

# Some legal issues related to the EPAs

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## Acknowledgements

This note summarizes key legal considerations addressed in the study by Sanoussi Bilal, *Concluding EPA Negotiations: Legal and institutional issues*, ECDPM Policy Management Report 12, June 2007, [www.ecdpm.org/pmr12](http://www.ecdpm.org/pmr12). ECDPM gratefully acknowledges the financial contribution of the Department for Sustainable Economic Development (DDE), Directorate General for International Co-operation (DGIS), Ministry of Foreign Affairs, The Netherlands, which has made this study possible.

## Abbreviations

ACP	African, Caribbean and Pacific
CARIFORUM	Caribbean Forum (Caribbean ACP states)
CEMAC	Communauté Économique et Monétaire de l'Afrique Centrale
CPA	Cotonou Partnership Agreement
DDE	Department for Sustainable Economic Development
DGIS	Directorate General for International Co-operation
EAC	East African Community
EC	European Community
ECOWAS	Economic Community of West African States
EP	European Parliament
EPA	economic partnership agreement
ESA	East and Southern Africa
EU	European Union
GATT	General Agreement on Tariffs and Trade
GAERC	General Affairs and External Relations Council
GSP	Generalised System of Preferences
RTA	regional trade agreement
SADC	Southern African Development Community
TDCA	Trade, Development and Cooperation Agreement
TEC	Treaty establishing the European Community
UNECA	United Nations Economic Commission for Africa
WTO	World Trade Organization

# 1 Introduction

The purpose of this note is to address some of the legal commitments related to the conclusion of the economic partnership agreements (EPAs) negotiations and their application by 2008.

The Cotonou Partnership Agreement (CPA) sets out the basic parameters for the negotiations of EPAs, particularly the key timeline and procedures (CPA Article 37). In September 2002, the European Union (EU) and the African, Caribbean and Pacific (ACP) States initiated negotiations on EPAs as foreseen by the Cotonou Partnership Agreement. These new trade agreements should lead to all of the following (CPA Articles 36(1) & 37 (7)):

- the progressive removal of barriers to trade between the EU and the ACP;
- enhanced cooperation 'in all areas relevant to trade'
- in a manner compatible to the rules of the WTO prevailing at the conclusion of the EPA negotiations,
- taking into account the level of development and capacity of the ACP countries.

EPA negotiations 'shall end by 31 December 2007 at the latest' so as to allow EPAs to enter into force no later than 1 January 2008 (CPA Article 37(1)). During the preparatory period, Lomé-type preferences (hereafter refer to as Lomé/Cotonou preferences) shall continue to be granted by the EU to the ACP on a non-reciprocal basis (CPA Article 36(3)).

## 2 Definition of parties to an EPA

Who are the parties to an EPA? In line with the CPA objective that '[e]conomic and trade cooperation shall build on regional integration initiatives of ACP States' (CPA Article 35(2)), the EPA negotiations have been conducted with self-determined regional groupings of ACP States, 'taking into account regional integration process within the ACP' (CPA Article 37(5)). The regional dimension is thus a constitutive element of the economic partnership agreements, irrespective of whether they are signed by the ACP countries only or also by their regional entities.

Apparently, none of the ACP regional entities engaged in EPA negotiations has been granted the power to conclude a trade agreement on behalf of its member countries. The signing and ratification of an EPA will most probably have to be carried out primarily by each individual ACP member country. To what extent the ACP regional entities involved have a legal entity and authority to also be parties to an EPA has to be determined for each EPA.<sup>1</sup>

For instance, in the East and Southern Africa (ESA) configuration, which has no legal entity at present, the definition of the Parties to the EPA has not yet been agreed upon at the regional level. Ratification will take place at the national level. According to a recent report by the United Nations Economic Commission for Africa (UNECA), 'most [ESA] countries have a clear ratification procedure that will be followed before signing of the EPA agreement. Essentially, the EPA agreement will be sent to the Cabinet where if approved will be forwarded to the National Assembly as a Bill for debate and ratification.'<sup>2</sup>

In principle, it appears that the parties to an EPA should be, on the European side, the European Community (EC) and the EU Member States, in line with their respective areas of competence (as defined by the Treaty establishing the European Community), and on the ACP side, the ACP States of the EPA regional configuration and, where appropriate, the relevant regional organisations, in their respective areas of competence. Ultimately, this is an issue to be resolved by the negotiating parties in each EPA configuration. For instance, in the case of

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<sup>1</sup> The issue of whether the regional entities are parties to the agreement is not a trivial one, as it has implications for the regional bearing of the EPA.

<sup>2</sup> See African Trade Policy Centre (2007).

the Caribbean – EU EPA, the agreement foresees that for the purpose of EPAs, the CARIFORUM States agree to act collectively; but no mention is made to the CARIFORUM or CARICOM organisations, which are not parties to the agreement (see Annex 1 for an example).

### 3 Provisional application and ratification processes

For the EU side, the Commission is responsible for the negotiations, in line with the directives adopted by the Council on 17 June 2002. On issues for which the European Community (EC) has exclusive competence, the Commission can conclude an agreement that must be approved by the Council by qualified majority voting. On areas of mixed competence, the Council must decide unanimously and the agreement must be approved by each Member State.<sup>3</sup> In practice, however, consensus decision-making has prevailed in the Council for approval of all types of regional trade agreements. While in principle, the European Parliament (EP) does not need to be formally consulted for trade agreements, in practice, the Commission does inform the EP during the negotiations. EP assent is required when the areas covered fall within its domain, i.e., when

- the international agreement covers an area where the co-decision procedure applies for internal EU acts, which is *a priori* not the case in an EPA;
- the agreement establishes a specific institutional framework, which might be the case in an EPA; for instance, if a Joint EPA Council and joint (e.g., parliamentary) committees are created for monitoring or reviewing purposes;
- the agreement has important budgetary implications, which might be the case if an ‘EPA Adjustment Facility’ or other funds are included in the agreement and financed – at least partially – by the EU budget.<sup>4</sup>

On the ACP side, the situation is more complex, as it depends on the setting of each regional institution and the legal power entrusted to it by the member countries, as well as the domestic law regarding the conclusion and ratification of international trade agreements in each of the ACP countries concerned. Obviously, the situation may vary across regions and countries.

For both the EU and ACP parties, the ratification process will most likely be lengthy. It took almost three years for the Cotonou Partnership Agreement, signed on 23 June 2000, to be ratified by the then 15 EU Member States and the EC and two-third (52 out of 77) of the ACP States, so as to enter into force on 1 April 2003. In the meantime, most of the CPA provisions have been provisionally applied following a decision by the EC and by the ACP-EC Council of Ministers. As for the revision of the CPA, which was concluded on 23 February 2005, it has been ratified to date by only 6 EU Member States and 8 ACP States.<sup>5</sup>

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<sup>3</sup> See Articles 133, 300 and 310 of the Treaty establishing the European Community (TEC). For instance, TEC Article 300(2) states the following:

Subject to the powers vested in the Commission in this field, the signing, which may be accompanied by a decision on provisional application before entry into force, and the conclusion of the agreements shall be decided on by the Council, acting by a qualified majority on a proposal from the Commission. The Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal rules and for the agreements referred to in Article 310.

<sup>4</sup> According to TEC Article 300(3) [*emphasis added*]:

The Council shall conclude agreements after consulting the European Parliament, *except for the agreements referred to in Article 133(3)*, including cases where the agreement covers a field for which the procedure referred to in Article 251 or that referred to in Article 252 is required for the adoption of internal rules. The European Parliament shall deliver its opinion within a time limit which the Council may lay down according to the urgency of the matter. In the absence of an opinion within that time limit, the Council may act.

