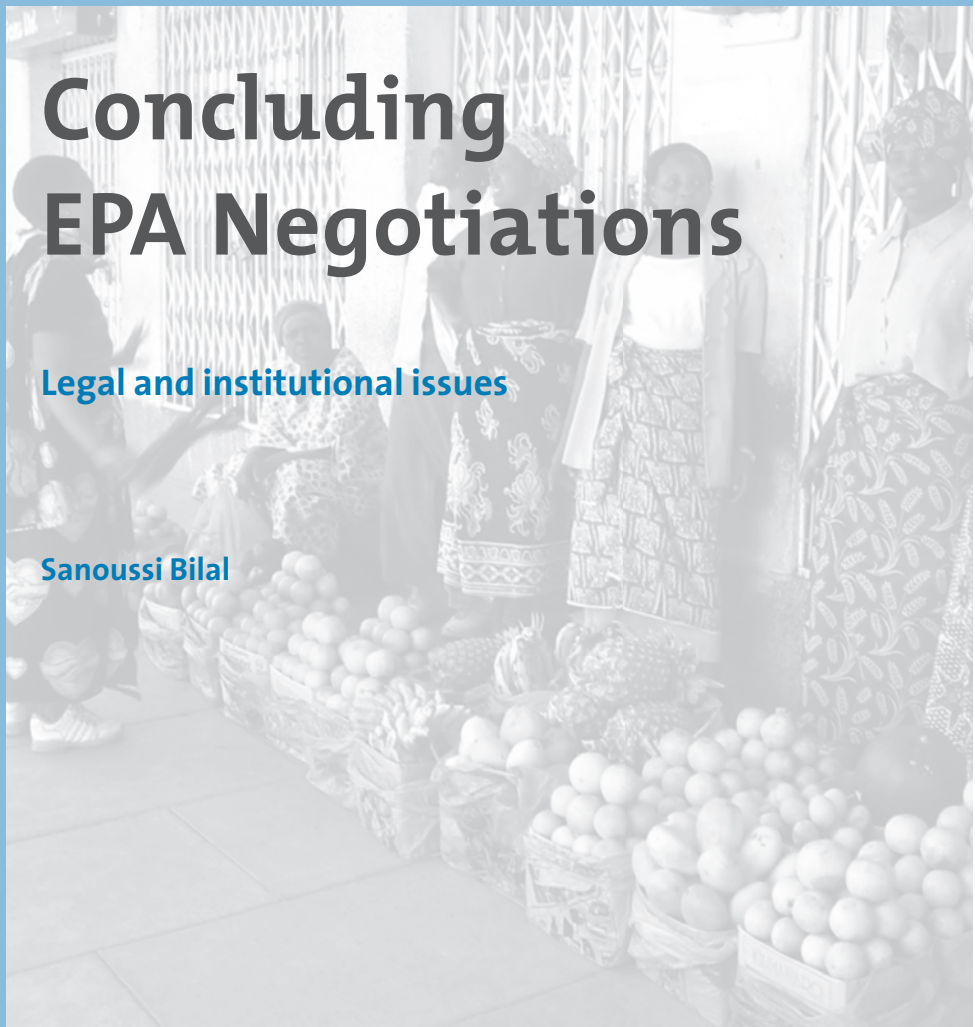


Concluding EPA Negotiations

Legal and institutional issues

Sanoussi Bilal



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June 2007

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Abbreviations

ACP	African, Caribbean and Pacific
AGOA	African Growth and Opportunity Act
CARIFORUM	Caribbean Forum (Caribbean ACP states)
CEMAC	Communauté Économique et Monétaire de l'Afrique Centrale
Coreper	Committee of Permanent Representatives
CPA	Cotonou Partnership Agreement
DCs	developing countries
DDE	Department for Sustainable Economic Development
DG	Directory General
DGIS	Directorate General for International Co-operation
DSU	dispute settlement understanding
EAC	East African Community
EBA	everything-but-arms
EC	European Community
ECOWAS	Economic Community of West African States
EDF	European Development Fund
EP	European Parliament
EPA	economic partnership agreement
ESA	East and Southern Africa
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GAERC	General Affairs and External Relations Council
GSP	Generalised System of Preferences
LDCs	least-developed countries
MFN	most-favoured nation
NIP	national indicative programme
ODI	Overseas Development Institute
RIP	regional indicative programme
RPTF	regional preparatory task force
RTA	regional trade agreement
SADC	Southern African Development Community
TDCA	Trade, Development and Cooperation Agreement
TEC	Treaty establishing the European Community
TRIPS	Trade Related Aspects of Intellectual Property Rights
UNECA	United Nations Economic Commission for Africa
WTO	World Trade Organization

