that EPAs will be

5 The ACP and EU would therefore enter into Free Trade Agreements (FTA) according to the requirements of Article XXIV of GATT 94, whereby trade between the two blocs would liberalised.

6 GSP is a formal system of exemption from the more general rules of the WTO. This exemption allows WTO members to establish systems of trade preferences for other countries, with the caveat that these systems have to be, generalised, non-discriminatory and non-reciprocal with respect to the countries they benefited. Countries are not supposed to set up GSP programs that benefited just a few of their 'friends'.

7 GATT 94 Article XXV.5 it provides 'In exceptional circumstances not elsewhere provided for in [GATT 94], the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties....'

8 See the process of EPA negotiations on http://ec.europa.eu/trade (last accessed on 12/02/2006)

signed. According to the timetable set out in the CPA[9] this phase should be completed by 31 December 2007, at the same time the WTO waiver will expire.

1.1.1. Development of Trade Relations between EU and ACP Countries

Trade relations between the EU[10] and the ACP countries dates back to the 1950s in what was known as the Associated African and Malagasy States (AAMS) and the European Economic Community (EEC). At that time, France had wished that a continued special relationship with its African colonies would extend to all members of the EEC. This culminated in the signing of the first Yaoundé convention between the AAMS and the EEC in 1963.[11]

The first Yaoundé Convention aimed at strengthening the economic independence of the 'associated' states while promoting their industrialisation and encouraging regional integration.[12] The commercial regime of the Convention was based on reciprocity and non-discrimination in line with the principles of the treaty of Rome.[13] The long term goal was that the countries party to the Yaoundé Convention would create a free trade zone among themselves, and eventually sign reciprocal agreements with the EEC as a regional trade group.[14] However, even with the negotiations and signing of Yaoundé II,[15] a Free Trade Area (FTA) between EEC and African states did not take off because of three main reasons:[16]

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9 CPA Article 37 (1).

10 Over the years the EU has evolved from the European Economic Community (EEC) to European commission (EC) and eventually to EU.

11 The countries that were signatory to the 1963 Yaoundé I; Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Democratic Republic of Congo, Cote d'Ivoire, Gabon, Madagascar, Mali, Mauritania, Niger, Rwanda, Senegal, Somali and Togo.

12 HBS Lecomte, *Effectiveness of developing country participation in ACP-EU negotiations*: Overseas Development Institute working Paper (2001) p8 also available on www.odi.org (last accessed on 20th may 2006).

13 The treaty of Rome is the Treaty Establishing the EEC. It was signed in 1957 amongst six European states: France, Germany, Italy, Luxemburg, Netherlands, Belgium.

14 PA Messerlin, *MFN-Based Freer Trade and Regional Free Trade: What Role for the European Community*? EU-LDC News 4(3), NEI (1997).

15 Signed in 1969 by the parties to Yaoundé I; Kenya Tanzania and Uganda also joined as new members in the same year.

16 See HBS Lecomte, n12 p9.

- Newly independent African states themselves embarked on self-centred development strategies which relied, *inter alia*, on protectionist trade policies. Therefore they showed no interest to provide trade preference to their European partners
- International firms in various ex-colonies of the European states which had been benefiting from traditional preferences positions in those ex-colonies were keen to protect themselves from potential other European competitors.
- The United States opposed Europe making Africa its restricted 'backyard', fearing that Europe would gain privileged access to African markets and natural resources at its expense.

New impetus with regard to development of the relationship between EEC members and their former colonies was experienced after the signing of the Act of Accession to the Treaty of Rome by Britain in 1972. Soon after, negotiations began at various levels among African and Caribbean Commonwealth countries, and the Yaoundé associated states which eventually formed the ACP[17] group under the Lomé Conventions.

Trade relations under the Lomé Conventions were on a concessional and non-reciprocal basis; this was a major shift from the Yaoundé Conventions where economic interests in the relationship between the African states and the EEC were on a reciprocal and non-discrimination basis. The determination by ACP countries in general and African countries in particular to have a paradigm shift with regard to trade relations under the first Lomé Convention is evident from the basic principles promulgated to govern the discussion of the African group with the EEC prior to the commencement of negotiations: [18]

- non-reciprocity for trade and tariff concessions given by the EEC;
- extension on a non-discriminatory basis towards third countries of the provisions on the right of establishment;
- revision of the rules of origin to facilitate the industrial development of Africa;

17 The ACP group was officially created in June 1975, soon after the signing of the first Lomé Convention, by the original forty-six ACP states. New states included, The Bahamas, Barbados, Botswana, Ethiopia, Fiji, Gambia, Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, Jamaica, Lesotho, Liberia, Malawi, Mauritius, Nigeria, Samoa, Sierra-Leone, Sudan, Swaziland, Tonga, Trinidad and Tobago and Zambia.

18 Conference of African ministers held in Accra, Ghana (1973).

- revision of the provision concerning the objective of monetary independence in Africa countries;
- dissociation of the EEC financial and technical aid from any particular form of relationship with the EEC;
- free and assured access to EEC markets for all African products including processed and semi-processed agricultural products, whether or not they are subject to the common agricultural policy (CAP) of the EEC;
- granting to African countries of stable equitable and remunerative prices in EEC markets for their products, and;
- agreement made with the EEC should not adversely affected intra-Africa Cooperation.

For twenty five years, Lomé trade preferences granted advantages to the ACP products imported into Europe in relation to competing products from other countries. This period comprised four rounds of negotiations and five successive Lomé Conventions (Lomé I to Lomé IV-bis). During the fifth round (1998-2000)[19] the EU-ACP trade relations were to be profoundly transformed by the inclusion of clauses providing for the negotiations of alternative trading arrangements which are to take effect in the year 2008. This therefore, effectivelly extended the duration of the Lomé trade preferences until December 2007 under the CPA.[20]

1.1.2. Cotonou Partnership Agreement (CPA)

The CPA was signed on 23 June 2000 and is expected to be in effect for twenty years commencing on 1 March 2000.[21] It looks forward to the continued partnership between the EU and the ACP countries building on the strengths and achievements of previous ACP-EU Conventions.

The central objective of the CPA is the reduction and eventual eradication of poverty, 'consistent with the objectives of sustainable development and the gradual integration of

19 CPA signed in 2000.

20 See CPA Article 36(2) n4.

21 CPA Article 95 Duration of the agreement and revision clause.

the ACP countries into the world economy.'[22] It encompasses many provisions which can be pigeonholed into five pillars of relationship between the EU and ACP countries: [23]

a. comprehensive political dimension;
b. participatory approaches;
c. strengthened focus on poverty reduction;
d. new framework for economic and trade cooperation,; and
e. reform of financial cooperation.

This study narrows down to provisions concerning the new framework for economic and trade cooperation that provides for the basis of the ongoing EPA negotiations. The reason being that ensuing document from the process of EPA negotiations will not replace the whole CPA but only the trade chapters of the CPA.[24] The economic and trade cooperation section under part 3, (cooperation strategies) in the CPA is the most relevant to this study as it provides for *inter alia*:

i. the objectives and principles underlying the economic and trade cooperation; and
ii. the modalities and procedures that will be followed in the negotiation process of the new trading arrangements (EPAs).

The objectives of economic and trade cooperation are enumerated under article 34 of the CPA as:

i. To foster the smooth and gradual integration of the ACP countries into the global economy.'[25]
ii. To enable the ACP states to play a full part in international trade;[26]

22 CPA Article 1.

23 See CPA, also available on http://europa.eu.int/comm/development/body/cotonou/overview_en.htm (last accessed on 14/9/2006).

24 See the address by EU Commissioner for Trade Peter Mandelson and acting EU Commissioner for Development Olli Rehn during the meeting of African, Caribbean and Pacific Ministers in Brussels on Friday May 25 for the 2007 EU-ACP Joint Ministerial meeting also available on http://ec.europa.eu/trade/issues/bilateral/regions/acp/pr240507_en.htm (last visited on 24/06/2007). See also that Article 95(3) of the CPA refers to the ongoing EPA negotiations as 'a review of the provisions on economic and trade cooperation'.

25 CPA Article 34(1).

26 CPA Article 34(2).

iii. Enhancing the production, supply and trading capacity of the ACP countries, as well as their capacity to attract investment.[27] and

iv. The affirmation that economic and trade cooperation shall be implemented in full conformity with the provisions of the WTO including S&D treatment. [28]

The highlight of the economic and trade cooperation section of the CPA is the agreement to negotiate new trading arrangements (EPAs) between ACP countries and the EU.[29] It anticipates a fundamental change in the ACP-EU trade relationship. The parties agreed to negotiate and conclude new trading arrangements compatible with WTO provisions. This would entail the phasing out of trade preferences granted since 1975 under the Lomé Conventions to the ACP and progressively remove trade barriers between the ACP and EU.

With regard to the process of negotiations, ACP countries are at liberty to carry out EPA negotiations at a level they consider appropriate and in accordance with procedures agreed upon by the ACP group. [30] However, the CPA put a lot of emphasis on regional integration and cooperation. Article 37(5) of the CPA underscores that the process of EPA negotiation shall take into account the regional integration process within the ACP. That notwithstanding the EU left the freedom of choosing the regional grouping for the purposes of EPA negotiations to rest on the ACP countries.

Within the wider ACP-EU cooperation framework provided under the CPA, regional cooperation and integration receive a lot of attention as the partnership undertakes to support regional cooperation and integration.[31] The cooperation is looked at as means to provide effective assistance to achieve the objectives and priorities which the ACP states

27 CPA Article 34(3).

28 CPA Article 34(3) previously the EU/ACP partnership did not strictly conform to WTO provisions and relied on exemptions sought from WTO.

29 CPA Article 36.

30 CPA Article 37 (5).

31 CPA Section 3, Articles 28-30.

have set for themselves.[32] Among the areas on regional economic integration that the cooperation has agreed to support include *inter alia*:[33]

(a) developing and strengthening the capacities of:

(i) regional integration institutions and organisations set up by the ACP states to promote regional cooperation and integration, and

(ii) national governments and parliaments in matters of regional integration

Regional integration is also highlighted under the principles guiding the economic and trade cooperation.[34]It is provided that, 'economic and trade cooperation shall build on regional integration initiatives of ACP states...' [35] Therefore, negotiations in regional groupings were favoured over individual negotiations thus the ACP countries grouped into various EPA regions i.e.

i Economic Commission of West African States (ECOWAS);

ii Central Africa Monetary Union (CEMAC);

iii Eastern and Southern Africa (ESA);

iv Southern Africa Development Community (SADC);

v The Caribbean; and

vi Pacific

1.1.3. EPAs and the Multilateral Trading System

Most ACP countries are members of WTO the multilateral trade organisation, and are bound by the provisions of among others the General Agreement on Tariffs and Trade (GATT 94).[36] Some of the underlying principles in GATT 94 are non-discrimination and reciprocity.

Non-Discrimination

This principle includes two obligations:

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32 CPA Article 28.

33 CPA Article 29.

34 See Article 35(2).

35 Ibid.

36 GATT 94 is a successor of GATT 1947. It was incorporated as one of the major Agreements of WTO in 1994 when GATT (organisation) was transformed into WTO.

i. Most favoured nation (MFN) treatment,[37] which states that WTO member countries should apply the same tariff and other measures to all members; and
ii. The principle of national treatment (NT),[38] which stipulates that imports from WTO member countries should get same treatment as 'like' national products.

Reciprocity

This principle provides that any country offering a concession must also receive one in return.[39]

However, these principles have some exemptions, which include: Special and more favourable treatment extended to the developing and Least Developed Countries (LDCs); and trading between members of a Regional Trade Agreement (RTA).

Article XXIV of GATT 94,[40] Article V of GATS,[41] and Enabling Clause,[42] allows for the formation of RTAs, and the trading thereof, as an exemption to MFN principle, whereby, countries which are members of RTA can extend preferential treatment as regards tariff and other measures of commerce without extending the same to non-members. However,

37 GATT 94 Article I, provides for the principle of, Most-Favoured-Nation Treatment, "...any advantage, favour, privilege or immunity granted by any contracting party [now Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

38 GATT 94 Article III, National Treatment on Internal Taxation and Regulation. (2) "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1".

39 GATT 94 Article XXVIII, Modification of Schedule. (2) "In such negotiations and agreement, which may include provision for compensatory adjustment with respect to other products, the contracting parties concerned shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations."

40 Territorial Application - Frontier Traffic - Customs Unions and Free-trade Areas.

41 Economic Integration.

42 Differential and more favorable treatment, reciprocity and fuller participation of developing countries (Decision of 28 November 1979, L/4903)

member countries have to meet some stringent measures which have been set within the GATT 94[43] and GATS.[44]

Further, WTO Agreements allow Special and Differential (S&D) Treatment to be extended to developing, and LDCs.[45] S&D treatment allows a more favourable treatment to be extended to a particular country or custom territory member of WTO on a discriminatory basis. However, the limits of the discrimination are set in accordance with a known class of countries or custom territories such as developing countries, LDCs, (as listed by the United Nations (UN) classifications) to which the S&D treatment is extended on an MFN basis.

With regard to the ongoing EPA negotiations, the WTO rules relating to RTAs, S&D treatment, and the principle of non-discrimination are the major factors in play. EPAs are designed to be reciprocal free trade agreements (FTAs) that would fall within the exceptions of the WTO rules. This would therefore allow the ACP countries continued enjoyment of trade preferences akin to those enjoyed under the Lomé Conventions but would have to reciprocate by liberalising their markets to trade originating from the EU. Trade preferences enjoyed under FTA arrangements are secure and assured than those which are unilaterally granted since they cannot be withdrawn by the party providing them.[46]

1.2.0. Statement of the Problem

The process of EPA negotiations particularly through the ESA configuration faces the following problems:

43GATT 94 Article XXIV(8) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all trade.

44 GATS Article V(1) a&b. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement: has substantial sectoral coverage and provides for the absence or elimination of substantially all discrimination.