By way of derogation from the previous subparagraph, *agreements referred to in Article 310, other agreements establishing a specific institutional framework by organising cooperation procedures, agreements having important budgetary implications for the Community and agreements entailing amendment of an act adopted under the procedure referred to in Article 251* shall be concluded after the assent of the European Parliament has been obtained.

The Council and the European Parliament may, in an urgent situation, agree upon a time limit for the assent.

<sup>5</sup> See Europa (2005) and CRNM (2007).

With now 27 EU Member States and at least 6 EPA regional groupings,<sup>6</sup> the ratification process of EPAs is unlikely to be completed in less than a couple of years, at least – far beyond the date of entry into force of EPAs envisaged by the CPA. For EPAs to start being implemented by 1 January 2008, it will be necessary for them to be applied provisionally until the ratification process is completed. This is a common procedure for international agreements, including trade agreements concluded by the EC.<sup>7</sup>

How can it work in practice?

To conclude a comprehensive EPA, which would include areas of mixed competence between the EC and Member States, the formal approval of both the Council and the Member States is required. However, the provisional application of an EPA only requires the (unanimous) approval of the Council.<sup>8</sup> This can be done during a meeting of the General Affairs and External Relations Council (GAERC) (for instance at the one foreseen on 19-20 November 2007), but if the EPA does not entail any controversial issue for the Member States, it can be adopted at any Council meeting – even a written procedure may suffice. All things considered, the EC could approve the provisional application of an EPA in a couple of weeks.

On the ACP side, the situation is less clear, as it depends on the regional and domestic legal setting, as discussed above. In many ACP countries, it is expected that the national legal system requires EPAs to be approved by national parliaments. But once the agreement is signed by the parties, at the conclusion of the EPA negotiations, a formal exchange of letters may be sufficient for the parties to agree on the provisional application of an EPA.<sup>9</sup>

In this respect, it might be sufficient to conclude the negotiations as late as October or November 2007.

## 4 WTO notification

The final requirement before starting to implement an EPA is for the WTO to be notified about the agreement, under Article XXIV of the General Agreement on Tariffs and Trade (GATT) of 1994, according to the WTO Decision of 14 December 2006 on the *Transparency Mechanism for regional trade agreements* (RTAs).<sup>10</sup> This newly agreed-upon mechanism for transparency notably requires the following:

- Member parties to a newly signed RTA shall convey to the WTO, in so far as and when it is publicly available, information on the RTA, including its official name, scope and date of signature, any foreseen timetable for its entry into force or *provisional application*, relevant contact points and/or website addresses, and any other relevant unrestricted information [Point A(b); *emphasis added*];
- The required notification of an RTA by Members that are party to it shall take place *as early as possible*. As a rule, it will occur no later than directly following the parties' ratification of the RTA or any party's decision on application of the relevant parts of an agreement, and

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<sup>6</sup> The East African Community (EAC), which currently comprises Kenya, Tanzania and Uganda and now also include Burundi and Rwanda, could conclude an EPA as one regional entity, independent of the ESA region..

<sup>7</sup> For instance, the Trade, Development and Cooperation Agreement (TDCA) between the EU and South Africa was signed on 11 October 1999 and has been in force, provisionally and partially, since January 2000, fully only since May 2004, following its ratification by all parties.

<sup>8</sup> As discussed above, for an EPA that would fall solely under the exclusive competence of the EC, the approval of the Member States is not required and the Council may decide by qualified majority, although in practice consensus is sought.

<sup>9</sup> Specific provisions indicating this procedure have been proposed in the draft legal text for an EPA.

<sup>10</sup> WT/L/671, 18 December 2006, [www.wto.org](http://www.wto.org).

before the application of preferential treatment between the parties. [Point B.3; *emphasis added*]

Hence, while it might be commendable for notification about an EPA to be done as soon as it is concluded, for practical reasons notification should take place immediately after the parties have agreed (at least by exchange of letters) on the provisional application of the EPA and, in any case, before the EPA provisional application, i.e., by 1 January 2008 at the absolute latest.

While many RTAs have been implemented without notification (the WTO has not yet been notified about some 70 RTAs currently in place), this is a blatant violation of WTO rules.<sup>11</sup> Should an EPA not be notified in due time, it would also contravene the Cotonou Partnership Agreement because the new trade regime would then not be in conformity with WTO rules, contrary to the requirement specified notably in CPA Articles 36(1) and 37(7).

The final question is who should notify the WTO about an EPA? There are several possibilities. An EPA can be notified jointly by the parties to the agreement or it can be notified by one of the parties on behalf of the others. Hence, the EC could notify an EPA on behalf of the ACP parties, or they could notify it collectively, or the EC and one ACP State nominated by the EPA regional grouping could notify on behalf of the other parties. Note that while the EC has a legal personality at the WTO, it can automatically notify RTAs for the EU Member States. However, this is not possible for an EPA regional grouping, as none are recognized entities at the WTO.<sup>12</sup>

## **5 Possible legal and institutional quandaries following a failure to ratify**

One possible drawback of a hurried conclusion of EPA negotiations would be the lack of appropriation of its results by a country's government, national assembly and public opinion (notably the private sector, trade unions, farmers' organisations and other representatives of civil society, as well as the media). This could seriously complicate, if not jeopardise, the ratification process of an EPA at the national level.

As a consequence, it is possible to envisage a situation whereby an EPA would be concluded before the end of 2007, so as to provisionally enter into force by 1 January 2008. It would then be provisionally implemented, allowing ACP exports to enter EU markets basically duty- and quota-free,<sup>13</sup> and might possibly allow some EU imports to start benefiting from preferential access to ACP markets. This EPA preferential regime would take place pending ratification, and *a priori* in a manner compatible with WTO rules, following WTO notification, unless otherwise challenged. This would not prevent an ACP country from opposing ratification of the EPA at a later stage. In which case, all the benefits from the EPA would then have to be withdrawn and an alternative trade arrangement (for that country at least) would have to be found.

While any country/region may fail to ratify an EPA, even one concluded in 2007, the risks of such an occurrence are greater the lower the ownership by a country/region of the EPA outcome, since such an EPA would be more likely to attract domestic opposition. The strategy

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<sup>11</sup> It is worth noting that none of the RTAs that have not been notified to the WTO involves a developed country. This is not to say that some aspects of an agreement by a developed country may not fail to be notified. For instance, the EU has yet to notify the WTO about the service provisions of its enlargement agreement with Bulgaria and Romania.

<sup>12</sup> The notification configuration has no bearing on how to consider an RTA (a free trade area versus customs union) or its parties (i.e., definition of customs territories or determination of the notion of substantially all trade coverage between the parties in GATT Article XXIV:8).

<sup>13</sup> See EU market offer (EC, 2007a) as endorsed by the General Affairs and External Relations Council of 15 May 2007 (GAERC, 2007).



of pushing through an EPA by the end of 2007 could thus backfire. It could also open the door to more insidious strategic behaviour by some reluctant negotiators. They could agree in 2007 to an EPA as proposed by the European Commission simply to avoid the risk of losing preferential access to the EU market in the short run, knowing perfectly well that such an EPA would not be ratified at a later stage (which could easily be more than two years after its temporary entry into force). In buying time this way, they might hope to force the later revision of an EPA, as necessary to obtain sufficient support for ratification. This would be all the more possible as an EPA contains asymmetric commitments, with immediate full duty- and quota-free liberalisation on the EU side for all products except rice and sugar; whereas, the ACP will liberalise over a longer transition period (of up to 25 years) and not for all products. The provisional application of an EPA is thus unlikely to entail significant commitments (notably in terms of opening markets) on the part of the ACP countries in the initial stage. Should the EU oppose any revision of an EPA, sufficient time could be obtained to identify possible alternative trade arrangements (such as the GSP+, for instance, or an enhanced version of it, after 2008).

The lack of implementation of an EPA, the substantial revision of some of its provisions or the failure to follow through its provisional application, which would also require the parties to withdraw their notification to the WTO under RTA rules, cannot be in the interest of the parties concluding an EPA. Such an outcome would generate legal uncertainty that would be most undesirable and could possibly have adverse effects on development.

EPAs are based on and build on regional integration. This complicates matters further when considering the possibility that a country might not conclude or ratify an EPA. Suppose that in an EPA regional grouping all countries except one agreed to conclude an EPA before 2008. What would be the result? Would the EPA be signed by the region minus that reluctant country, or would the region have to forego concluding an EPA within the initially agreed time frame?

If a country failed to ratify an EPA that was provisionally applied at the regional level, the regional integration process could be sent into disarray, and the legal basis of the EPA could be questioned. Figure 4 helps illustrate the situation: ACP countries from the same region agree to negotiate an EPA on a regional basis. In line with the CPA provisions and their regional road map, they conclude an EPA in 2007 that provisionally enters into force on 1 January 2008. The ratification process takes place at a different speed in each country. This EPA will fully enter into force only when all the ACP countries of that region have ratified it<sup>14</sup> – provided that the EU has also completed its own ratification process. Now, should a country decide not to ratify the EPA,<sup>15</sup> the EPA cannot enter into force at the regional level. It must either be amended to apply only to the subset of countries in the region that have ratified it (excluding the country that has not ratified it) or an alternative arrangement has to be found for all the countries concerned. Needless to say, this would generate serious tensions within the region.

The decision by a country not to conclude EPA negotiations at the same time as its regional partners or not to ratify the EPA could generate several other adverse effects.

Intra-regional trade is likely to be undermined.

Another issue relates to determining the market access required for compliance with the WTO rules on RTAs. GATT Article XXIV:8(b) requires the following (emphasis added):

the duties and other restrictive regulations of commerce . . . are eliminated on *substantially all the trade* between the constituent territories in products originating in such territories.

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<sup>14</sup> Contrary to the ratification of the CPA, an EPA will certainly require ratification by all its parties to fully enter into force. For the CPA, ratification by only two-thirds of the ACP States was required.

<sup>15</sup> This is a plausible scenario. For instance, members of the parliamentary committee on Trade and Industry in Ghana have recently indicated that they might reject an EPA in favour of an alternative, the GSP+. See Adabre (2007).

A recurrent issue in the interpretation of this provision is the determination of what constitutes 'substantially all the trade'. GATT Article XXIV does not make a distinction between RTAs between 'a group of two or more customs territories'. In the case of RTAs with more than two countries, it is unclear whether the 'substantially all trade' requirement refers to the trade between each pair of customs territories or within the group of customs territories as a whole. The EU has argued for an interpretation that allows asymmetric liberalisation among the partners (whereby the EU would fully liberalise more of its trade than its developing partners), and that applies at the regional level. In the context of the EPAs, this means that:

- the EU opens its markets more than the ACP EPA regional grouping does;
- the ACP EPA regional grouping is regarded by the EU as one block (i.e., a customs union), whereby the definition of 'substantially all trade' is the trade between the EC on the one side and the ACP EPA regional grouping on the other, and not between the EU and each individual ACP country member of the EPA regional grouping.

It is not the purpose of this note to discuss the WTO requirements for RTAs.<sup>16</sup> It suffices to note here that the determination of each party's obligations, notably in the determination of 'substantially all trade', will have significant consequences should a country not sign or ratify an EPA. The withdrawal of one large country from an EPA configuration would affect the regional basket of sensitive products for which trade barriers should be maintained. This, in turn, could affect the compliance of the other EPA member countries with WTO rules if the 'substantially all trade' requirement is considered at the regional level. EPA provisions might have to be adjusted accordingly.

The argument could be extended to any regional commitment that depends on specific undertakings by individual countries, with the consequence that the EPA might have to be revised (i.e., renegotiated) should a country pull out. For instance, the treatment of preferences like the sugar protocol within an EPA might need to be revisited if one of the beneficiary countries was no longer part of the regional EPA configuration.

A last, but not least, additional concern is the availability of EPA-related development support at the regional level.

## 6 Monitoring EPAs<sup>17</sup>

There is an increased awareness of and openness to the importance of monitoring the implementation and impact of EPAs. There can be different reasons for engaging in the monitoring<sup>18</sup> of EPAs. But a key objective is to closely monitor the implementation of the agreement and the impact thereof, to ensure that EPAs effectively deliver on their development

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<sup>16</sup> In the absence of a WTO decision and case law, the issue is open to various legal interpretations: some legal experts have argued that substantially all trade should apply to each of the countries individually.

<sup>17</sup> This section draws on Bilal, S., F. Jerosch, N. Keijzer, C. Loquai and F. Rampa (2007), *From Legal Commitments to Practice: Monitoring EPAs*, ECDPM Discussion Paper 79, October 2007, [www.ecdpm.org/dp79](http://www.ecdpm.org/dp79), and based on a study conducted jointly with the German Development Institute (DIE), with the financial support of the German Federal Ministry for Economic Cooperation and Development (BMZ); for more information on EPA monitoring, see [www.ecdpm.org/trade/epamonitoring](http://www.ecdpm.org/trade/epamonitoring)

<sup>18</sup> Based on recent official reports and statements regarding EPA monitoring, we define EPA monitoring as follows:

The systematic collection of data through different approaches that allows

- (a) to check the compliance of the signatories with the agreement;
- (b) the implementation of the policies and measures convened;
- (c) to provide plausible indications of the degree to which the EPAs have the positive impact in terms of trade and development set out in the agreements and the Cotonou Partnership Agreement. This includes tracking undesired effects and impacts and signalling them to EU and ACP decision makers.

promises. Monitoring can thus be used to produce evidence regarding:

- (a) the capacity of the involved actors to implement EPAs in a way that benefits them,
- (b) compliance to the commitments made, and
- (c) the outcomes and impacts of their implementation.

The scope of EPA monitoring should cover the following aspects:

- (i) The **capacity to implement** the EPAs. In order to ensure that EPAs can be implemented properly the parties have to monitor the degree of capacity of different stakeholders to comply with EPA provisions, benefit from them and put in place the relevant accompanying measures. This would also help to identify capacity building needs.
- (ii) The **implementation of EPA provisions** (including on development cooperation). For compliance purposes, the parties will monitor the implementation of EPA provisions, including those related to development cooperation and capacity building.
- (iii) **Impacts and outcomes of EPAs**. Monitoring the results of EPAs should aim at triggering policy adjustments, appropriate accompanying measures and possibly to the revision of some provisions of the agreement where relevant.
- (iv) The **enabling environment**. EPAs will not happen in a vacuum and thus have to be seen in the broader environment, which ideally should be enabling. To ensure that EPAs will deliver on their objectives, accompanying domestic measures will have to be adopted. Appropriate adjustment measures as well as the framework conditions will have to be monitored too.

Obviously, the broader the scope of the monitoring, the more complex and costly the conduct and analysis of the monitoring exercise will become. It is thus necessary to carefully prioritise the areas to be monitored, so as to focus on the essential issues.

Monitoring results should inform the EPA-related national, regional and ACP-EU policy processes (including development assistance provided by the EU), and should be able to trigger adjustment and remedial measures.