45 S&D provisions are discussed extensively in Chapter 2.

46 Examples of unilateral trade preferences are the Lomé preferences, AGOA preferences and preferences under GSP.

First, ESA is an *ad hoc* organisation created for the purposes of negotiating an EPA with the EU.[47] Therefore it lacks established institutions that would facilitate the negotiation of an EPA as a regional group, with a common negotiating mandate, and delegated supranational powers, to negotiate with the European Commission (EC), which negotiates on behalf of the EU. Therefore it becomes a problem while trying to create internal consensus within the organisation, and setting out tariffs schedules prior to negotiations.

Second, the rationale for negotiating EPAs is to comply with the WTO law/ rules. In complying with the WTO law, ESA region exposes itself to bad law/ largely ineffective or inefficient provisions of WTO particularly with regard to S&D treatment for venerable developing and Least Developed Countries (LDCs) which comprises ESA configuration.

Third, the ESA region is made up of overlapping regional integration initiatives. The multiplicity of regional memberships creates difficulties for the ESA countries since it means they must comply with various tariff reduction schedules, rules of origin and other liberalisation requirements. It therefore has the potential to cause conflict on various rules in different Regional Trade Agreements (RTAs) and certainly imposes greater transaction costs on commodities and services moving across the bounders. This is detrimental to the envisaged deeper integration and cooperation within the ACP by the CPA.

Last and not least, there are some inconsistencies between the CPA as the framework Agreement providing for the negotiation of EPAs on the one hand and some policies carried out by the EU under the multilateral trading system on the other hand. These inconsistencies are briefly enumerated as;

a. The EU has a scheme providing market access to all LDCs on everything but arms (EBA) basis under the EU's GSP. On the other hand the EU wants to enter into reciprocal trade agreements with a group of LDCs under EPAs. Reciprocal

47 See the decision of the 8th Summit of COMESA Authority of Heads of State and Government held in Khartoum, Sudan on 17th March 2003 on the establishment of the ESA configuration for the purpose of negotiation of an Economic Partnership Agreement (EPA) with the European Union.

trade agreements would imply that the affected LDCs would offer tariff concessions to EU goods and services that are imported into their markets.

b. The EU has existing free trade agreements (FTAs) with Egypt and Libya. These two countries are members of COMESA. If the spirit of the CPA is upheld that, 'economic and trade cooperation shall build on regional integration initiatives of ACP states; COMESA and not ESA would have been the ideal organisation to enter into FTA with the EU. This compounds the problem of *ad hoc* organisation within COMESA.

This study seeks to explain how the forgoing problems and the inconsistencies affect the negotiation of ESA-ÈU EPA. It will where possible suggest some solutions that would help solve the imminent deadlock in the negotiations.

1.3.0. Objectives and Research Questions

This study seeks to critique the negotiations of the EPA between ESA and the EU. It will analyse the negotiations in light of the envisaged problems enumerated under the statement of the problem. It seeks to clearly show that:

i. Complying with the WTO regulations, more so, incorporating the S&D treatment provisions of the WTO does not add value to the standing of the ESA countries vis-à-vis their position in the multilateral trading system as they are largely ineffective and unenforceable.

ii. Formation of the configuration comprising ESA countries in the negotiation of an EPA with the EU complicates the regional integration agenda in the region..

In its quest to meet the forgoing objectives this study will seek to answer the following questions:

i Should ESA members be contented with WTO standards and rules, or should they negotiate for standards and rules that are 'WTO plus'?

ii What S&D treatment provisions or motivations should be included for ESA LDCs in the EPA?

iii What is the need for supranational institutions in the EPA negotiation?

iv What should be done to the overlapping regional integration initiatives in the ESA region?

v What is the impact of the existing FTAs between the EU and members of the COMESA on the ongoing ESA-EU EPA negotiations?

1.4.0. Theoretical Framework

This study is encapsulated in the theory of free trade[48] as expounded by the principles of non-discrimination and reciprocity under the WTO.[49] The reduction or removal of tariffs within the WTO framework makes it possible for member countries to replace high cost domestic production with lower cost production from other members. This is made possible by the principle of non-discrimination which stipulates that, WTO member countries should apply the same tariff and other measures of commerce to all members without discriminating, and imports from another WTO member country should get the same treatment as 'like' national products.

However, the rules of the multilateral trading system are not absolute and therefore have some exceptions where for the purposes of this study we will consider RTAs, and S&D treatment. Moreover, even within the exceptions, the cardinal principle of non-discrimination must be respected e.g. trading within RTA should be non-discriminatory, and S&D treatment should be extended on a non-discriminatory manner. Therefore the principle of non-discrimination cannot be dispensed with.

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48 *Dictionary of Trade Policy Terms* fourth edition (2003) define Free trade as: in principle, the free movement across borders of goods, services, capital and people. In practice, national policy and regulatory objectives put greater or lesser constraints on the movement of each. The meaning of "free trade" itself has changed over the years. Observers have noted that in the case of American policy free trade meant a tariff under 20% in the early 19th century. By the late 19th century free traders advocated tariff levels below 40%. By the middle of the 20th century free trade meant a tariff of less than 5%. In the case of AFTA, free trade is understood to be a tariff ranging from 0% to 5%. Under Article XXIV of the GATT 94, customs unions and free-trade areas have to eliminate duties and other restrictive regulations of commerce on substantially all the trade between the parties to meet the free-trade criterion. The norm there is the abolition of all tariffs between the partners either immediately or over several years. See also *Bogor Declaration, economic integration arrangements, four freedoms and free and fair trade.*

49 GATT 94 Article I, provides for the principle of, Most-Favoured-Nation Treatment; Article III, provides for National Treatment on Internal Taxation and Regulation and Article XXVIII, Modification of Schedule.

The understanding of how international trade is facilitated by the multilateral trading system; through providing a forum within which countries can reduce tariffs and other measures of commerce to facilitate free trade, and the principle of non-discrimination, forms the theoretical basis of this study. The parties concerned are the EU on the one hand and the developing countries of the ACP on the other. This study tries to bring out a scenario where the EU a major player in international trade is in the process of engaging the ACP states in negotiations to enter into free trade agreements (FTA) irrespective of them being lesser players in international trade.

1.5.0. Literature Review

A lot of ink has been spilled on the area of international trade generally. Writers have analysed a lot of WTO provisions including the provisions on regional integration, S&D treatment, MFN and others. However, there is no much authoritative works which have been written on the CPA and particularly on the anticipated alternative trading arrangements between the ACP countries and the EU. That notwithstanding, many people working and researching on the area of trade, and some non-governmental organisations (NGOs) have raised issues with regard to EPAs which this study is determined to expound on and critically analyse.

The WTO secretariat has published a lot on the various issues under the multilateral trading system. The study appreciates the works of A Keck and P Low,[50] *Special and Differential Treatment in the WTO: Why, When and How?* It puts in perspective the various S&D treatment provisions and how they have been implemented; the work of the WTO Committee on Trade and Development,[51] *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*. It candidly enumerates the provisions and shows how the implementation is being/has been carried out. This study also acknowledges the work of E Kessie,[52] *Enforceability of the Legal*

50 A Keck & P Low, *Special and Differential Treatment in the WTO: Why, When and How?* WTO Staff Working Paper ERSD-2004-03 (2004).

51 WTO *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions* WT/COMTD/W77 (2000).

52 E Kessie, *Enforceability of the Legal Provisions relating to special and Differential Treatment under the WTO Agreements* The Journal of World Intellectual Property p. 955-975.

Provisions relating to special and Differential Treatment under the WTO Agreements, he clearly discusses the ineffectiveness and un enforceability of the WTO S&D treatment provisions. These works and many others which are disjointed can be distinguished from the study since they look at the S&D treatment provisions vis-à-vis the multilateral trading system while the study looks at the S&D treatment in relation to; how the concept is threatened under EPAs, and the possibility of strengthening S&D treatment provisions under ESA/EU EPA to really benefit the ESA countries.

The work of HBS Lecomte,[53] *Effectiveness of developing Country participation in ACP-EU Negotiations* is also very important in informing the study. He gives a historical perspective to the EU-ACP relations and he tries to speculate on the proposed EPAs. This is because the research was done a while back and the area has been developing quite fast since his research. Though he considers some critical issues with regard to the regional configuration requirements, his research lacked the hindsight on the actual configurations that emerged when negotiations kicked off.

The study also acknowledges the works of Victor Murinde (Ed)[54] *The Free Trade Area of the Common Market for Eastern and Southern Africa*; N K Ng'eno *et al*[55] *Regional Integration Study of East Africa: the Case of Kenya* and F M Mwega & H O Nyangito[56] (Ed) *African Imperatives in the World Trade Order: Case Studies of Kenya*. These authors present broad principles on the area or regional integration, and are very useful in enlightening the study on economic tests to successful regional integration.

The Institute for Development Studies (IDS), formed a worthwhile source of research information, most of its papers have current information though a bit disjointed. C

53 HBS Lecomte, *Effectiveness of developing country participation in ACP-EU negotiations*: Overseas Development Institute working Paper (2001).

54 V Murinde (Ed) *The Free Trade Area of the Common Market for Eastern and Southern Africa* (2001) Ashgate England.

55 N K Ng'eno et al. *Regional Integration Study of east Africa: the Case of Kenya* KIPPRA working papers series WP/09/2003.

56 F M Mwega & H O Nyangito (Ed) *African Imperatives in the World Trade Order: Case Studies of Kenya* (2005) AERC and KIPPRA.

Stevens & J Kennan,[57] *EU-ACP Economic Partnership Agreements: The Effects of Reciprocity*; give insight to some of the issues the study explores such as complex regionalism in ESA/ Africa, and gives some economic statistics. The study however, goes beyond that in its analysis of the ESA/EU-EPA.

The study also relies on other information from organisations such as the International Monetary Fund (IMF),[58] World Bank, United Nation Economic Commission for Africa (UNECA),[59] and Common Market for Eastern and Southern Africa (COMESA)[60] to get the general perception on the issues of trade and regionalism. Most of these reports have an economic outlook and do not necessarily look at the legal and trade perspective. The study analyses this information and makes important legal and trade conclusions with regard to the ESA/EU-EPA.

1.6.0. Hypotheses

The study is based on the following assumptions:

- While S&D treatment is said to be beneficial to the developing countries, incorporation of the current WTO S&D treatment provisions in the ESA /EU EPA would not benefit ESA countries
- The lack of an established institutional framework within the ESA configuration prejudices the ESA countries in negotiating the EPA.
- The EU/ESA EPA will not deepen regional integration in the Eastern and Southern Africa region

1.7.0. Methodology

The study is basically a desktop study done through library and internet research. It relies on both secondary and primary information.

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57 C Stevens & J Kennan, *EU-ACP Economic Partnership Agreements: The Effects of Reciprocity*, IDS Brief Paper (2005).

58 See e.g. P Khandelwal COMESA and SADC: Prospects and Challenges for Regional Trade Integration IMF Working Paper WP/04/227 (2004).

59 See e.g. UNECA *Assessing Regional Integration in Africa (ii) Rationalizing Regional Economic Communities* (2006) ECA Addis Ababa, Ethiopia. UNECA EPA negotiations: African countries continental review draft report (2006) unpublished.

60 COMESA, Review of the ESA EPA negotiations with the European Union consistent with the Cotonou Agreement, Article 37.4 (2006) unpublished.

The secondary information is gathered by reviewing a wide range of documents and materials including articles published in various electronic journals, books, WTO publications, and other materials from the internet.

Primary information on the other hand is gathered from primary documents such as the agreements under WTO and GATT 94 1947, Cotonou Partnership Agreement, Lomé Conventions and other International Agreements forming part of the study.

1.8.0. Chapter Breakdown

Chapter 1 lays the foundation for the study by generally introducing the study; it gives the background of the study by introducing what EPAs are, their rationale, and the framework. It further introduces the CPA, the development of the ACP/EU trade relationship, some principles of the multilateral trading system, exceptions and how they relate to EPAs. Chapter 1 also carries the other aspects of an introduction such the objectives of the study and enumerating the problem prompting the study.

Chapter 2 discusses selected legal issues that would affect the ESA-EU EPA. The process of making EPAs WTO compliant may involve the incorporation of WTO like provisions some of which may not be effective. This Chapter analyses the WTO S&D Treatment provisions in light of their effectiveness and enforceability.

Chapter 3 critically analyses the proposes EPA between the ESA countries with the EU; it explores the deficiencies of the configuration in the negotiations; the effects of multiple memberships of the configuration's members to other RTAs and the challenges of the configuration in complying with the WTO rules; it gives particular attention to Article XXIV of GATT 94, Article V of GATS and the Enabling Clause, the rules that stipulate regional arrangements.

Chapter 4 looks at the various risks and opportunities that present themselves with the negotiation of EPAs. Further it explores some strategic options that the ESA countries may explore in the negotiations with the EU.

Chapter 5 summarises the various suggested solutions to the preceding chapters and concludes the study. It also gives recommendations.

Chapter-two

Selected Legal Issues in the ESA-EU EPA Negotiations

2.1.0. Introduction

The EPA will form the legal framework under which the issues agreed upon by parties shall be implemented. Therefore in the negotiation process, parties must be certain of the terms that they wish to negotiate. The CPA for instance provides that, 'economic and trade cooperation shall be implemented in full conformity with the provisions of the WTO, including *special and differential treatment*, taking account of the parties' mutual interests and their respective levels of development (own emphasis).' [61]

This provision seems to have the effect of introducing WTO S&D treatment provisions to the EPAs. Therefore this study asks the following questions:-

- What are the WTO provisions on S&D treatment?
- Are the WTO S&D treatment provisions adequate and effective for the ACP/ developing countries?
- Are the WTO S&D treatment provisions the standard by which the S&D treatment provisions will be applied in an EPA?
- Can the ESA countries bargain for 'WTO Plus' S&D treatment Provisions in an EPA?

This Chapter briefly explains what S&D treatment is. It further critically analyses the WTO provisions on S&D in light of the questions put forward, by first, discussing the principle of S&D treatment and then, the efficacy of the WTO S&D treatment provisions to the developing countries that they were supposed to assist. It concludes by looking at S&D treatment provisions that are of interest to the ESA region taking into account that the region has a small market power.

61 CPA Article 34(4) – Objectives.

2.2.0. S&D Treatment Provisions and their Efficacy under WTO

2.2.1. The Concept of S&D Treatment

The principle of S&D treatment was and has been the traditional approach of the GATT 47/ WTO systems to address inequitable distribution of wealth among members.[62] Though S&D treatment principle is in direct collision with another principle of international trade law, the principal of the Most-Favoured Nation (MFN),[63] it is however, accommodated regardless of its collision with the MFN principle as an exception to the MFN principle to cater for the special circumstances and vulnerability of developing countries.[64] In this regard, various WTO Agreements contain provisions allowing for S&D treatment to be accorded to the developing countries, LDCs, vulnerable small landlocked states and vulnerable island states.

In the second recital of the preamble to the Agreement establishing the WTO, (Marrakesh Agreement) members recognised among other things, that:[65]

> ... there is need for positive efforts designed to ensure that developing countries, and especially the Least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development

The recognition of the need to have specially designed measures to address the special circumstances of developing countries reinforces the principle of S&D treatment in the WTO institution. However, the implementation and the efficacy of the S&D treatment provisions encompassed under the constituent WTO Agreements have been very controversial casting doubts as to their effectiveness in integrating the developing

62 See P Lichtenbaum, Reflections on the WTO Doha ministerial: "special treatment" vs. "equal participation": striking a balance in the Doha negotiations (2002) 17 Am. U. Int'l L. Rev. 1008.

63 See GATT 1947 Article I, sec I "...any advantage, favour, privilege or immunity granted by any [WTO Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [WTO Member].

64 See e.g. the Enabling Clause Article 1. Notwithstanding the provisions of Article I of the GATT 94, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.

65 Preamble, Marrakesh Agreement.

countries into the world economy. Moreover, the concept of S&D treatment is also under scrutiny with some commentators arguing that preferences do not improve the trade performance of most of the beneficiaries.[66]

Arguments to counteract those against the concept of S&D treatments have been put forward to the effect that nothing is inherently wrong with the concept of S&D treatment and that, the reasons that account for the low or the non-utilisation of the preferences by some of the developing countries are:

> ... too many complications pertaining to restrictive, complex and varying rules of origins, quotas, designation criteria ... exclusion of sensitive products which are of export interest to developing countries, mismatch between exports of beneficiaries and coverage of preferences, and non-economic conditionalities.[67]

Though in some cases it is clear-cut why developing countries do not benefit from S&D treatment provisions as explained by Kessie, others are subtle and have seen developing countries split hairs. For example, there is no clear-cut agreement on the benefits of import substitution policy amongst the developing countries. Import substitution was a consequence of S&D treatment whereby, developing countries erected a high tariff wall to discourage imports and thereby encourage the growth of domestic industries (import substitution policy).[68] The divergence of opinion amongst the developing countries with regard to the effectiveness of this provision on import substitution policy were brought out by the fact that some countries are of the view that it assisted in the establishment and protection of industries, while others feel that the erection of high tariff walls and the

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66 See e.g. M. Davenport, A. Hewitt and A. Kining, *Europe's Preferred Partners? The Lomé Countries in the World Trade*, Overseas Development Institute, London, 1995, p. 5-6. 'The Lomé Conventions, though being in place for over twenty-five years it failed to improve the trade performance of the most of the beneficiary countries hence the decision of the EU to discard the non-reciprocal preferences under the Convention in favour of EPAs'.

67 Edwini Kessie, *Enforceability of the Legal Provisions relating to special and Differential Treatment under the WTO Agreements* The Journal of World Intellectual Property p. 955-975

68 This was made possible by the redrafting of Article XVIII at the 1954-1955 GATT 94 Review Session. The ensuing article permitted developing countries to disregard, under certain conditions, their tariff commitments and implement non-tariff measures such as quotas and other restrictive measures to promote the establishment of a particular industry within their territory, and also to deal with their balance-of-payment difficulties.

imposition of quotas and other prohibitive restrictions had largely isolated their economies from the global economy and contributed to their stagnation and decline.[69]

Further, a WTO committee of eminent persons added its take to the concept of S&D treatment when it concluded that,[70] "[S&D treatment] had done nothing to advance the interests of the developing countries in the multilateral trading system; rather it had encouraged 'the tendency to treat them as being outside the system'." Analysts say that, this realisation led developing countries to accept the dilution of the S&D treatment provisions in the Uruguay round in exchange for better market access and strengthened rules; therefore not allowing themselves to be distracted by the idea of preferences, which the developed countries used as an easy substitute for action in more essential areas.[71]

It is against such a background that the study considers the concept of S&D treatment in so far as it would be incorporated in the EPA as recommended by the CPA. It is however noted that, there is a move in the WTO to strengthen the S&D treatment provisions by making them legally enforceable. whereby, some members of WTO are pressing for the legal enforceability of the S&D treatment provisions arguing that as they stand, the provisions create no justifiable right, since they are just statements of 'best-endeavours'. At the launch of the Doha Round of Negotiations, the ministers agreed to *inter alia*:[72]

> ...review all special and differential treatment provisions with a view to strengthening them and making them more precise, effective and operational.

The wording of the Doha Ministerial Declaration is to the effect that, it made commitment to review S&D treatment provisions but did not make any specific commitments to strengthen, make effective and operational the S&D treatment provisions. The study is of the view that; strengthening, making effective and operational

69 This is not to suggest that developing countries are very critical of the concept of S&D treatment. While they were prepared to accept the shortcomings of import substitution policy, they have always defended the need for preferential access into developed country markets. See further Rohini Hensman, *World Trade and Workers' Rights: to Link or not to Link*, Economic and Political Weekly,8 April 2000, 1247 at p. 1249

70 See F. Leutwiler et al, *Trade Policies for a Better Future: Proposal for Action*, GATT 94 Secretariat, Geneva p. 34

71 See F. Leutwiler et al. n12 p18.

72 See *Doha Ministerial Declaration* adopted by the Doha Ministerial Conference on 14th November 2001 Paragraph 44.

can only come after the review. The Doha round of negotiations is progressing at a snail speed and the ESA countries would need a quick fix to their vulnerability in dealing with economically powerful partners, as well as difficulties of breaking out of vicious cycles of poverty, and embarking upon sustainable development.

2.2.2. Efficacy and Enforceability of WTO's S&D Treatment Provisions

The examination of the WTO's S&D treatment provisions is important more so if the process of EPA negotiations will be shifting provisions from the WTO Agreements to the EPA. This section critically analyses the various S&D treatment provisions in the WTO agreements; it discusses their effectiveness and enforceability. The analysis is based on the phraseology of the provisions and in some cases the decisions by the WTO dispute settlement body (DSB). Though the decisions under the dispute settlement procedures of WTO are not binding on a subsequent panel, they are considered as creating a legitimate expectation among the WTO Members, and therefore they should be taken into account where they are relevant to a dispute.[73] For a more effective examination, the study looks at the S&D treatment provisions under the following heads:

- Provisions aimed at increasing trade opportunities through market access;
- Provisions requiring WTO Members to safeguard the interests of developing countries;
- Provisions allowing flexibility to developing countries in rules and disciplines governing trade measures;
- Provisions allowing longer transitional periods to developing countries; and
- Provisions for technical assistance

Provisions aimed at increasing trade opportunities through market access

WTO members are encouraged to adopt measures, which would increase trade opportunities for developing countries, particularly the least developed among them.

73 See the appellate Body decision in Japan-taxes on Alcoholic Beverages, WT/DSB/ABR, WT/DS10/AB/R, WT/DS11/AB/R, adopted by the DSB on 1st November 1996 "a panel is not bound by its decisions but can refer to consistent rulings."

Other provisions permit the developed countries to grant preferences to developing countries with a view to stimulating their export industry.[74]

Generally, provisions relating to market access are hortatory and do not bind developed country members. Their language does not direct any action but merely encourages or promotes active participation of the developed country members in the development efforts of developing countries, many provisions effectively are "soft law" in this case, a WTO dispute settlement panel cannot review any alleged violation of these provisions.[75]

Article XXXVII of GATT 94 provides a good example. The relevant parts of the Article provide that:

> ...the developed [Members] *shall to the fullest extent possible* ... accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to ... [developing countries] (own emphasis)

It is reasonably arguable that developed countries have no legal obligation to reduce or eliminate barriers to products of current or potential export interest to developing countries. The use of the words 'shall to the fullest extent possible' indicates that the obligation on the developed countries is qualified. Moreover, the use of the words 'accord high priority to' confirm that there is no obligation imposed on developed countries under the Article.[76]

A further interpretation of the provisions is given through WTO case law. In the case of *Norway-Restrictions on Imports of Certain Textile products,* [77] Hong Kong challenged Norway's imposition of quantitative restrictions on certain textiles products. Norway

74 See e.g. the Decision of 28 November 1979, L/4903- Enabling Clause; Part IV of GATT 94- Trade and Development

75 See P Lichtenbaum, *Reflections on the WTO Doha ministerial: "special treatment" vs. "equal participation": striking a balance in the Doha negotiations* (2002) 17 Am. U. Int'l L. Rev. 1014.

76 GATT 94 Article XXXVII provide that the developed country should implement the provisions of Article XXXVII except when compelling reasons, which may include legal reasons, make it impossible.

77 GATT Basic Instruments and Selected Documents (BISD), 20th supplement, 1981, also see; United Kingdom-Dollar Area Quotas GATT BISD, 20th supplement 1974; European Economic Community-Restriction on Imports of Dessert Apples GATT BISD 36th supplement 1990.

argued, *inter alia*, that preferences it accorded to six developing countries were in conformity with the spirit and objectives of GATT 94, Part IV[78] as it facilitated their exports. The Panel rejected Norway's argument by noting that GATT 94 Part IV cannot be relied upon by a country to circumvent its obligations under GATT 94 Part II.[79] This decision may be interpreted to imply that some S&D treatment provisions in the WTO Agreements rank lower than other provisions such as that of national treatment.

In the case of *United States-Anti-Dumping and Countervailing Measures on Steel Plate from India*[80], India Complained against certain measures taken by the US regard to investigate sales of certain steel plate products from India at less than fair value by US Department of Commerce. India's contention was that these measures were inconsistent with obligations of the United States to India under Article 15 of the Anti-Dumping agreement, GATT 94 and the agreement establishing the WTO. The DSB held that

> ...the United States did not Act inconsistently with Article 15 of AD Agreement with respect to Indi in antidumping investigation underlying this dispute.

In *EC-Anti-Dumping Duties On Imports of Cotton-Type Linen From India*[81], India asserted that the EC initiated anti dumping proceedings against imports of cotton-type bed-linen from India by publishing a notice of initiation and thereafter levying Provisional and thereafter definitive antidumping duties. India complained that such action was contrary to WTO law and that it did not take into account the special situation of India as a developing country. It further cited a violation of several Articles of The Ant-Dumping Agreement including Article 15.

The Panel held that the EC acted inconsistently with its obligations under Article 15 among others in determining the margins of dumping and in failing to evaluate all relevant factors of the domestic Industry and in failing to explore the possibilities of constructive remedies before applying anti-dumping duties.

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78 Trade and Development. One of the S&D treatment provisions under GATT 94.

79 Principle of non-discrimination e.g.-National Treatment.

80 WT/DS206/R

81 AB-000-13,WT/DS141/AB/R

The parties appealed severally but finally the appellate body recommended that the DSB *request* the EC to bring its measures into conformity with Anti-Dumping Agreement.
The protracted nature of this dispute shows how tedious it can be for a developing country to enforce its rights under the law as against the obligations of a developed country. Even after the final decision is reached, such a country has to sit and agree on the timelines with the developed country. The DSB cannot also make an order but rather can only request the offending party to conform to the law.
It is also clear that the DSB's decision can go either way even in similar cases as the later two discussed above.

The General Agreement on Trade in Services (GATS) contains such hortatory provisions as those contained in the GATT 94. The relevant provision provides: [82]

> ... the increasing participation of developing country members in world trade *shall be facilitated through negotiated specific commitments*... relating to ... the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia*, through access to technology on commercial basis; ... the improvement of their access to distribution channels and information networks; and ... the liberalisation of market access in sectors and modes of supply of export interest to them (own emphasis).

This provision though being the basis of the S&D treatment under GATS requires developing countries to negotiate for specific commitments and to engage in progressive liberalisation. Similar concerns are shared over the benefits of the derogation from MFN treatment obligations[83] under the Enabling Clause[84] to enable the developed countries to give preferences to developing countries due to the use of language which is legally non-binding. The Enabling Clause does not impose an obligation on developed countries to accord differential treatment to exports from the developing countries. It merely allows

82 GATS Article IV Increasing Participation of Developing Countries.

83 GATT 94, Article I.

84 see Enabling Clause Paragraph 1.

developed countries to depart from their MFN obligations to accord preferential treatment on products from developing countries.[85]

Under the ongoing Doha Development Round of negotiations, the issue of S&D treatment with regards to market access, particularly for the products of the LDCs was tabled. The LDCs Group was negotiating for a hundred percent legally binding Duty Free Quota Free (DFQF) market access to the developed countries' markets.

This is one of the issues that consensus has been achieved that LDCs need more market access. However, LDCs will have to be contented with ninety-seven percent market access DFQF[86]. Considering that the LDCs account for less than two percent of the world trade, exclusion of three percent of tariff lines, which in most cases are of concern to the LDCs, makes the ninety-seven percent DFQF tariff lines a drop in the ocean.[87] A mismatch between exports of beneficiaries and coverage of preferences will still continue to be experienced. Moreover, since the WTO accession is based on single undertaking, the gains of the LDCs will have to wait for the conclusion of the rest of the negotiations to be effected. Currently the deadlock in the negotiations has not been resolved.

Provisions requiring WTO Members to safeguard the interests of developing countries

Quite a number of the of the WTO Agreements require developed country members of the WTO to take into account the special situation of developing countries before imposing any measures which might affect their trade interest. A simple sampling of such provisions would include,

Articles 10(1) of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) –the relevant parts provides;

85 See P Lichtenbaum, Reflections on the WTO Doha ministerial: "special treatment" vs. "equal participation": striking a balance in the Doha negotiations (2002) 17 Am. U. Int'l L. Rev. 1012..