For the establishment of an effective and workable monitoring mechanism it is important that the design and process of monitoring be carefully thought out. Yet, to be of use a monitoring mechanism must remain flexible and adaptable to unforeseen and evolving circumstances.

In determining the appropriate provisions on monitoring in an EPA text, the key considerations should be to provide for the conditions for the establishment of a credible, transparent, workable and effective monitoring mechanism. These should include:

- (1) The **principles** of monitoring
- (2) The **key functions** of monitoring
- (3) The **scope** of monitoring
- (4) The **use of the results** of monitoring
- (5) The **basic institutional setting** for monitoring
- (6) The **related cooperation and development assistance** for monitoring
- (7) Indications on the possible **methods and procedures** to be followed for monitoring

Recommendations are summarised in Table 1 that highlights key provisions and principles that should be stipulated in every EPA agreement.

**Table 1 Recommendations for legal provisions on EPA Monitoring**

Dimension	Recommendations	Opportunities	Challenges
<p><b>1. Principles of monitoring</b></p>	<ul style="list-style-type: none"> <li>-commitment for establishments of credible, workable and effective MM, in line with principles (ownership, transparency, mutual accountability, participatory)</li> <li>-MM must remain flexible/adaptable to unforeseen/evolving circumstances</li> </ul>	<ul style="list-style-type: none"> <li>- Agreeing on main principles may avoid politicisation of monitoring process</li> <li>- Agreeing on principles help aligning/integrating the monitoring process into general EPA implementation</li> </ul>	<ul style="list-style-type: none"> <li>- policy space and flexibility may be reduced</li> <li>- An “EPA monitoring mechanism” entails danger of duplicating efforts- principles (transparency, participatory, flexible) overambitious compared to feasibility of EPA monitoring</li> </ul>
<p><b>2. Key functions of monitoring</b></p>	<ul style="list-style-type: none"> <li>-EPAMM aim at checking that parties have capacity to implement and take advantage of EPAs, while assessing compliance to the commitments made/impacts of their implementation</li> <li>-MM both to identify problems (gathering of information) &amp; assess changes required (information analysis)</li> </ul>	<ul style="list-style-type: none"> <li>- Credible MM is established</li> <li>- its role/functions clearly identified</li> <li>-otherwise proliferation of Shadow MM</li> <li>- information analysis function may decrease the political/vested interpretation of information gathered</li> </ul>	<ul style="list-style-type: none"> <li>- policy space and flexibility reduced</li> <li>- available resources and capacities not sufficient to carry out all the functions</li> <li>- too costly to do both gathering and analysis of information</li> </ul>
<p><b>3. Scope of monitoring</b></p>	<ul style="list-style-type: none"> <li>- a)compliance + b)impacts + c)capacity development needs + d)framework conditions (in which EPAs will take place) will be monitored</li> <li>- MM to cover trade(-related) indicators + development objectives</li> <li>- Exact MM content to be specific to each agreement and related commitments</li> <li>- Prioritisation necessary, based on national/regional development strategy + data collection capacity + Human Resources capacity</li> </ul>	<ul style="list-style-type: none"> <li>-at least tracking undesired effects and impacts</li> <li>- monitoring a)-d) within a commonly agreed MM likely to be less cumbersome, controversial, political</li> <li>- ensure that development dimension of EPAs is not overlooked/left to interpretations</li> <li>- reality-check prioritisation limits too high ambitions / expectations</li> </ul>	<ul style="list-style-type: none"> <li>- development impacts are difficult to measure due to uncertainties on causality</li> <li>- parties may quarrel over causality links (attribution gap)</li> <li>- overlaps with other policy MM at national/regional levels</li> <li>- difficult to agree on exact scope by end of negotiations</li> <li>- scope too broad for available resources and capacities</li> </ul>
<p><b>4. Use of the results of monitoring</b></p>	<ul style="list-style-type: none"> <li>-MM to feed into EPA-related national/regional/ACP-EU policy making processes &amp; to trigger adjustment/remedial measures: periodic formal reviews and evaluation of EPA; specifically inform the application of built-in flexibilities such as safeguards; development assistance provided by the EU</li> <li>-accountability &amp; public info (forwarding the reports to national parliaments, the media and other interested stakeholders)</li> </ul>	<ul style="list-style-type: none"> <li>-increase effectiveness/credibility of the MM</li> <li>-incentive for actors to engage</li> <li>- if not: EPA implementation likely to prove more cumbersome, controversial, political</li> </ul>	<ul style="list-style-type: none"> <li>-can the parties effectively monitor themselves?</li> </ul>

<b>5. Basic institutional setting for monitoring</b>	<ul style="list-style-type: none"> <li>- synergies with other (existing) policy MM at national/regional levels, with existing joint ACP-EU institutions when appropriate</li> <li>- MM to involve not only government officials but also parliamentarians/private sector &amp; civil society representatives</li> <li>- specify respective roles/responsibilities of different institutions/stakeholders involved in the national, regional and joint ACP-EU monitoring bodies</li> <li>- MM to take place both at regional and national levels, with task division following the principle of subsidiarity</li> <li>- Light institutional design</li> </ul>	<ul style="list-style-type: none"> <li>-avoiding duplications/unnecessary demands on ACP</li> <li>- increase the efficiency of monitoring while reducing its cost</li> <li>- ensure credibility, accountability and ownership</li> <li>-possible outsourcing of parts of the monitoring process</li> <li>- timely production of info &amp; smooth functioning of MM</li> </ul>	<ul style="list-style-type: none"> <li>- available resources and capacities not sufficient for certain stakeholders</li> <li>- institutional flexibility reduced</li> </ul>
<b>6. Related cooperation and development assistance for MM</b>	<ul style="list-style-type: none"> <li>- investment in capacity building at both ACP &amp; EU levels</li> <li>- assistance at both national &amp; regional level</li> <li>- categories of assistance: establishment of nat. level monitoring frameworks, participation of different actors, and collection/development of monitoring data</li> <li>- ensure that representatives of vulnerable and marginalised groups take part in MM / make use of the information generated</li> <li>- possible sources: EU Joint Aid for Trade initiative/European Development Fund (EDF)</li> </ul>	<ul style="list-style-type: none"> <li>- addressing problems of low data quality &amp; availability in most ACP countries increase credibility of MM</li> <li>- own investment in capacity building strengthens commitment to serious monitoring process</li> <li>- assistance for actors' participation enhances credibility of MM</li> </ul>	<ul style="list-style-type: none"> <li>- development resources used for MM may be diverted away from other key areas of EPA support</li> <li>- the assistance agreed upon is not delivered timely enough for smooth functioning of MM</li> </ul>
<b>7. Indications on possible methods &amp; procedures to follow for MM</b>	<ul style="list-style-type: none"> <li>-evidence-based approach &amp; participatory national/regional establishment</li> <li>-different methodologies for diff. regions/countries &amp; for different areas to be monitored: methods for identification of impact paths &amp; Indicators &amp; collection of evidence; availability of data &amp; analytical capacities</li> <li>- procedures ensuring concrete follow-up to MM establishment, at least naming different institutions that are to develop it (by an agreed deadline)</li> <li>-'impact chain analysis' offer appropriate approach for monitoring EPAs and assess causal links</li> </ul>	<ul style="list-style-type: none"> <li>-ensuring operationalisation of MM (as agreeing on principles/functions may not suffice for establishment)</li> <li>-formalise MM results within jointly agreed framework and thus promote evidence-based interpretation/analysis</li> <li>-otherwise MM process risks to become too polemical &amp; political and its results contestable</li> </ul>	<ul style="list-style-type: none"> <li>-difficult before conclusion of negotiations to agree methodologies &amp; indicators valid for all parties</li> <li>- available resources and capacities not sufficient for certain methodologies</li> <li>- specifying methods &amp; procedures reduce operational/institutional flexibility</li> </ul>