86 WT/MIN(05)/DEC 22 December 2005 Annex F.

87 See e.g. the USA excluded textiles from the DFQF; Textiles are the major export for Bangladesh which is an LDC.

> In the preparation and application of Sanitary or phytosanitary measures, Members shall *take account* of the special needs of developing country members, and in particular of the least developed country members

Article 12.3 of the Agreement on Technical Barriers to Trade (TBT Agreement) provides,

> Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, *take account* of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

Though the language used appears not to be hortatory, doubt exist as to the success of an action initiated against a developed country, which asserts it took into account the interest/needs of developing country in the preparation and application of an SPS measure, a standard or technical regulation.

The major problem with the two provisions which have been examined is that both the SPS and TBT Agreements only impose a duty on developed countries to consider what the impact of their measures would be on developing country Members. They do not specify that developed Members should refrain from implementing or should withdraw their measures when it has been demonstrated by developing country Member that the measure would harm its trade interests. A duty to consider something cannot be equated with a duty to accept it.[88]

The Anti-Dumping Agreement also provides a good example of S&D measures designed to protect the interest of the developing countries. Article 15 of the Anti-Dumping Agreement provides,

> It is recognised that *special regard must be given* by developed country Members to the special situation of developing country Members when considering the application of

88 See Edwini Kessie n9 p969.

anti-dumping duties under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

The Article put an obligation on the part of the developed country Members to consider constructive remedies e.g. accepting price undertakings instead of imposing anti-dumping duties. There is however, no positive obligation on the developed members to accept such alternative remedies. This issue was considered in *EC-Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil.*[89] The panel concluded that the EC was not in breach of its obligations under this Article, as it had considered whether it could enter a quantitative undertaking and had come to a conlusion that such an undertaking would not eliminate the injury caused by the dumped imports"[90].

Provisions allowing flexibility to developing countries in rules and disciplines governing trade measures

Developing countries in the Uruguay Round sought as one of the S&D measures to assume lesser obligations rather than a total exemption from the WTO disciplines. The Agreement on Agriculture (AoA) provides a good example of such measures where the developing countries are required to undertake lesser commitments than their developed counterparts as well as getting a longer implementation period.

The study presents Table 2.1 on provisions allowing flexibility on application/ implementation of measures for comparative purposes between the developed and the developing countries

It is clear that the provisions in the AoA and SCM Agreement have legal force in the sense that a developing country cannot be compelled by another Member of the WTO to undertake more than are actually provided for under the Agreement. In the same stroke, developing countries cannot be compelled to implement their obligations earlier than the time envisaged under the Agreement.

89 EC-Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil ADP/137, 4th July 1995.

90 EC-Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, para589, at p.136

The enforceability of the S&D treatment provisions in the SCM Agreement were examined by the panel and the Appellate Body in *Brazil-Export Financing Programme for Aircraft*[91]. Brazil, a developing country was alleged to have given prohibited export subsidies to a civilian aircraft manufacturer, Embraer. Brazil argued, *inter alia*, that even if it was providing prohibited export subsidies, it had a right under Article 27 of the SCM Agreement to provide such subsidies for a period of Eight years from the date of entry to force of the WTO Agreement.

The Panel in upholding Brazil's argument said that, '...there is no inconsistency with a given provision if a member is explicitly excluded from [the] scope of application....'[92] Therefore, some S&D treatment provisions can successfully be relied upon by developing countries to defend themselves against allegations of breaches of the WTO Agreements.[93]

Table 2.1 Flexibilities

Agreement	Discipline	WTO developed country Members	Developed country Implementation period	WTO developing country Members	Developing country Implementation period
Agreement on Agriculture	Tariffs	Reduce tariffs by an average of 36 percent	Six years[94]	Reduce tariffs by an average of 24 percent LDCs are excluded from reduction commitments	Ten years[95]
"	"	Reduction commitment for at least 15 percent on each tariff line		Reduction commitment for at least 10 percent on least tariff line	

91 Brazil-Export Financing Programme for Aircraft WT/DS46/R adopted by the DSB on 20th August 1999

92 Brazil-Export Financing Programme for Aircraft, at p. 92.

93 Though Canada was successful in the case on other grounds it indicates that S&D treatment provisions of this nature can be relied upon in a Panel submission. C.f. Norway-Restrictions on Imports of Certain Textile products.

94 AoA Part III, Article 4.

95 AoA Part IX, Article 15 Para. 2

"	Trade Distorting Domestic Support	Reduce by 20 percent	Ten years[96]	Reduce by 13.3 Percent	Ten years[97]
"	Export subsidies	Reduce the value and volume by 24 percent	Ten years	Reduce the value and volume by 14 percent	Ten years
Agreement on Subsidies and Countervailing Measures (SCM Agreement)	Export subsidies	Prohibited	Three years to phase out Export subsidies	LDCs and Developing countries with GDP less than $1000 are exempt so long as they do not attain export competitiveness[98]	Eight years to phase out export subsidies[99]

Provisions allowing longer transitional periods to developing countries

These S&D treatment provisions take the form of longer transition periods for the developing countries to comply with their obligations. Therefore, the Agreements incorporate negotiated provisions on agreed delays on the part of the developing countries on certain provisions of the Agreement concerned.[100] Indeed all Agreements with notable exceptions of Anti-Dumping Agreement and the Pre-shipment Inspection Agreement contain these provisions.

Provisions falling within this category as earlier discussed are legally enforceable; in that if a developing country is within the transition period, it is in principle insulated from any actions that may be brought by developed countries. In *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*[101], the panel noted that,

> ... a critical part of the deal struck [in the TRIPs Agreement] was that, developing countries that did not provide product patents protection for pharmaceuticals and

96 Ibid., relevant annexes

97 *Ibid.*,

98 SCM Agreement Article...

99 SCM Agreement Article 27.4.

100 See e.g. some of the provisions discussed under Provisions allowing flexibility to developing countries in rules and disciplines governing trade measures e.g. on AoA, SCM Agreement e.t.c.

101 India-Patent Protection for Pharmaceutical and Agricultural Chemical Products; WT/DS50/R adopted by the DSB on 16th January 1998.

agricultural chemicals were permitted to delay the introduction thereof for a period of ten years from the entry into force of the WTO Agreement.[102]

Provisions for technical assistance

Some WTO Agreements require the WTO or its developed Members to provide technical assistance to developing countries to enable them to comply with their obligations under various WTO Agreements and also to assist them to participate in the multilateral trading system.

Article 9 of the SPS Agreement for example provides that,

1. Members *agree to facilitate* the provision of technical assistance to other members, especially developing country Members, ...such assistance may be, *inter alia* ... and may take the form of advice, credits, donations and grants including for the purposes of seeking technical expertise, training and equipments...
2. where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter *shall consider* providing such technical assistance as will permit the developing country Member to maintain and expand its market-access opportunities for the product involved

The use of the words 'agree to facilitate' and 'shall consider' seems to indicate that it was intended to make the provision of technical assistance obligatory. However, it is up to a developed country Member to decide whether or not it is going to provide assistance to a particular developing country. Seemingly, the same would apply to technical assistance provided by WTO and other multilateral institutions as it is subject to availability of funds.

2.3.0. What S&D treatment provisions should the EU/ESA EPA incorporate?

Article 34(4) of the CPA outlines EPA's compliance with the WTO provisions including the S&D treatment provisions as one of the objectives of EPA. However, if Article 34(4)

102 India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, p. 51.

is interpreted as applying the WTO S&D treatment provisions as they are, then the ESA countries would have to put up with largely ineffective provisions which have no force of law as the above examination of WTO S&D treatment provisions reveals. In any event many of the provisions on flexibility extending the time for application/ implementation have already lapsed. Should EPA incorporate them?

The CPA shows a precedence of incorporating WTO Agreements by reference. For example it has incorporated the WTO Agreement on Technical Barrier to Trade (TBT Agreement) and the WTO Agreement on the Application of Sanitary and Phytosanitary measures (SPS Agreement) through reference as follows.

> ... [parties] reaffirm their commitment under the Agreement on Technical Barrier to Trade, annexed to the WTO Agreement (TBT Agreement).[103]

Similarly, Article 48(1) provides:

> ... [parties] reaffirm their commitment under the WTO Agreement on the Application of Sanitary and Phytosanitary measures, annexed to the WTO Agreement (SPS Agreement).[104]

The study finds that this kind of incorporation would not add value to EPA S&D treatment provisions since as illustrated the WTO S&D treatment provisions are largely ineffective and unenforceable.

The need for effective and enforceable S&D treatment provision is elucidated by the gains made by the LDCs in the WTO. The LDCs managed to successfully negotiate for legally enforceable duty free quota free (DFQF) market access to the developed countries' market.[105] With such precedence, EPAs should be negotiating for the 100% DFQF market access to the EU market. However, ESA configuration presents a unique problem with regard to the negotiation for S&D treatment provisions in the EPA with the EU.

- Of the 15 countries negotiating under ESA, 11 are LDCs therefore they are eligible to the 97% DFQF market access to the EU under the WTO provisions and are also eligible to the EU's GSP EBA initiative;

103 CPA Article 47 (1) Standardisation and Certification.

104 CPA Article 48 (1) Sanitary and Phytosanitary Measures.

105 WT/MIN(05)/DEC 22 December 2005 Annex F.

- By virtue of numbers, (4 countries against 11), S&D treatment provisions may not be a priority;

Therefore, Kenya Mauritius, Seychelles and Zimbabwe have a hard task in making sure that the issue of a legally enforceable DFQF market access to the EU's market finds itself on the agenda where majority of the ESA countries already enjoy the status.

However, in the case where the ESA LDCs may look at the future and see the possibility of being graduated to developing countries, thereby, prioritise the issue of DFQF market access to the EU's market, the countries must look at the issues pertaining to too many complications with regard to restrictive, complex and varying rules of origins designation criteria. In case of something less than 100%, the exclusion of sensitive products which are of export interest to ESA countries, and non-economic conditionalities.

ESA countries should negotiate for S&D treatment provisions with regard to technical assistance which are binding and enforceable. Kessie[106] points out that in the past the ACP countries were unable to utilise their preferences because sanitary and phytosanitary measures, standards or technical regulation set were too high and out of reach by most ACP countries. The WTO provisions do not provide specific obligations and the developed countries can selectively provide technical assistance to friendly countries only. In the ESA-EU EPA, the ESA countries should be looking at having the EU provide mandatory technical assistance to all members of the configuration to enable the ESA countries meet the SPS measures, standards or technical regulation. This is also in line with the CPA to address the supply and demand side constrains.[107]

Most of the WTO's provisions to allow longer transition periods have lapsed. On the other hand, ESA countries would be required under the EPA to progressively open their markets to the EU.[108] Though this is apparently in contradiction to the S&D provisions of

106 See Edwini Kessie n6.

107 CPA, Article 35(1).

108 CPA, Article 36(1).

WTO particularly with regard to LDCs in the multilateral trading system,[109] for an EPA to be WTO compliant, there has to be reciprocity.[110] This withstanding, as an S&D measure the ESA countries should be allowed some time to prepare for the reduction of duties on products from the EU.

Clearly, the ESA countries require special measures over and above those provided for under the WTO system to be able to meaningfully enter into a reciprocal EPA with the EU. WTO S&D treatment standards are not enough to enable the ESA countries benefit from a reciprocal trading arrangement with the EU. Since Article 34(4) of the CPA provide that account of the parties' mutual interests and their respective levels of development will be taken into consideration, ESA countries should look at these as a lee way to negotiate for better terms with regard to S&D treatment in the EPA.

109 Enabling Clause of 1979 and Part IV of GATT 94; They provide that LDCs should not reciprocate in negotiations with Developed Members of WTO.

110 GATT 94, Article XXIV.

Chapter-three

Regional Integration and Structural Challenges Facing the EPA Negotiations

3.1.0. Introduction

The CPA stresses the importance of preserving regional integration initiatives of the ACP in the process of EPA negotiation. The principles agreed upon to guide the economic and trade cooperation provides that 'economic and trade cooperation shall build on regional integration initiatives of ACP states ...'. [111] However, the EU does not impose on the ACP states the regions in which to negotiate EPAs. The CPA also gives the ACP countries liberty to negotiate EPAs by not being in a regional configuration or even enter into alternative agreements with the EU.[112]

"Regional Economic Partnership Agreements" were however favoured to establish free - trade area[113] (FTA) between ACP regions and EU. The ACP countries grouped into various EPA regions i.e. Economic Commission of West African States (ECOWAS), Central Africa Monetary Union (CEMAC), Eastern and Southern Africa (ESA), Southern Africa Development Community (SADC), The Caribbean and Pacific, for the purposes of EPA negotiations.

In order to enter into an EPA with the EU, the countries belonging to a particular region would be required to establish a FTA as the minimum integration requirement. Though this is not a requirement of the CPA it would be necessary to make the EPAs WTO

111 CPA Article 35(2), 37 (5).

112 Article 37 (5) & (6) CPA Countries may individually or in regional groups negotiate the new trading arrangements (EPAs) at a level they consider appropriate. However, those non-LDCs which are not in a position to negotiate EPAs with the EU can look for alternative possibilities for a new framework which is equivalent to their existing situation and in conformity with WTO rules.

113 See Dictionary of Trade Policy Terms fourth edition (2003); Free-trade area: a group of two or more countries or economies, customs territories in technical language, that have eliminated tariff and all or most non-tariff measures affecting trade among themselves. Participating countries usually continue to apply their existing tariffs on external goods.

compliant such that either party to an EPA have to accomplish WTO recognised standards of integration which are either FTAs or Customs Union.[114]

When FTAs or Customs Union are carried out on regional basis, they can be referred to as Regional Trade Agreements (RTAs). RTAs are an exemption to WTO rules on non-discrimination as against other members of WTO who are not members of the RTA since they allow members within the RTA to extend more favourable terms to each other without doing the same to non-members.[115]

RTAs find their legal basis in WTO law under the GATT 94,[116] GATS[117] and the Enabling Clause.[118] Article XXIV of GATT 94 recognises two basic principles in relation to RTAs: first, the desirability of increasing freedom of trade by the development of closer integration of economies through voluntary agreements;[119] and second, that the purpose of customs unions or free trade areas should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other WTO members.[120] The Article sets out a number of conditions and requirements, on the basis of which customs unions and FTAs are reviewed to determine their compatibility with the WTO Agreements.