Source: Bilal, S. et al. (2007)

Note: MM = Monitoring mechanism

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# Annexes Draft Legal provisions in EPA texts

Some draft texts proposed for the EPAs are publicly available at [www.bilaterals.org](http://www.bilaterals.org)

- CEMAC (June 2007): [http://www.bilaterals.org/article.php3?id\\_article=9722](http://www.bilaterals.org/article.php3?id_article=9722)
- ECOWAS (April 2007): [http://www.bilaterals.org/article.php3?id\\_article=9721](http://www.bilaterals.org/article.php3?id_article=9721)
- ESA (July 2007): [http://www.bilaterals.org/article.php3?id\\_article=9720](http://www.bilaterals.org/article.php3?id_article=9720)
- PACIFIC (August 2007): [http://www.bilaterals.org/article.php3?id\\_article=9529](http://www.bilaterals.org/article.php3?id_article=9529)
- SADC (June 2007): [http://www.bilaterals.org/article.php3?id\\_article=9719](http://www.bilaterals.org/article.php3?id_article=9719)

For the sake of illustration, this annex reproduces the legal provisions proposed in the Pacific-EC EPA text, the most recent proposed agreement publicly available. Other EPA texts use identical or similar wording.

## Annex 1 General provisions

PACIFIC (August 2007): [http://www.bilaterals.org/article.php3?id\\_article=9529](http://www.bilaterals.org/article.php3?id_article=9529)

### PART VI GENERAL AND FINAL PROVISIONS

#### Article 1

#### **Definitions and fulfilment of obligations**

For the purposes of this Agreement:

1. With the exception of Title I the Parties shall mean the Cook Islands, Federated States of Micronesia, Fiji Islands, Kiribati, Republic of the Marshall Islands, Nauru, Niue, Republic of Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu, hereinafter referred to as the "Pacific States", on the one part, and the European Community or its Member States or the European Community and its Member States, within their respective areas of competence as derived from the Treaty establishing the European Community, hereinafter referred to as the "EC Party".
2. For the purposes of this Agreement, the Pacific States agree to act collectively. In cases individual action is provided for or required to exercise the rights or comply with the obligations under this Agreement reference is made to the "Signatory Pacific States".
3. The Parties and the Signatory Pacific States shall adopt any general or specific measures required for them to fulfil their obligations under this Agreement and shall ensure that they comply with the objective laid down in this Agreement.
- 4.

#### Article 2

#### **Coordinators and exchange of information**

1. In order to facilitate communication and to ensure the effective implementation of the Agreement the Parties shall designate a coordinator upon entry into force of this Agreement. The designation of coordinators is without prejudice to the specific designation of competent authorities under specific Titles or Chapters of this Agreement.
2. On the request of either Party, the coordinator of the other Party shall indicate the office or official responsible for any matter pertaining to the implementation of this Agreement and provide the required support to facilitate communication with the requesting Party.
3. On request of the other Party, and to the extent legally possible, each Party through their coordinators shall provide information and reply promptly to any question from the other Party relating to an actual or proposed measure that might affect trade between the Parties. The Pacific States agree to channel their exchanges of information through the Pacific States coordinator to the maximum extent possible.
4. Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application relating to any trade matter covered by this Agreement are promptly published or made publicly available and brought to the attention of the other Party.

5. Without prejudice to specific transparency provisions in this Agreement, the information referred to under this Article shall be considered to have been provided when the information has been made available by appropriate notification to the WTO or when the information has been made available on the official, publicly and fee-free accessible website of the Party concerned.

#### Article 3

#### **Regional preference**

1. Nothing in this Agreement shall oblige a Party to extend to the other Party of this Agreement any more favourable treatment which is applied within each of the Parties as part of its respective regional integration process.

2. Any more favourable treatment and advantage that may be granted under this Agreement by any Signatory Pacific State to the EC Party shall immediately and unconditionally also be enjoyed by each signatory to this Agreement.

#### Article 4

#### **Balance of payments difficulties**

1. Where any Signatory Pacific State or the EC Party is in serious balance of payments and external financial difficulties, or under threat thereof, it may adopt or maintain restrictive measures with regard to trade in goods, services and establishment.

2. The Pacific States and the EC Party shall endeavour to avoid the application of the restrictive measures referred to in paragraph 1.

3. Any restrictive measure adopted or maintained under this Article shall be non-discriminatory and of limited duration and shall not go beyond what is necessary to remedy the balance of payments and external financial situation. They shall be in accordance with the conditions established in the WTO Agreements and consistent with the Articles of Agreement of the International Monetary Fund, as applicable.

4. Any Signatory Pacific State or the EC Party maintaining or having adopted restrictive measures, or any changes thereto, shall promptly notify them to the other Party and present, as soon as possible, a time schedule for their removal.

5. Consultation shall be held promptly within the Joint EPA Implementation Committee. Such consultations shall assess the balance of payments situation of the concerned Signatory Pacific State or the EC Party and the restrictions adopted or maintained under this Article, taking into account, inter alia, such factors as:

- (a) the nature and extent of the balance of payments and the external financial difficulties;
- (b) the external economic and trading environment;
- (c) alternative corrective measures which may be available.

The consultations shall address the compliance of any restrictive measures with paragraphs 3 and 4. All findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments shall be accepted and conclusions shall be based on the assessment by the Fund of the balance of payments and the external financial situation of the concerned Signatory Pacific State or EC Party.

#### Article 5

#### **Relations with the Cotonou Agreement**

1. With the exception of development cooperation provided for in Title II of Part III of the Cotonou Agreement, in case of any inconsistency between the provisions of this Agreement and the provisions of Title II of Part III of the Cotonou Agreement the provisions of this Agreement shall prevail.

2. Nothing in this Agreement shall be construed so as to prevent the adoption by the EC Party or a Signatory Pacific State of any measures, including trade-related measures under this Agreement, deemed appropriate, as provided for under Articles 11b, 96 and 97 of the Cotonou Agreement and according to procedures set by these Articles.



Article 6  
**Relations with the WTO Agreement**

The Parties agree that nothing in this Agreement requires them or the Pacific States to act in a manner inconsistent with their existing WTO obligations.

Article 7  
**Relationship with Other International Agreements**

Nothing in this Agreement shall be regarded as exempting any Party from its existing obligations, or abrogating the rights of any Party, under any existing international agreement, unless a contrary intention is expressly stated.

Article 8  
**Entry into force**

1. This Agreement shall enter into force the first day of the month following that in which the Signatory Pacific States and the EC Party have notified each other of the completion of the procedures necessary for this purpose.
2. Notifications shall be sent to the Secretary General of the Council of the European Union, who shall be the depositary of this Agreement.
3. Pending entry into force of the Agreement, the EC Party and the Pacific States shall agree to provisionally apply the agreement. Such application may be effected by provisional application pursuant to the laws of a signatory or by ratification of the Agreement. Provisional application shall be notified to the depositary. The Agreement shall be applied provisionally 10 days after the latter of the receipt of notification of provisional application from the EC Party or from all the Pacific States.

Article 9  
**Duration**

1. This Agreement shall be valid indefinitely.
2. Either Party may give written notice to the other of its intention to denounce this Agreement.
3. Denunciation shall take effect six months after notification to the other Party.

Article 10  
**Territorial application**

This Agreement shall apply, on the one hand, to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty, and, on the other hand, to the territories of the Pacific States. References in this Agreement to "territory" shall be understood in this sense.

Article 11  
**Revision clause**

1. The Parties agree to consider extending this Agreement with the aim of broadening and supplementing its scope in accordance with their respective legislation, by amending it or concluding agreements on specific sectors or activities in the light of the experience gained during its implementation. The Parties may also consider revising this Agreement to bring Overseas countries and Territories associated with the European Community within the scope of this Agreement.
2. As regards the implementation of this Agreement, either Party may make suggestions oriented towards expanding trade related cooperation, taking into account the experience acquired during the implementation thereof.
3. The Parties agree that this Agreement may need to be reviewed in the light of the expiration of the Cotonou Agreement.

[4. The Joint EPA Implementation Committee shall conduct a general review of the implementation, operation and performance of this Agreement every 5 years after the Agreement comes into force. The first revision should be no later than 2012. The review shall assess the extent to which the objectives of this Agreement are being achieved and what further actions should be taken to better achieve the objectives.]

#### Article 12

##### **Accession of new EU Member States**

1. The Joint EPA Council shall be advised of any request made by a third State to become a member of the European Union. During the negotiations between the Union and the applicant State, the EC Party shall provide the Pacific States with any relevant information and they in turn shall convey their concerns to the EC Party so that it can take them fully into account. The Pacific States shall be notified by the EC Party of any accession to the European Union (EU).

2. Any new Member State of the EU shall accede to this Agreement from the date of its accession to the EU by means of a clause to that effect in the act of accession. If the act of accession to the Union does not provide for such automatic accession of the EU Member State to this Agreement, the EU Member State concerned shall accede by depositing an act of accession with the General Secretariat of the Council of the European Union, which shall send certified copies to the Pacific States.

3. The Parties shall review the effects of the accession of new EU Member States on this Agreement. The Joint EPA Council may decide on any transitional or amending measures that might be necessary.

#### Article 13

##### **Accession of the Pacific Islands**

1. This Agreement shall remain open for accession of Pacific Islands whose structural characteristics and economic and social situation are comparable to those countries which are Parties to the Cotonou Agreement. Any request for accession shall be presented to the Joint EPA Council.

If the request is approved by the Joint EPA Council, the Pacific Island concerned shall accede to this Agreement by depositing an act of accession with the depositary which shall notify the Parties.

2. The Parties shall review the effects of the accession of new Pacific Island on this Agreement. The Joint EPA Council may decide on any transitional or amending measures that might be necessary.

#### Article 14

##### **Authentic texts**

This Agreement is drawn up in duplicate in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, each of these texts being equally authentic.

#### Article 15

##### **Annexes**

The Annexes to this Agreement shall form an integral part thereof.

## Annex 2 Institutional provisions

ESA Draft EPA text (juillet 2007): [http://www.bilaterals.org/article.php3?id\\_article=9720](http://www.bilaterals.org/article.php3?id_article=9720)

### PART V INSTITUTIONAL PROVISIONS

Text in Articles 27 to 30 not agreed. Parties to consider ESA and EC proposals with a view to identifying common ground and possible common text. EC refers to Article 1 to 7 of its "Institutional provisions"

#### Article 27

##### Joint Institutions

The Joint Institutions of this agreement are the ESA-EU Council of Ministers, Committee of Senior Officials and Specialised Committees.

#### Article 28

##### ESA-EU Council of Ministers

1. An ESA-EU Council of Ministers is hereby established
2. The Council shall comprise, on the one hand, a member of the Government of each ESA State, and on the other the members of the Council of the EU and members of the Commission of the European Communities.
3. The Office of the President of the Council shall be held alternately by a member of the Council of the EU and a member of the government of an ESA country.
4. The Council shall meet at Ministerial level at regular intervals, at least once every one year, and at extraordinary sessions, at the request of either Party.
5. The Council shall adopt its own rules of procedure within the first year after entry into force of this Agreement.
6. The functions of the Council shall be:
  - (a) to supervise the implementation of this Agreement;
  - (b) to examine proposals and recommendations from the Parties, including the Committee of Senior Officials, for the effective implementation of this Agreement and enhancement of the Agreement;
  - (c) examine and make recommendations on any issue of common interest relating to the smooth implementation of the EPA, in particular the need for development support to be provided;  
**Provide for decisions on issues on which the Council would have full powers to do so under this Agreement. Reconcile with ACP issues where only recommendations can be made**
  - (d) to examine the impact of wider liberalisation initiatives by the EU on the ESA-EU trade and the ESA Economies. It shall adopt the necessary measures with a view to preserving the benefits of this agreement; and
7. Subject to Article .. (on dispute settlement) the Council shall, for the purpose of attaining the objectives of this Agreement, have the power to take decisions in all matters covered by this Agreement.
8. The decisions of Council shall be binding on all Parties which shall take all necessary measures to implement them.
9. The Council may also make appropriate recommendations on all relevant issues to the ACP-EU Council of Ministers.
10. The Council shall adopt its decisions by common agreement of the parties. The proceedings of the Council of Ministers shall be valid only if half the members of the Council of the European Union, one member of the Commission and two-thirds of the members representing the governments of the ESA States are present. Any member of the Council of Ministers unable to attend may be represented. The representative shall exercise all the rights of that Member.

(Review if there may not be need for all ESA States to ratify Agreement before it comes into force. However this is subject to the definition of “party”).

#### **Article 29**

##### **Committee of Senior Officials**

1. The ESA-EU Council shall be assisted by a Committee of Senior Officials composed of representatives of members of the EU on the one hand and representatives of ESA States on the other.
2. The Committee shall make recommendations to Council on policy matters.
3. The Committee shall prepare for the sessions of Council.
4. The Committee shall meet once a year, or in extra-ordinary session as and when either Party requests.
5. The Committee shall be chaired alternately by a representative of each of the Parties.
6. The Committee shall adopt its own rules of procedure, within six months of entry into force of this Agreement.

#### **Article 30**

##### **Specialised Committees**

1. Specialised Committees established pursuant to this Agreement, shall assist the Council in the performance of its duties.

(Identify all the specialised Committees and list them in this paragraph)

2. The Council may decide to set up any additional specialised committees.

# Annex 3 Dispute avoidance and settlement

PACIFIC (August 2007): [http://www.bilaterals.org/article.php3?id\\_article=9529](http://www.bilaterals.org/article.php3?id_article=9529)

## PART III: DISPUTE AVOIDANCE AND SETTLEMENT

### CHAPTER 1

#### OBJECTIVE AND SCOPE

##### Article 1

##### **Objective**

The objective of this Part is to avoid and settle any dispute between the Parties with a view to arriving at a mutually agreed solution.

##### Article 2

##### **Scope**

1. This Part shall apply to any dispute concerning the interpretation and application of this Agreement.
2. Notwithstanding paragraph 1, the procedure set out in Article 98 of the Cotonou Agreement shall be applicable in the event of a dispute concerning development finance cooperation as provided for by the Cotonou Agreement.