GATS provides for rules with regard to concessions on trade in services in an RTA. Article V of GATS allows Members to enter into regional agreements to liberalise trade

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114 Article XXIV GATT 94. Territorial Application - Frontier Traffic - Customs Unions and Free-trade Areas.

115 GATT 94 Article XXIV (3) The provisions of this Agreement shall not be construed to prevent: (b) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory ...

116 GATT Article XXIV (4) The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

117 Article V GATS Economic Integration.

118 Differential and more favourable treatment, reciprocity and fuller participation of developing countries decision of 28 November 1979.

119 GATT 94 1994 Article XXIV.4.

120 GATT 94 1994 Article XXIV.5 a & b.

in services.[121] Such agreements should aim to facilitate trade between their parties. They must not raise the overall level of trade barriers *vis-à-vis* other Members of the WTO who are not parties to them.[122]

The Enabling Clause on the other hand, provide for S&D treatment with regard to regional integration amongst developing countries. Therefore, RTAs notified under the Enabling Clause do not put member countries under strict obligation to substantially reduce tariffs amongst themselves, and to involve substantially all trade like required under GATT 94 and GATS.[123]

This chapter explains what an RTA is and gives their legal basis under WTO law, it sets out the regional integration agreements (RIAs) in existence within the Eastern and Southern Africa region, and it further looks into the Eastern and Southern Africa (ESA) as a configuration for the purposes of the negotiations of an EPA with the EU. It explores the deficiencies of the configuration in the negotiations; the effects on the configuration amidst the multiple memberships of its members to other RTAs and the challenges of the configuration in complying with the WTO rules.

3.1.1. An Overview of Regional Integration Agreements within Eastern and Southern Africa Region

The Eastern and Southern Africa region[124] is characterised by the development and proliferation of regional integration agreements (RIAs). It is estimated that Africa's appetite for RIAs surpasses that of any other continent, and the Eastern and Southern Africa region is no exception. On average, regional integration and cooperation

121 GATS Article V.1.

122 GATS Article V.4.

123 GATT 94 Article XXIV:8 'substantially all Trade' and GATS Article V ' substantial sectoral coverage' are the required involvement of tariff lines in a RTA to make the RTA WTO compatible: *Cf.* Enabling Clause Para 2(c) provides that S&D treatment may be accorded to "regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another".

124 The term is used in reference to the geographical region and not the configuration.

agreements signed in Africa are to the extent that countries often belong to four or more separate RIAs[125].

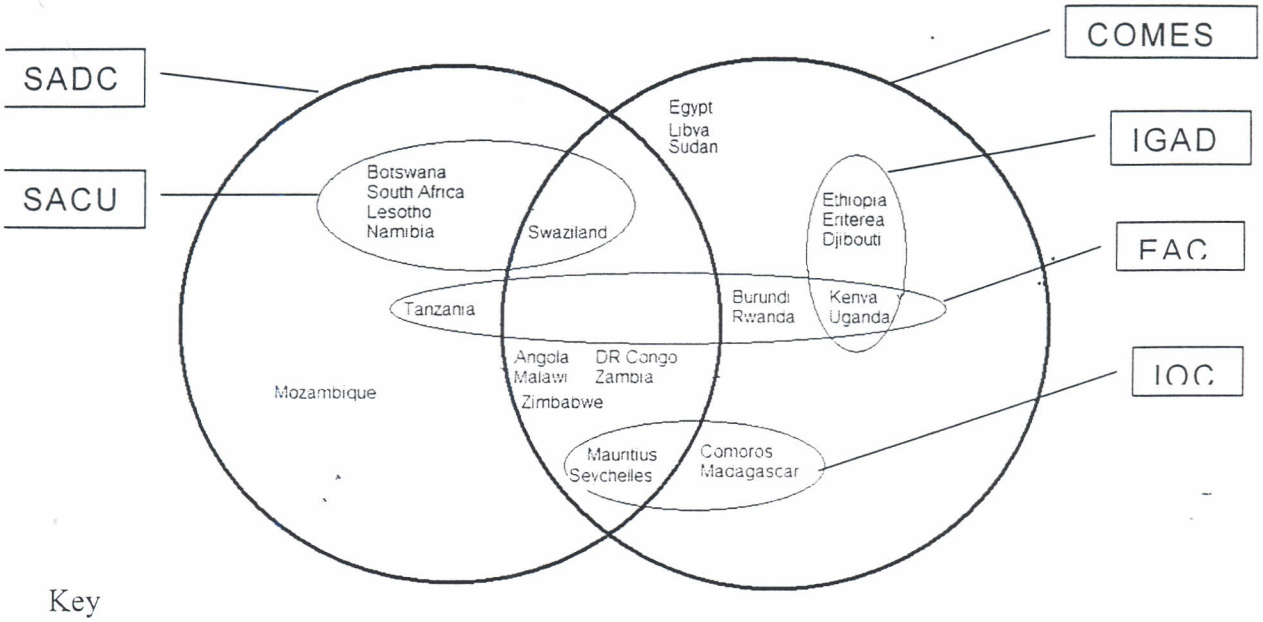
Some of the most common RIAs in the Eastern and Southern Africa region comprises of the following:

- Common Markets for Eastern and Southern Africa (COMESA)
- East African Community (EAC)
- Indian Ocean Commission (IOC)
- Inter Governmental Agency for Development (IGAD)
- Southern Africa Customs Union (SACU)
- Southern Africa Development Community (SADC)

Membership to these RIAs by the Eastern and Southern African countries, and some Northern African countries form a complex web of membership something akin to a spaghetti bowl. The study uses figure 3.0 to illustrate the affinity by the Eastern and Southern African countries to belong to RIA. This issue is further taken up while discussing overlapping membership in RTAs amongst the Countries of ESA. It is worth to note at this early stage that the EPA configuration for the ESA region would be creating an added layer of RIAs further complicating the complex web of memberships.

125 See Richard Hess and Simon Hess, Regional Integration Agreements in eastern and Southern Africa Confusion Grows: Trade Hot Topics Commonwealth issue 43.

Figure 3.0[126]: Regional Integration Agreements in Eastern and Southern Africa



Key

COMESA	Common Markets for Eastern and Southern Africa
EAC	East African Community
IOC	Indian Ocean Commission
IGAD	Inter-Governmental Authority on Development
SACU	Southern Africa Customs Union
SADC	Southern Africa Development Community

There are some other initiatives such as the Great Lakes Initiative which bring together countries of the Great Lakes Region on matters of security. The Great Lakes Initiative draws its membership from countries of both Eastern and Central Africa regions. Such initiatives even make the web more complicated since it joins the countries in different regions.

3.2.0. The East and Southern Africa (ESA) Configuration

ESA came into being after a decision of the 8th Summit of COMESA Authority of Heads of State and Government held in Khartoum, Sudan on 17th March 2003 on the

126 Adapted from HBS Lecomte, *Effectiveness of developing country participation in ACP-EU negotiations*: Overseas Development Institute working Paper (2001) p46 also available on www.odi.org (last accessed on 20th may 2006). with author's modification..

establishment of the ESA configuration for the purpose of negotiation of an EPA with the EU. Currently, ESA is made up of fifteen[127] countries which are; Republic of Burundi, Republic of Comoros, Republic of Djibouti, State of Eritrea, Federal Democratic Republic of Ethiopia, Republic of Kenya, Republic of Madagascar, Republic of Malawi, Republic of Mauritius, Republic of Rwanda, Republic of Seychelles, Republic of Sudan, Republic of Uganda, Republic of Zambia and Republic of Zimbabwe.

This group is wholly comprised of members of the Common Market for Eastern and Southern Africa (COMESA) who are also members of the ACP group. The ideal situation is where these countries would carryout their EPA negotiations with the EU under COMESA[128] as it would be in line with the objectives of the CPA to take into account the regional integration processes within the ACP. However, it might not be achievable because:

- EPAs as stipulated by the CPA are negotiated between (and amongst) countries belonging to the ACP group and the EU. However, Egypt and Libya who are members of COMESA are not members of the ACP group;
- Egypt and Libya, separately have existing Free Trade Agreements (FTA) with the EU;[129] and
- Some members of COMESA who have membership in other RTAs opted to negotiate their EPAs under those RTAs.[130]

Therefore, the predominantly COMESA group negotiates as ESA.

3.2.1. Structure of ESA-EU EPA Negotiations

The ESA negotiation structure comprises of the ESA Council of Ministers, Committee of ESA Ambassadors, regional Negotiation Forum (RNF), and National Development and Trade Policy Forum (NDTPF).

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127 Initially they were 16 until DRC which was negotiating EPAs in CEMAC and ESA was asked to negotiate under CEMAC only.

128 See Richard Hess and Simon Hess, Regional Integration Agreements in eastern and Southern Africa Confusion Grows: Trade Hot Topics Commonwealth issue 43.

129 See Manuel de la Rocha, *The Cotonou Agreement and its implications for the regional trade Agenda in Eastern and Southern Africa* World Bank policy research working paper 3090, June 2003. see the report on Review of ESA EPA (2006) both countries will enter into Euro-Med trade cooperation with the EU by 2010.

130 These countries include, Swaziland and Angola negotiating under SADC, DRC negotiating under CEMAC.

The NDTPF is a forum within the countries negotiating an EPA. The composition of NDTPF should be multi-sectoral and representative of different actors in the country. The CPA defines actors of cooperation to include:[131]

a. State (local, National and regional); and
b. Non-State
   - private sector
   - economic and social partners, including trade union organisations
   - civil society in all forms according to national characteristics

To comply with the consultations guidelines of the CPA, the foregoing actors should be recognised and consulted within the structures of NDTPF. This presents a challenge on identification and organisation of representation by different stakeholders. However, for non-governmental actors, the recognition and consultation is dependent on the extent to which they address the needs of the population on their specific competences and whether they are organised and managed democratically.[132]

NDTPF should be used within a participating country to determine the optimal development and trade negotiation positions for the country and come up with briefs outlining the negotiating positions for that country.

The RNF is a forum at the ESA regional level. Representatives from different ESA countries meet at the RNF to harmonise their different countries' briefs to prepare an ESA position for the negotiations with the EU. RNF may also establish consultations with secretariats of other regional bodies whose interests may be represented in ESA.
On the other hand, the EU represents a single economic block. The Commission of the European Communities (EC)[133] is the single negotiating body. Since the negotiations

131 CPA Article 6(1).

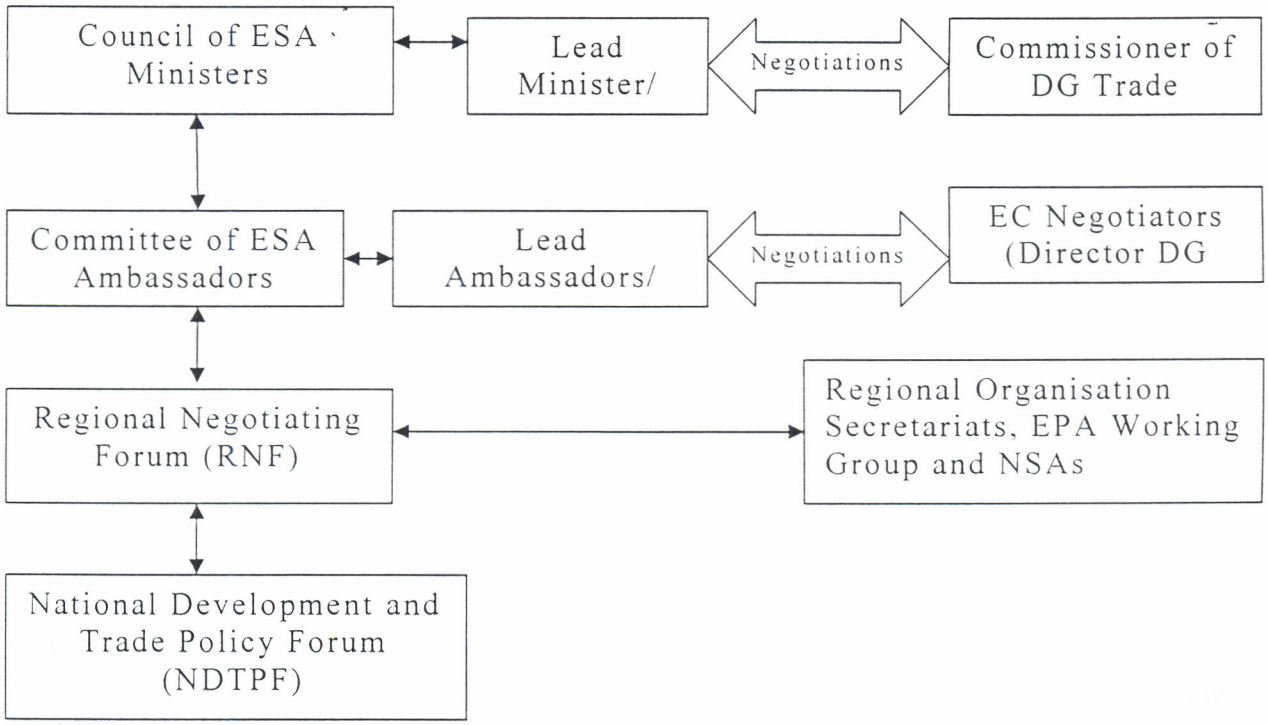
132 CPA Article 6(2).

133 See e.g. John Peterson and Michael Sheckleton; The Institutions of the EU Oxford University press 2004, pg. 13 ... since 1974 it has played a fundamental role in the development of European integration. It gives political guidance and impetus to the union, take the most important decisions, gives high visibility to external policy positions and declarations, and puts the seal of approval to

between ESA and EU take place at two levels - ministerial and Ambassadorial levels. ESA countries are led by a lead Minister from the ESA Council of Ministers and lead Ambassador from the Committee of ESA Ambassadors. This can be contrasted from the case of the EU where the negotiations at Ministerial level are led by the Director General Trade (DG Trade) who is also a commissioner in the EC while at the Ambassadorial level a senior official under the DG Trade is the lead negotiator.[134]

This study further presents the ESA-EU EPA negotiation structure in the diagram below:

The ESA- EU Negotiation Structure[135]



3.2.2. Challenges of Regional Cooperation and Integration within ESA

Regional cooperation and integration is a major theme provided for under the agreement reached in the CPA. It is envisaged that cooperation and integration of the ACP regions shall:[136]

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significant documents. Its composition gives it an intergovernmental character, yet successive decisions at that level have increased the supranational character of the union.

134 See KEPROTRADE brief, December 2006 Ministry of Trade Document.

135 Ministry of Trade and Industry KEPROTRADE, brief to stakeholders on Economic Partnership Agreements August 2006.

a. foster the gradual integration of the ACP States into the world economy;
b. accelerate economic cooperation and development both within and between the regions of the ACP States;
c. promote the free movement of persons, goods, services, capital, labour and technology among ACP countries;
d. accelerate diversification of the economies of the ACP States; and coordination and harmonization of regional and sub-regional cooperation policies; and
e. promote and expand inter and intra-ACP trade with third countries.

However, does ESA further the objectives of regional cooperation and integration in the ACP as listed above? This question is looked at in relation to the structure of ESA, and how the structure promotes or hinders the listed objectives.

To promote the free movement of persons, goods, services, capital, labour and technology among ESA countries which is the epitome of integration; the duties and other regulations of commerce maintained in each of the ESA constituent Countries and applicable at the conclusion of EPA, to trade amongst ESA members should be lower than that applicable between ESA and EU or third countries. However this may not be the case since duties amongst the ESA members are high and the commitments made within COMESA have not born a lot of fruits because only 13 countries who are members of COMESA have attained a free trade area.[137] Further, ESA does not have mandate to impress on its members to liberalise trade amongst them since it is just a forum for the negotiation of an EPA with the EU. It is therefore imperative that a researcher would ponder over issues like:

- How well do liberalisation schedules within COMESA serve the interests of ESA members considering that not all members of COMESA are in ESA?

136 CPA Article 28.

137 Members of COMESA FTA include, Burundi, Comoros, Djibouti, Egypt, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Zambia and Zimbabwe.

- Can ESA successfully push its integration and trade liberalisation agenda in COMESA?
- What would happen if other members of COMEAS do not agree with ESA countries' timelines simply because ESA members are under pressure from their EPA with the EU?

Definitely, these are issues that would impact on regional integration and cooperation because countries in the ESA configuration may have renewed momentum for regional integration to take advantage of their EPA with the EU. However, this might not be the momentum of liberalisation and integration that other countries outside the ESA configuration would want to see occurring within COMESA, since they have varying terms with regard to the relationship with the EU.[138]

The desired level of integration for the ESA countries to be able to effectively conclude an EPA with the EU and reap maximum benefits would be a Customs Union[139] whereby several individual economies or customs territories[140] within ESA would remove all tariffs and broader trade impediments between them, and then the members making up the area would apply a common external tariff (CET). However, if ESA countries fail to harmonise their liberalisation schedules amongst themselves and also with the EU, it is likely to cause post EPA integration problems. Example,[141] if there are no attempts to harmonise each ESA country's liberalisation schedule, for instance where country A excludes commodity X from liberalisation and maintains a high tariff, but its neighbour country B removes all tariff, traders may circumvent A's restrictions by transporting EU goods across the border from B. To avoid this, either the tariff difference between A and

138 Some COMESA Members have relationship with the EU outside the institution of COMESA or ESA either on their own (Egypt), through SADC (Angola), or the Euro-Med trade cooperation (Egypt & Libya).

139 Dictionary of Trade Policy Terms fourth edition (2003) define a Custom Union as an area consisting of two or more individual economies or customs territories which remove all tariffs and sometimes broader trade impediments between them. The members making up the area then apply a common external tariff.

140 See Dictionary of Trade Policy Terms n24: Customs territory may be any territory with a tariff or other regulations of commerce of its own which governs its trade with other territories. A customs territory need not be a sovereign state. See also customs union.

141 Example adopted with modification from Christopher Stevens and Kane Kennan, EU-ACP Economic Partnership Agreements: The Effects of Reciprocity, Institute for Development Studies, Sussex.

B must be sufficiently small to make such trans-shipment commercially unviable or rigorous border control must be maintained to prevent trans-shipment, which will hurt intra-regional trade in the process.

Moreover, as pointed out earlier tariffs and other regulations of commerce within the ESA region are relatively high and need to be significantly reduced before the ESA/EU-EPA can come into force. The big question is, would this be best done in ESA or COMESA?

Negotiation of EPAs through already established RTAs has the advantage of not going through the issue of tariff liberalisation schedule amongst members since RTAs have existing liberalisation schedules amongst members and established mechanisms of negotiating the tariff reduction schedules. Under COMESA for example, twelve countries already participate in a COMESA-FTA[142] and studies for a CET are at an advanced stage with plans to implement a COMESA-CET in 2008.[143] Out of the COMESA Members that have liberalised trade among them to attain a FTA eleven are members of ESA configuration, thereby necessitating the remaining four to fast track their tariff and other regulation of commerce reduction before entering into an EPA with the EU to avert post EPA integration problems outlined above. However, a FTA is not sufficient but is a good starting point and negotiations for a COMESA Customs Union should be fast tracked. Similarly, ESA is just a forum and has no institutions that would facilitate such negotiations as it relies on COMESA for trade liberalisation commitments and the institutional framework.

3.3.0. Overlapping Membership in RTAs amongst the ESA Countries

When countries have overlapping membership in different RTAs which more or less have the same functions they expose themselves to among others the following setbacks:[144]

142 Members of the FTA include, Burundi, Comoros, Djibouti, Egypt, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Zambia and Zimbabwe.

143 see CL Chanthunya, The COMESA free trade area: concept, challenges and opportunities in V Murinde (ed) (2001) The Free Trade Area of the Common Market for Eastern and Southern Africa.

144 Padamja Khandelwal, (2004) COMESA and SADC: Prospects and Challenges for Regional Trade Integration IMF Working Paper WP/04/227.

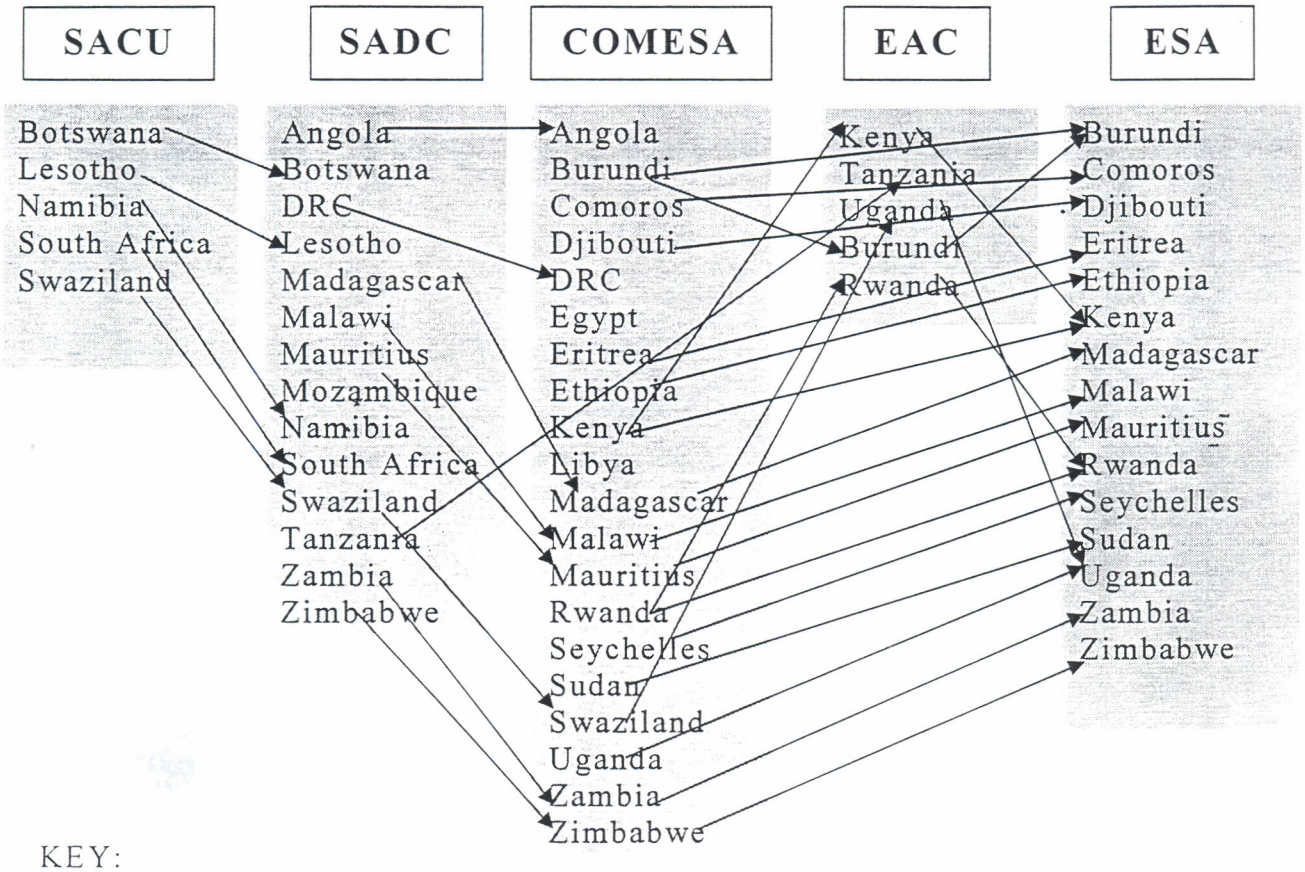
- Subscription fees for such countries are unnecessarily high;
- Overlapping membership has the potential to cause conflict on various rules in different RTAs and certainly imposes greater transaction costs on the business communities and governments; and
- Government face increased costs, such as the time demands on key personnel as well as funding the organisation's secretariat and attendance of meetings

Figure 3.1 show the membership of the current trade oriented RIAs in the Eastern and Southern Africa Region. It clearly illustrates the problem of overlapping and potentially contradictory memberships and obligations in these trade agreements and notes that the problem is likely to get complicated since some of non trade oriented organisations are contemplating to adopt trade protocols which would be implemented within their organisations.[145]

The multiplicity of regional memberships creates difficulties for the ESA countries since it means they must comply with various tariff reduction schedules, rules of origin and other liberalisation requirements. For instance, countries that are members of both SADC and COMESA must implement both the SADC Trade Protocol and the COMESA FTA. Similarly, EAC has an established customs union and COMESA plans to establish one in 2008. Since a country cannot be a member of two customs unions, unless the two have equivalent trade policies, including the same common external tariff, in which the two could be merged. Therefore, Kenya and Uganda would have to decide whether they want to be a member of COMESA or the EAC on implementation of COMESA common external tariff (CET), the same applies to Tanzania with respect to its dual membership in SADC and EAC.

145 See e.g. The objectives of the Indian Ocean Commission (IOC), Compare with the initial objectives of SADC; IGAD is set to adopt a trade protocol see KIPPRA Regional Integration Study of East Africa: The case of Kenya (2003).

Figure 3.1[146] Overlapping Memberships in RTAs



KEY:

SACU	Southern African Customs Union
SADC	Southern African Development Community
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
ESA	East and Southern Africa

NOTES

- Burundi and Rwanda applied to be members of EAC and were officially admitted on 18th June 2007
- Tanzania negotiates its EPA under SADC though being in EAC
- Egypt and Libya have existing FTAs with EU
- Indian Ocean Commission (IOC) and Inter Governmental Agency on Development (IGAD) are set to adopt trade protocols as well

146 Adopted with necessary Author's modifications from R Hess and S Hess n15.

Overall, overlapping membership in different RTAs hinders the achievement of the aspired regional integration and cooperation. It does not promote deeper integration and cooperation because where there are conflicts of rules in different RTAs the movement of goods, persons, labour and other factors is curtailed. Example, exporters may be unsure of which agreement will apply to the movement of their goods across countries where more than one regime may apply. This also increases the cost for the business people.

3.4.0. The Challenge of Complying with the WTO Rules

The main reason why the EPAs were contemplated in the first place was to make the relationship between the ACP and EU compliant with the obligations that both parties had assumed within the multilateral trading system.[147] Since this Chapter deals with the structure of ESA, this section looks at the challenges the configuration faces in complying with the WTO rules; it gives particular attention to Article XXIV of GATT 94, Article V of GATS and the Enabling Clause since these are the rules that stipulate regional arrangements.

The provisions of Article XXIV of GATT 94 and Article V of GATS are the mainstay of regional integration within the WTO. Though the Enabling Clause is essential for the integration within the developing countries, it only provides some exceptions to Article XXIV of GATT 94. Therefore, developing countries are exempted from the strict rules of article XXIV of GATT 94 if the integration initiative is notified under the Enabling Clause.