*[Additional language may be required to cover other sources of financing]*

### CHAPTER 2

#### CONSULTATIONS AND MEDIATION

##### Article 3

##### **Consultations**

1. The [Parties] shall endeavour to resolve any dispute [referred to in Article 2] by entering into consultations in good faith with the aim of reaching an agreed solution.
2. A [Party] shall seek consultations by means of a written request to the other Party, copied to the Joint EPA Implementation Committee, identifying the measure at issue and the provisions of the Agreement that it considers the measure not to be in conformity with.
3. Consultations shall be held within 40 days of the date of the submission of the request. The consultations shall be deemed concluded within 60 days of the date of the submission of the request, unless [both Parties] agree to continue consultations. All information disclosed during the consultations shall remain confidential.
4. Consultations on matters of urgency, including those regarding perishable or seasonal goods shall be held within 15 days of the date of the submission of the request, and shall be deemed concluded within 30 days of the date of the submission of the request.
5. If consultations are not held within the timeframes laid down in paragraph 3 or in paragraph 4 respectively, or if consultations have been concluded and no agreement has been reached on a mutually agreed solution, the complaining Party may request the establishment of an arbitration panel in accordance with Article 5.
6. A Party shall not bring a dispute under this Part concerning the interpretation and application of Chapters 4 and 5 of Title V unless the procedures of Articles , paragraph 3, 4 and 5 have been invoked and the matter has not been satisfactorily resolved within 9 months of the initiation of the consultations. Consultations pursuant to those provisions shall replace those which would have been required under this Article.

Article 4  
**Mediation**

1. If consultations fail to produce a mutually agreed solution, the [Parties] may, by agreement, seek recourse to a mediator. Unless the Parties agree otherwise, the terms of reference for the mediation shall be the matter referred to in the request for consultations.
2. Unless the [Parties] agree on a mediator within [10] days of the date of the agreement to request mediation, the chairperson of the Joint EPA Implementation Committee, or his or her delegate, shall select by lot a mediator from the pool of individuals who are on the list referred to in Article 20 and are not nationals of either Party. The selection shall be made within [20] days of the date of the submission of agreement to request mediation and in the presence of a representative of each [Party]. The mediator will convene a meeting with the [Parties] no later than 30 days after being selected. The mediator shall receive the submissions of each [Party] no later than 15 days before the meeting and notify an opinion no later than 45 days after having been selected.
3. The mediator's opinion may include a recommendation on how to resolve the dispute consistent with the provisions referred to in Article 2. The mediator's opinion is non-binding.
4. The [Parties] may agree to amend the time limits referred to in paragraph 2. The mediator may also decide to amend these time limits upon request of any of the [Parties] or on his own initiative, given the particular difficulties experienced by the [Party] concerned or the complexities of the case.
5. The proceedings involving mediation, in particular all information disclosed and positions taken by the [Parties] during these proceedings shall remain confidential.

CHAPTER 3  
**DISPUTE SETTLEMENT PROCEDURES**

*Section I – Arbitration Procedure*

Article 5  
**Initiation of the arbitration procedure**

1. Where the [Parties] have failed to resolve the dispute by recourse to consultations as provided for in Article 3, or by recourse to mediation as provided for in Article 4, the complaining Party may request the establishment of an arbitration panel.
2. The request for the establishment of an arbitration panel shall be made in writing to the [Party] complained against and the Joint EPA Implementation Committee. The complaining [Party] shall identify in its request the specific measures at issue, and it shall explain how such measure constitutes a breach of the provisions of this Agreement.

Article 6  
**Establishment of the arbitration panel**

1. An arbitration panel shall be composed of three arbitrators.
2. Within 10 days of the date of the submission of the request for the establishment of an arbitration panel to the Joint EPA Implementation Committee, the Parties shall consult in order to reach an agreement on the composition of the arbitration panel.
3. In the event that the Parties are unable to agree on its composition within the time frame laid down in paragraph 2, either Party may request the chairperson of the Joint EPA Implementation Committee, or her or his delegate, to select all three members by lot from the list established under Article 20, one among the individuals proposed by the complaining Party, one among the individuals proposed by the Party complained against and one among the individuals selected by the Parties to act as chairperson. Where the Parties agree on one or more of the members of the arbitration panel, any remaining members shall be selected by the same procedure.

4. In the event of a dispute concerning the interpretation and application of Chapters 4 and 5 of Title V the panel shall comprise at least two members with specific expertise on the matters covered by that Chapter drawn from a list of 15 persons established by the Joint EPA Implementation Committee as provided for under art. 20.

5. The chairperson of the Joint EPA Implementation Committee, or her or his delegate, shall select the arbitrators within five days of the request referred to in paragraph 3 by either Party and in the presence of a representative of each Party.

6. The date of establishment of the arbitration panel shall be the date on which the three arbitrators are selected.

#### Article 7 **Interim panel report**

The arbitration panel shall notify to the Parties an interim report containing both the descriptive section and its findings and conclusions, as a general rule not later than 120 days from the date of establishment of the arbitration panel. Any Party may submit written comments to the arbitration panel on precise aspects of its interim report within 15 days of the notification of the report.

#### Article 8 **Arbitration panel ruling**

1. The arbitration panel shall notify its ruling to the Parties and to the Joint EPA Implementation Committee within 150 days from the date of the establishment of the arbitration panel. Where it considers that this deadline cannot be met, the chairperson of the arbitration panel must notify the Parties and the Joint EPA Implementation Committee in writing, stating the reasons for the delay and the date on which the panel plans to conclude its work. Under no circumstances should the ruling be notified later than 180 days from the date of the establishment of the arbitration panel.

2. In cases of urgency, including those involving perishable and seasonal goods, the arbitration panel shall make every effort to notify its ruling within 75 days from the date its establishment. Under no circumstance should it take longer than 90 days from its establishment. The arbitration panel may give a preliminary ruling within 10 days of its establishment on whether it deems the case to be urgent.

3. Either party may request the arbitration panel to provide a recommendation as to how the Party complained against could bring itself into compliance. In the event of a dispute concerning the interpretation and application of Chapters 4 or 5 of Title V the arbitration panel shall include a recommendation on how to ensure compliance with the provisions of this Chapter.

### *Section II – Compliance*

#### Article 9 **Compliance with the arbitration panel ruling**

[Each Party] shall take any measure necessary to comply with the arbitration panel ruling, and the Parties will endeavour to agree on the period of time to comply with the ruling.

#### Article 10 **The reasonable period of time for compliance**

1. No later than 30 days after the notification of the arbitration panel ruling to the Parties, the Party complained against shall notify the complaining Party and the Joint EPA Implementation Committee of the time it will require for compliance (reasonable period of time).

2. If there is disagreement between the Parties on the reasonable period of time to comply with the arbitration panel ruling, the complaining Party shall, within 20 days of the notification made under paragraph 1, request in writing the arbitration panel to determine the length of the reasonable period of time. Such request shall be notified simultaneously to the other Party and to the Joint EPA Implementation Committee. The arbitration panel shall notify its ruling to the Parties and to the Joint EPA Implementation Committee within 30 days from the date of the submission of the request.

3. The arbitration panel will, in determining the length of the reasonable period of time, take into consideration the length of time that it will normally take the defending Party to adopt comparable legislative or administrative measures to those identified by the defending Party as being necessary to ensure compliance. The arbitration panel may also take into consideration demonstrable capacity constraints which may affect the defending Party's adoption of the necessary measures.

4. In the event of the original arbitration panel, or some of its members, being unable to reconvene, the procedures set out in Article 6 shall apply. The time limit for notifying the ruling shall be 45 days from the date of the submission of the request referred to in paragraph 2.

5. The reasonable period of time may be extended by agreement of the [Parties].

#### Article 11

##### **Review of any measure taken to comply with the arbitration panel ruling**

1. The [Party] complained against shall notify the other [Party] and the Joint EPA Implementation Committee before the end of the reasonable period of time of any measure that it has taken to comply with the arbitration panel ruling.

2. In the event that there is disagreement between the Parties concerning the compatibility of any measure notified under paragraph 1, with the provisions of this Agreement, the complaining Party may request in writing the arbitration panel to rule on the matter. Such request shall identify the specific measure at issue and it shall explain how such measure is incompatible with the provisions of this Agreement. The arbitration panel shall notify its ruling within 90 days of the date of the submission of the request. In cases of urgency, including those involving perishable and seasonal goods, the arbitration panel shall notify its ruling within 45 days of the date of the submission of the request.

3. In the event of the original arbitration panel, or some of its members, being unable to reconvene, the procedures set out in Article 6 shall apply. The time limit for notifying the ruling shall be 105 days from the date of the submission of the request referred to in paragraph 2.

#### Article 12

##### **Temporary remedies in case of non-compliance**

1. If the [Party] concerned fails to notify any measure taken to comply with the arbitration panel ruling before the expiry of the reasonable period of time, or if the arbitration panel rules that the measure notified under Article 11 paragraph 1 is not compatible with that [Party's] obligations under the provisions referred to in Article 2, the Party complained against [shall, if so requested by the complaining Party, present an offer for temporary compensation].

2. If no agreement on compensation is reached within 30 days of the end of the reasonable period of time or of the arbitration panel's ruling under Article 11 that a measure taken to comply is not compatible with the provisions referred to in Article 2, the complaining [Party] shall be entitled, upon notification to the other [Party], to adopt appropriate measures. In adopting such measures the complaining Party shall endeavour to select measures that least affect the attainment of the objectives of this Agreement and shall take into consideration their impact on the economy of the Party complained against and on the individual Pacific States.

3. The EC Party shall exercise due restraint in asking for compensation or adopting appropriate measures pursuant to paragraphs 1 or 2 of this Article.

4. The appropriate measures shall be temporary and shall be applied only until any measure found to violate the provisions referred to in Article 2 has been withdrawn or amended so as to bring it into conformity with those provisions or until the [Parties] have agreed to settle the dispute.

#### Article 13

##### **Review of any measure taken to comply after the adoption of appropriate measures**

1. The [Party] complained against shall notify the other [Party] and the Joint EPA Implementation Committee of any measure it has taken to comply with the ruling of the arbitration panel and of its request for an end to application of appropriate measures by the complaining [Party].



2. If the Parties do not reach an agreement on the compatibility of the notified measure with the provisions of this Agreement within 30 days of the date of the submission of the notification, the complaining Party shall request in writing the arbitration panel to rule on the matter. Such request shall be notified to the other Party and to the Joint EPA Implementation Committee. The arbitration panel ruling shall be notified to the Parties and to the Joint EPA Implementation Committee within 45 days of the date of the submission of the request. If the arbitration panel rules that any measure taken to comply is not in conformity with the provisions referred to in Article 2, the arbitration panel will determine whether the complaining Party can continue to apply appropriate measures. If the arbitration panel rules that any measure taken to comply is in conformity with the provisions of this Agreement, the appropriate measures shall be terminated.

3. In the event of the original arbitration panel, or some of its members, being unable to reconvene, the procedures laid down in Article 6 shall apply. The period for notifying the ruling shall be 60 days from the date of the submission of the request referred to in paragraph 2.

### *Section III – Common Provisions*

#### Article 14

#### **Mutually agreed solution**

The [Parties] may reach an agreed solution to a dispute under this Part at any time. They shall notify the Joint EPA Implementation Committee of any such solution. Upon adoption of the mutually agreed solution, the procedure shall be terminated.

#### Article 15

#### **Rules of procedure**

1. Dispute settlement procedures under Chapter III of this Part shall be governed by the Rules of Procedure which shall be adopted by the Joint EPA Council within three month of provisional application of this Agreement.

2. Any meeting of the arbitration panel shall be open to the public in accordance with the Rules of Procedure, unless the arbitration panel decides otherwise on its own motion or at the request of the Parties.

#### Article 16

#### **Information and technical advice**

At the request of a [Party], or upon its own initiative, the arbitration panel may obtain information from any source, including the [Parties] involved in the dispute, it deems appropriate for the arbitration panel proceeding. The arbitration shall also have the right to seek the relevant opinion of experts as it deems appropriate. Interested parties are authorised to submit amicus curiae briefs to the arbitration panels in accordance with the Rules of Procedure. Any information obtained in this manner must be disclosed to each of the Parties and submitted for their comments.

#### Article 17

#### **Languages of the submissions**

The written and oral submissions of the [Parties] shall be made in English, and those of the EC Party in any of the official languages of the European Union.

#### Article 18

#### **Rules of interpretation**

Any arbitration panel shall interpret the provisions of this Agreement in accordance with customary rules of interpretation of public international law, including the Vienna Convention on the Law of Treaties. The rulings of the arbitration panel cannot add to or diminish the rights and obligations provided in the provisions of this Agreement.

Article 19  
**Arbitration panel rulings**

1. The arbitration panel shall make every effort to take any decision by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, the matter at issue shall be decided by majority vote. However, in no case dissenting opinions of arbitrators shall be published.
2. The ruling shall set out the findings of fact, the applicability of the relevant provisions of this Agreement and the reasoning behind any findings and conclusions that it makes. The Joint EPA Implementation Committee shall make the arbitration panel rulings publicly available unless it decides not to do so.

CHAPTER 4  
**GENERAL PROVISIONS**

Article 20  
**List of arbitrators**

1. The Joint EPA Implementation Committee shall, no later than three months after the provisional application of this Agreement, establish a list of 15 individuals who are willing and able to serve as arbitrators. Each of the Parties shall select five individuals to serve as arbitrators. The two Parties shall also agree on five individuals that are not nationals of either Party and who shall act as chairperson to the arbitration panel. The Joint EPA Implementation Committee will ensure that the list is always maintained at this level.
2. Arbitrators shall have specialised knowledge or experience of law and international trade. They shall be independent, serve in their individual capacities and not take instructions from any organisation or government, or be affiliated with the government of any of the Parties, and shall comply with the Code of Conduct annexed to the Rules of Procedures.
3. The Joint EPA Implementation Committee may establish an additional list of 15 individuals having a sectoral expertise in specific matters covered by this Agreement. When recourse is made to the selection procedure of Article 6, the chairperson of the Joint EPA Implementation Committee may use such a sectoral list upon agreement of both Parties. The Joint EPA Implementation Committee shall establish an additional list of 15 individuals having an expertise in the specific matters covered by Chapters 4 and 5 of Title V.

Article 21  
**Relation with WTO obligations**

1. Arbitration bodies set up under this Agreement shall not adjudicate disputes on each Party or Signatory Pacific States' rights and obligations under the Agreement establishing the World Trade Organisation (WTO).
2. Recourse to the dispute settlement provisions of this Agreement shall be without prejudice to any action in the WTO framework, including dispute settlement action. However, where a Party or Signatory Pacific State has, with regard to a particular measure, instituted a dispute settlement proceeding, either under Article 5(1) of this Part or under the WTO Agreement, it may not institute a dispute settlement proceeding regarding the same measure in the other forum until the first proceeding has ended. For purposes of this paragraph, dispute settlement proceedings under the WTO Agreement are deemed to be initiated by a Party or Signatory Pacific States' request for the establishment of a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO.
3. Nothing in this Agreement shall preclude a Party or Signatory Pacific State from implementing the suspension of obligations authorised by the Dispute Settlement Body of the WTO. Nothing in the WTO Agreement shall preclude Parties from suspending benefits under this Agreement.

Article 22  
**Time lines**

1. All time limits laid down in this Part, including the limits for the arbitration panels to notify their rulings, shall be counted in calendar days from the day following the act or fact to which they refer.
2. Any time limit referred to in this Part may be extended by mutual agreement of the Parties.

Article 23  
**Modification of Part III**

The Joint EPA Council may decide to modify this Part.

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