With regard to EPAs and in respect to what has already been discussed, the issue of market liberalisation schedules is one area that is likely to cause conflict with the WTO rules. Article XXIV.7 (b) of GATT 94 provides that, WTO members are entitled to study the plan and schedule proposed in the entering into an FTA. If the Contracting Parties find that such agreement is not likely to result in the formation of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the Contracting Parties shall make recommendations to the parties to the

147 See CPA Article 36(1) and the discussions at the beginning of this Chapter.

agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

The issue of concern is, ESA countries need to have a common schedule in which tariffs shall be progressively reduced as against the reduction by the EU. A common schedule of tariffs within different customs territory as in the case of EPA can only be achieved if EPA countries agreed upon a common external tariff of which their level of integration would be a Customs Union. Currently, only eleven out of the fifteen members have a FTA, which means that trade amongst the eleven countries is not charged any tariff though they maintain different external tariffs against imports from outside COMESA. With four countries part of the ESA configuration not being part of the COMESA FTA thinking of a Customs union is a far cry. The other alternative would be to notify to the WTO of the ESA configuration under the Enabling Clause thereby allowing it not be challenged under the understanding that the arrangements entered into amongst them would facilitate the mutual reduction or elimination of tariff and non-tariff measures, on products imported from one another. However, such an approach would not guard the ESA-EU EPA against post EPA integration problem discussed earlier.

Chapter - four

Opportunities, Risks and Strategic Options for the ESA Countries

4.1.0. Introduction

The process of EPA negotiations presents some opportunities for the ESA countries. Similarly, it also brings with it some risks that need to be safeguarded and or managed. This chapter builds on the identified legal and structural challenges in Chapters 2&3 and discusses the opportunities and risks associated with the EPA negotiations and suggest some strategic options that ESA countries would adopt to minimise the risks and maximise on the opportunities to ensure maximum benefits.

4.2.0. Opportunities

Economic Partnership Agreements are designed to make trade relationship between the ACP countries and the EU, WTO compatible. In the process of EPA negotiation, ACP countries are encouraged to coalesce in regional groups wherein they negotiate reciprocal trade agreement with the EU. If the process of forming regional groups is designed to overcome the challenges discussed in Chapter three, regional groupings within the ACP would: -

i accelerate economic cooperation and development amongst the countries belonging to a particular regional configuration;

ii promote the free movement of persons, goods, services, capital, labour and technology amongst the countries of the same configuration;

iii promote economies of scale due to the enlargement of the markets by amalgamating the small markets;

iv accelerate diversification of the ACP economies; and

v promote and expand inter and intra-ACP trade with third countries.

Similarly, there are other opportunities that may arise during the negotiation process such as, building the blocks for multilateral trade negotiations, promotion of investments, and building capacity and awareness on issues of trade.

Expanded Regional Market

While the Lomé Conventions subsisted for over twenty five years and was later succeeded by the CPA, there was no emphasis on intra ACP trade, rather they emphasised on trade between the ACP and the EU. EPAs on the other hand encourage the ACP countries to coalesce in regional groups wherein they would negotiate an EPA as a regional configuration. Sceptics may want to look at the requirement as enlarging markets for the EU industries, however, if the opportunity for regional integration is well utilised it would first serve the ACP industries because, the removal of trade barriers would be gradual.[148] Currently the ACP countries enjoy preferential market access to the EU and there is a commitment that ACP countries shall not be worse-off under EPAs than they were under the CPA.[149] This means that most of the liberalisation would be by the ACP countries rather than by the EU. Therefore, ACP countries would continue to enjoy preferential market access to the EU under EPAs and at the same time they will have the opportunity to expand their markets within the region therefore encouraging economies of scale.

Negotiated Market Access

Negotiated market access is by its very nature an opportunity. While the EU can renegade on its unilateral commitment to provide duty free quota free market access to LDCs on EBA terms, it cannot do the same to commitments for market access negotiated under an EPA without offering compensation. EBA is a GSP scheme offered to all LDCs, thereby countries ranked as LDCs which achieve a certain level of development that would lead to their ranking being upgraded may subsequently lose their market access to the EU. Therefore it is an opportunity for ESA countries to negotiate an EPA with the EU even

148 CPA Article 36(1) Modalities ... removing progressively barriers to trade between them ...

149 CPA Article 36(4) Modalities. countries agreed to review commodity protocols with a view of making them WTO Compatible under the new trading arrangements. However, there is an agreement that the review shall be with a view to safeguarding the benefits derived there from.

though most of them are LDCs and they enjoy duty free quota free market access on EBA.

Negotiations by their very nature do not mean signing on the dotted lines. Therefore, the ACP regions have the opportunity to address the issues that affect market access such as rules of origin, the need for a substantive improvement in real market access opportunities for ACP exporters in areas of immediate benefit e.g. the elimination of the residual market access restrictions on at least 40% of agricultural tariff lines where the EU retains in place restrictions, and consultations on how genuine EU health concerns (human, animal and plant) can be addressed without creating new barriers to ACP exporters. In this case the ACP's position in the negotiations would be strengthened by the fact that, ACP countries in their various regional grouping will also be making various market access commitments to the EU. Therefore unlike where the EU unilaterally grants market access through their GSP schemes, ACP regions have both negotiating power and authority to demand some action on real market access. It has been noted that in the past, including during the 25 years of the Lomé Conventions, the too many complications pertaining to restrictive, complex and varying rules of origins, quotas, designation criteria (exclusion of sensitive products which are of export interest to developing countries), mismatch between exports of beneficiaries and coverage of preferences, and non-economic conditionalities have been the reasons why developing countries have not been able to benefit from preferences.[150] The process of EPA negotiations provides the opportunity for the ACP countries to negotiate on their own terms and therefore ensure real commitments on market access.

Investment and Economic Growth

Enlarged regional markets, and secure negotiated markets access for ESA countries are brilliant ways to increase confidence in the ESA countries' small markets. The enlarged regional markets would serve as an attraction to foreign investors who would set up industries in the region to take advantage of the enlarged regional markets. Similarly, secured negotiated market access would attract investors who would set up business in

150 Edwini Kessie, *Enforceability of the Legal Provisions relating to special and Differential Treatment under the WTO Agreements* The Journal of World Intellectual Property p. 955-975

the region to take advantage of the ascertained preferential market access to the EU. Moreover, the existing industries in the ESA region would increase production to cater for the enlarged market, regionally and the EU. It could also be projected that investors would also want to take advantage of the low costs of factors of production in the region which is the competitive edge that the region has. Increased investment and production would eventually lead to economic growth.

Building the Blocks for Negotiations in the Multilateral Trading System

Currently the Doha round of the WTO negotiations (Development Round) is on going. However, it has been marred by lack of consensus on some critical issues which are of interest to developing countries.[151] The ACP countries through EPAs can shift the forum of the negotiations on the critical issues that are of concern to the developing countries to the EPAs. In this case, if they are agreed upon under the EPA they would be easily agreed upon at the multilateral forum as it would be easier to build consensus. Furthermore, under Article 39(2) of the CPA the parties agreed to cooperate closely in identifying and furthering their common interest in international economic and trade cooperation in particular in the WTO, including participation in setting and conducting the agenda in future multilateral trade negotiations.

While it might be hard to convince the entire WTO membership and build consensus on some issues such as, legally binding and enforceable S&D treatment provisions, binding commitments on technical assistance, and real market access, it would be easier if such consensus was achieved under EPAs then introduced to the WTO by the ACP and EU bloc.[152]

Building Capacity and Awareness on Issues of Trade

The process of EPA negotiations has facilitated capacity building in the public and private sectors of ACP countries. This is factored under Article 37(3) of the CPA where it

151 The current stand off between the big players in international trade(USA & EU) have caused a quagmire in the Doha Negotiations. Some of the issues that are of importance to the developing countries include real market access.

152 The US used a similar strategy when it introduced trade related issues of intellectual property rights in the WTO. The US had negotiated many FTAs with other countries of the Americas and the EU where intellectual property rights (IPRs) were incorporated, when the issue came to the WTO it had a wider acceptance and therefore it was easy to build consensus.

is provided that during the preparatory period, capacity shall be build in the public and private sectors of the ACP countries, including on measures to enhance competitiveness, for strengthening of regional organisations and for support of regional trade integration initiatives, where appropriate with assistance to budgetary adjustment and fiscal reform, as well as for infrastructure upgrading and development, and for investment promotion. Subsequently, the EU has supported ACP regions to develop necessary capacity to negotiate, participate effectively, monitor and implement EPAs.

On the other hand it is noted that NGOs, Community Based Organisations (CBOs) and Professional Bodies have become more aware of trade issues that affect the interests they represent. These happenings cannot be said to be a coincidence but must be as a result of the heightened awareness that is caused by the EPA negotiations. The whole process of negotiations has also resulted to job creation and a better informed society on trade issues.

Lower Commodity prices

After the conclusion of EPAs and full implementation, a Free Trade Agreement (FTA) will ensue between a concerned ACP region (e.g. ESA) and the EU. With the reduction of trade barriers it is expected that imports from either party will be priced lower in the importing market. Kenya Institute for Public Policy Research and Analysis (KIPPRA) opine that Kenya will experience lower prices for imported consumer goods, capital goods, and intermediate goods sourced from the EU.[153] With the ESA region heavily reliant on imported capital and intermediate goods from the EU it would therefore mean that even locally produced goods will experience reduction in prices due to reduction in the cost of inputs.

153 KIPPRA *Assessment of the Potential Impact of Economic Partnership Agreements (EPAs) on the Kenyan Economy* (2005) p10 the analysis indicates that 34% of consumer goods imports are sourced from the EU, 17% of Motor vehicles, 58% of machinery and equipments and 22% of imported intermediate inputs of which an average tariff of 11% is applied, elimination of which would lead to low prices and more imports.

4.3.0. Risks

Immediate Loss of Revenue

In many ACP countries import duties constitute an important source of government revenue. Partly this is because imports duties are relatively easy and cheap to collect.[154] In many ACP countries, particularly in Africa, duties on imports from the EU constitute a major part of total customs revenues since the EU is an important trading partner.[155] Against this background in a number of ACP countries there is concern over the implications for government revenues when the countries move towards free trade with the EU.

Source Substitution

Source substitution is a risk that is inherent in the EPA negotiations. This risk is best explained from a country's point of view, in this case the study illustrates using Kenya since the data is ready available and because she is a major player in regional trade. Kenya is a member of COMESA and EAC regional integration blocs. These blocs have been registering increased intra-regional trade of which Kenya is a dominant player. For instance, Kenya's share in intra-COMESA trade in 2003 was 29% followed by Zimbabwe and Egypt, each taking up 11.7% and 10.1% of intra-COMESA trade respectively.[156] On the other hand, the EU enjoys a significant share of the COMESA export market. Although market share has been declining, it is still significant at about 30%.[157] Moreover, tariffs imposed on the Kenyan goods are on average lower than the tariffs applied on imports from the EU in the COMESA market.[158] With the formation of the ESA-EU EPA, Kenyan products will face competition from EU producers once the

154 See e.g. KIPPRA n4at p10: estimates based on the 2003 trade values, the potential revenue loss for Kenya is Ksh 6.9Billion on imports from the EU, an addition Ksh 2.5 billion through trade diversion from the rest of the world to the EU, and a further Ksh 35 million through trade creation. The total potential loss is estimated at Ksh 9.5 billion. When these potential loss is adjusted for leakages the loss translates to a reduction of revenue as a share of GDP from 21% to 19%, while imports duty as a share of total revenue decline from 8% to 6%.

155 Figures indicate that between 1991 and 2001 COMESA countries exported 50.8% of all their exports to the EU and imported 44.0% of all imports from the EU. Therefore the EU is by far the most important trade partner for COMESA. Also available on www.comesa.int.

156 KIPPRA n4 p11.

157 KIPPRA n4 p11.

158 Kenya is among the countries that have signed the COMESA-FTA and therefore only minimal duty is applied on selected products that may appear on the exclusion lists.

tariffs against EU products are eliminated since the preferential access to the regional market for Kenyan products will cease to be an advantage.

Negative Effects of EU Subsidies

There is a possibility that EPAs may not be of any benefit to the ACP countries more so if they are not accompanied by a corresponding policy change within the EU. The range of products that are exported from the ESA countries is not diverse and is mostly comprised of agricultural products. Though ESA countries are more efficient producers of most agricultural commodities, subsidies have continued to make EU agricultural products cheaper than those produced from the ESA region. Therefore if ESA countries do not negotiate for the discontinuation of some aspects of the Common Agricultural Policy (CAP) such as the subsidies, they will not reap the benefits of liberalisation within the EPA.

4.4.0. Strategic Options

Having considered the opportunities and risks facing the ESA countries, the study suggests certain strategic options that can be pursued in the process of EPA negotiations. For ease of discussion in line with the issues raised in Chapters 2&3 the study presents the strategic options in distinct sub-headings of legal options, structural options and other options.

4.4.1. Legal Strategic Options

Extension of the Negotiation Deadline by seeking a Waiver or by Consent

The EPA will form the legal framework that will govern the conduct of parties therein. As relates to the contents of the EPA, it will be as a result of negotiations, WTO guidelines and the CPA. According to the CPA[159] and Articles XXIV[160] & XXV.5[161] of GATT 94, the negotiations of EPAs would be inevitable unless the ACP countries are not interested in maintaining preferential access to the EU market. At the inception of CPA the ACP countries and the EU sought a WTO waiver under Article XXV.5 to allow ACP countries to export their products to the EU market at preferential terms for a period of

159 The agreement forming the basis for the negotiation of EPA and gives a timeframe.

160 The Article under GATT that allows the formation of regional trade agreements.

161 The Article under GATT that allows for waivers for exceptional circumstances not elsewhere provided for in GATT 94.

time within which they would be preparing to have their trade rationalised to comply with the rules of WTO. Since time is running out on both parties to have the EPAs concluded they may seek another WTO waiver for a negotiated period that would allow adequate time to conclude, ratify and start implementation of the EPAs.

Similarly, Parties can formally or informally agree to extend the negotiations deadline for a specific period to allow for continuation of the current trade arrangements. In this case there is no need to formally seek a waiver in WTO as there is not likely to be a challenge in the short term. The duration of the extension can be negotiated but maximum period should be set while early harvest is provided for. The disadvantage is that current timetables will be adjusted and regions will relax. The advantage is that regions will be able to cover all issues adequately especially if at the same time the parties agreed on the timetable for negotiations.

Part Signing or Reverting to GSP

Alternatively, if the foregoing two options are not favoured with regard to having time extended to the negotiation process, the parties may result to concluding an EPA agreement covering the essential elements namely development chapter and trade in goods. This would satisfy the requirements of article XXIV of GATT 94 thus meeting compatibility requirement. However, on the part of the EU it is felt that they would support this idea but may want to limit it to trade in goods only. The disadvantage is that once that is concluded it may be difficult to get the EU to agree on other important areas. The advantage of this option is that the parties would have met their commitments in the CPA and WTO compatibility. Since this may cause lethargy in the negotiations process due to partial harvest, the parties may opt to divide ESA group into two: whereby LDCs will use EBA in the meantime, while completing the negotiations and the non LDCs will use GSP up until the negotiations are finalised.

Moreover, GSP may not be acceptable to small developing countries of the ACP more so developing countries of the ESA configuration since it would oblige them to compete with big developing countries such as China, India and Brazil for the EU market under

the same terms. Therefore the developing counties within ESA may opt for other options which will be discussed under structural options.

4.4.2. Structural Strategic Options

A COMESA-EU EPA

The underlying principle in the constitution of the configurations to negotiate EPAs with the EU is the consideration of the existing regional integration initiatives of the ACP States.[162] With this regard, COMESA members wanted to negotiate an EPA with the EU but were handicapped by the reason of:-

i. EPAs as stipulated by the CPA are negotiated between (and amongst) countries belonging to the ACP group and the EU. However, Egypt and Libya who are members of COMESA are not members of the ACP group;
ii. Egypt and Libya, separately have existing FTAs with the EU;[163] and
iii. Some members of COMESA who have membership in other RTAs opted to negotiate their EPAs under those RTAs.[164]

In respect of the foregoing principle on the constitution of configurations to negotiate EPAs, creation of ESA for the purposes of ESA-EU EPA was inappropriate as it adds to the problem of complex regional integration initiatives in Eastern and Southern Africa. ESA adds another layer to the overlapping intra-regional integration processes. Therefore the EU and COMESA should look for options beyond constrains of the CPA. Since the EU has existing relationships with Egypt and Libya, there is no rationale for the EU to continue differentiating these countries by having a different trade agreement from the other countries since they are all members of COMESA. Thinking beyond constrains of the CPA would entail trying to preserve the existing regional integration agreements and not being slaves to the CPA. Therefore COMESA countries should consider asking the EU to reopen Egypt's association agreement with the EU for renegotiations to

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162 See e.g. Article 35(2) of the CPA..

163 See Manuel de la Rocha, *The Cotonou Agreement and its implications for the regional trade Agenda in Eastern and Southern Africa* World Bank policy research working paper 3090, June 2003. see the report on Review of ESA EPA (2006) both countries will enter into Euro-Med trade cooperation with the EU by 2010.

164 These countries include, Swaziland and Angola negotiating under SADC, and later DRC negotiating under CEMAC.

accommodate other COMESA countries. This would ensure that COMESA remained intact and deeper integration within COMESA would also be achieved.

Moreover, even with COMESA the problems of complex regional initiatives would not be brought to an end. Tanzania is negotiating its EPA under SADC and its partners states in EAC (Burundi, Kenya, Rwanda and Uganda) are in ESA. Since EAC is a customs Union, there will be some problems in harmonising the liberalisation schedules and timeframes, and other measures of commerce to accommodate the members of the EAC customs union. This would necessitate the SADC and ESA EPAs with the EU to be identical so as not to hurt the EAC customs union. Such a problem could be avoided if all the parties were in one regional agreement. Therefore to remedy these overlapping memberships, the proposed COMESA–EU EPA should be in such a way that COMESA forms a Customs Union with all its current members except Swaziland which would stay in SACU while Tanzania rejoins COMESA. Thus, other joint members of SADC and COMESA would either be locked into COMESA or given an option to choose which regional body they would like to be part of. Similarly, the EAC Customs Union would merge with the COMESA Customs Union; this may not be an unreasonable suggestion given the high level of commitment by COMESA and EAC to working together.

An EAC-EU EPA

The pace at which countries agree on important matters such as regional integration is slow and is very much dependent on political will. Therefore the possibility of realignment to form configurations that would foster regional integration as suggested above would be very slim. On the other hand, time is running out and the EU might not be willing to extend the Cotonou trade regime. Therefore the other alternative would be, an EAC-EU EPA since the enlarged EAC (which includes Burundi, Kenya, Rwanda, Tanzania and Uganda) already has an established customs union. In consideration of the remaining time before the Cotonou regime lapses, an EPA between the EAC and EU would be a pragmatic suggestion as it would be a smooth sailing negotiation since the bloc has a common schedule on imports to the Customs Union. However, this would imply that Burundi, Kenya, Rwanda and Uganda would have to pull out of ESA

configuration, and Tanzania would have to pull out of SADC configuration.[165] These are much larger groups identified for the purposes of EPA negotiations and retreating to small groupings like EAC would be received with a pinch of salt as most of the ACP perceive EPAs as a divide and rule technique by the EU. Moreover, an EAC-EU EPA would only solve the problem of the EAC and not COMESA as the Egypt-EU FTA would still persist and the remaining members of COMESA would still need to negotiate an EPA.

ESA's Developing Countries to Negotiate Individual EPAs with the EU

Finally, the idea that time set to negotiate EPAs is running out and lack of unequivocal representation on the market access commitment by the EU for countries that will not have concluded an EPA may lead to a different structural option. Since the LDCs have no immediate need for an EPA for the reasons that:-

i. They have duty free quota free market access to the EU on 'Everything but Arms' (EBA) therefore EPAs would only oblige them to open up their markets to EU goods and reduction of revenue from import taxes.
ii. Development assistance which is of more importance to the LDCs is likely to continue under CPA regime.[166] The CPA has a lifespan till 2020 and the EU has indicated its intention to maintain the development aspects in the CPA rather than have them in EPAs.

Therefore the developing countries within ESA may opt to negotiate EPAs individually as it is also envisaged under Article 37(5) of the CPA. Developing countries will be motivated to negotiate EPAs because; if they do not negotiate an EPA with the EU by December 31 2007, they will revert to trading under GSP whereby they will compete on the same terms with large developing countries such as China, India and Brazil.

165 This option is under consideration and an EAC-EU EPA is imminent with the decision ratified by the EAC Heads of States Summit on the 20/08/2007. See also The East African 19-26 August 2007; Business Daily 20/08/2007 also available on www.nationmedia.com/eastafrican and www.bdafrica.com respectively.

166 Gichinga Ndirangu, *Funding Economic Partnerships Tricky* Daily Nation 21/08/2007.

4.4.3. Other Strategic Options

WTO Rules Flexibility

EPAs are to make the ACP-EU trade regime more easily defensible within the WTO.[167] One of the requirements under Article XXIV of GATT 94 is that substantially all trade is involved and liberalised in the FTA for it to be compatible with the requirements of WTO. However, WTO has not given the phrase a particular definition, though one thing is clear, that in an FTA most and not necessarily all trade should be liberalised. Therefore, the ACP countries have some room for manoeuvre to maintain their current barriers on some imports from the EU. How much room for manoeuvre, and the use that ACP countries make of it, will be a vital part of the EPA negotiations. In these regard countries of the ACP can identify the most imported goods or services from the EU and therefore retain tariffs on them to mitigate on government revenue losses. However, such a strategy would minimise consumer welfare and would be detrimental to achieving free trade.

Negotiate Adequate Transitional Periods

Negotiate adequate transition periods in line with the levels of development of the parties. This strategy would involve the recognition of inequality of parties to an EPA. This means that while the EU is able to eliminate all tariffs imposed on goods and services originating from the ACP countries in a short period of time, the ACP countries may not be in a position to transition within the same time. As earlier pointed out, that import duties is an important source of revenue for most African countries, therefore there is need to have the duties retained for some time after the EPAs have been concluded to give time to the ACP countries to adjust. Similarly, the industries in the ACP countries are not very competitive; therefore the flooding of EU goods in the ACP markets as a result of liberalisation would really damage their bottom line. Adequate transition time would enable the industries to restructure for competition from the EU while the government looks for alternative sources of revenue.

167 Stevens C and Kennan J EU-ACP Economic Partnership Agreements: The Effects of Reciprocity. Institute of Development Studies (IDS) Briefing Paper (2005).

Chapter - five

Conclusions and Recommendations

5.1.0. Introduction

This study set-out to critique the negotiations of the EPA between ESA and the EU. It sought to analyse the negotiations in light of some perceived problems and sought to show that: Complying with the WTO regulations, more so incorporating the S&D treatment provisions of the WTO does not add value to the precarious standing on international trade by ESA countries *vis-à-vis* their position in the multilateral trading system as they are largely ineffective and unenforceable. It also sought to show that the formation of the configuration comprising ESA countries in the negotiation of an EPA with the EU complicates the regional integration agenda in the region instead of fostering it.

In this study's quest to meet the forgoing objectives it sought to answer the questions that:

i Should ESA members be contented with WTO standards and rules, or should they negotiate for standards and rules that are 'WTO plus'?

ii What S&D treatment provisions or motivations should be included for ESA LDCs in the EPA?

iii Is there a need for supranational institutions in the EPA negotiation?

iv What should be done to the overlapping regional integration initiatives in the ESA region?

v What is the impact of the existing FTAs between the EU and members of the COMESA on the ongoing ESA-EU EPA negotiations?

This chapter looks at the various suggested solutions to the preceding chapters and serves as a conclusion. It also gives recommendations of the study

5.2.0. Conclusions

The study draws the following conclusions:

A. Most of the WTO S&D treatment provisions are unenforceable and ineffective.

B. The study concludes that using the WTO S&D treatment provisions as a standard for ESA would not alleviate the region's position in international trade since as they stand now the region has not been able to take advantage of them and better its position in international trade.

C. Negotiating EPAs through already established RTAs with some supranational characteristics has certain advantages such as there being no need to go through the issue of tariff liberalisation schedules amongst members since RTAs have existing liberalisation schedules amongst members and established mechanisms of negotiating tariff reduction schedules. This saves a lot of time that is spent by members of a configuration trying to come up with tariff schedules thus enhance quick decision making and conclusion of EPAs.

D. ESA is just a forum and has no institutions or legally constituted organs that would facilitate negotiations by members on issues of tariffs and other measures of commerce. Further, if ESA undertook such negotiations it would be replicating what COMESA does, therefore ESA relies on COMESA for trade liberalisation commitments and the institutional framework.

E. The multiplicity of regional memberships creates difficulties for the ESA countries since it means they must comply with various tariff reduction schedules, rules of origin and other liberalisation requirements by different RTAs. For instance, countries that are members of both SADC and COMESA must implement both the SADC Trade Protocol and the COMESA FTA.

F. Overlapping membership in different RTAs hinders the achievement of the aspired regional integration and cooperation. It does not promote deeper integration and cooperation because where there are conflicts of rules in different RTAs the movement of goods, persons, labour and other factors is curtailed.

G. EPAs are bound to bring some risks to the economies of the ACP such as revenue losses and product sources substitution.

5.3.0. Recommendations

The study recommends the following;

A. ESA countries should seek to get legally enforceable provisions and desist from incorporating WTO Agreements on the EPA through reference as is the case under CPA.[168] This kind of incorporation may bring with it undesired effects such as the lapsed periods of time for implementation, non-committal phraseology common with the WTO texts, and even the unenforceable S&D treatment provisions. This study seeks to interpret the provisions seeking to comply with the WTO regulations under the CPA, as to comply with the spirit of the WTO text and not the letter of the text.

B. ESA region has to insist on negotiating for an EPA with development components, which would equip member states with capacity to compete, and with development finance. Since EPAs are rooted primarily in the CPA, whose main objective is cooperation to end poverty within the ACP region, then it is imperative that the development issues of concern to the ESA region must be comprehensively addressed, as this will go a long way in fulfilling the objectives of the region.

C. Since the deadline to conclude and EPAs is approaching, the study would propose;

   i. Parties to seek another WTO waiver for a negotiated period that would allow adequate time to conclude, ratify, and start implementation of the EPAs; or

   ii. Parties can formally or informally agree to extend the negotiations deadline for a specific period to allow for continuation of the current trade arrangements. In this case there is no need to formally seek a waiver in WTO as there is not likely to be a challenge in the short term; or

   iii. Parties may result to concluding an EPA agreement covering the essential elements namely development chapter and trade in goods. This would satisfy the requirements of article XXIV of GATT 94 thus meeting compatibility requirement; or

   iv. Parties may opt to divide ESA group into two: whereby LDCs will use EBA in the meantime, while completing the negotiations and the non LDCs will use GSP up until the negotiations are finalised.

168 CPA Article 47 (1) Standardisation and Certification.; CPA Article 48 (1) Sanitary and Phytosanitary Measures

D. With regard to structure and to fostering regional integration the study suggests;

i A COMESA-EU EPA whereby, COMESA would form a Customs Union with all its current members except Swaziland which would stay in SACU while Tanzania rejoins COMESA. Other joint members of SADC and COMESA would either be locked into COMESA or given an option to choose another regional body they would like to be part of. Similarly, the EAC Customs Union would merge with the COMESA Customs Union. Such a scenario would remedy these overlapping memberships.

ii An EAC-EU EPA, - an enlarged EAC (which includes Burundi, Kenya, Rwanda, Tanzania and Uganda) and an already established customs union make an EAC-EU EPA a pragmatic suggestion. Since there are established schedules on imports to the Customs Union, and a secretariat which operates more like a supranational body the negotiations would be without complications. However, this would imply that Burundi, Kenya, Rwanda and Uganda would have to pull out of ESA configuration, and Tanzania would have to pull out of SADC configuration.

iii ESA's developing countries to negotiate individual EPAs with the EU - Developing countries will be motivated to negotiate EPAs because; if they do not negotiate an EPA with the EU by December 31 2007, they will revert to trading under GSP whereby they will compete on the same terms with large developing countries such as China, India and Brazil.

E. ESA countries should negotiate adequate transitional periods in line with the levels of development of the parties. Therefore the transition period after the EPAs have been concluded would allow the ACP countries to adjust. Adjustments would be required on ACP industries competitiveness and alternative sources of revenue for the ACP governments

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