Executive Summary

The Economic Partnership Agreements (EPAs) are due to be concluded by 31 December 2007, so as to enter into force by 1 January 2008. All parties are currently committed to the timely conclusion of the EPA negotiations this year. However, some African, Caribbean and Pacific (ACP) regions or countries may not find themselves in a position to do so. The negotiations have been marred by delays, with numerous issues remaining to be addressed by the negotiators. ACP countries and regions have faced serious constraints in their capacity to prepare for EPA negotiations and implementation. In addition, the European Union (EU) has not always responded as promptly as expected to ACP requests and positions during the negotiations. As a result, EPA negotiations have generally progressed at a pace much slower than initially anticipated in the respective regional road maps.

In this context, this study reviews the legal commitments and institutional arrangements necessary for the timely conclusion of the EPA negotiations and their application by 2008. It also considers the legal and institutional consequences of the failure by an ACP country or EPA regional grouping to sign an EPA by the end of 2007 or to later ratify it. It is not the purpose of this study to assess whether EPAs should be concluded or not, nor by what date. Nor does it intend to assess the merits of an EPA or any alternative trading arrangement.

Key conclusions

The EU and the ACP are committed under the CPA (notably Article 37(1)) to conclude EPA negotiations by 31 December 2007. Arguably, the negotiations could be extended into 2008, provided such a request results from the joint EPA review conducted under CPA Article 37(4). For those ACP countries that would not be in a position to conclude an EPA, CPA Article 37(6) requires the EU to identify an alternative regime that would leave these countries no worse off than they are under the current Lomé/Cotonou types of preferences, which are due to expire at the end of the transitional period for negotiating an EPA, on 31 December 2007.

The EPA negotiations should be concluded at least a few weeks before the end of 2007 to allow the EPA's provisional entry into force by 1 January 2008, after notification to the WTO. Each EPA will have to be approved by the ACP parties to it (i.e.,

the concerned ACP States and, where relevant, the constitutive regional organisations) and by the EU (i.e., the Council, together with the 27 EU Member States in areas of mixed competence). With so many parties involved in each EPA, formal ratification is likely to be a lengthy process.

It is possible that an ACP country or EPA regional grouping might encounter difficulties in concluding an agreement by the end of 2007 on all the various dimensions of an EPA. In this case, it is possible to envisage the signature before 2008 of a slimmed-down EPA that would only have to include a schedule for reciprocal full liberalisation of tariffs on substantially all the goods traded between the parties so as to comply with the minimum requirements of Article XXIV of the General Agreement on Tariffs and Trade (GATT). Provisions on services, trade-related measures and development assistance could be included in a built-in agenda or left out of such a narrow EPA.

If an EPA cannot be concluded before the end of 2007, the EU and the concerned ACP State(s) or region(s) could agree to continue negotiations in 2008. The transitional trade regime available after 2007 could be an arrangement under the EU's Generalised System of Preferences (GSP) or a continuation of the Lomé/Cotonou preferences.

The extension of the current Lomé/Cotonou regime of preferences beyond the expiration date of the WTO waiver on 31 December 2007 would require a new waiver (or a waiver extension) to be granted, which is likely to be resisted by some WTO members, and thus might be costly to obtain. Moreover, it is unlikely to be granted before 2008. In the absence of such a waiver, the risk of a complaint by a party that feels unduly disadvantaged at the WTO is real. While the legal proceedings under the WTO dispute settlement mechanism would be likely to take more than a year or a year and a half (thus providing some breathing space for the conclusion of an EPA), it would put the EU at odds with its WTO obligations, with the negative political implications this might have, notably in the context of the Doha Round negotiations.

The other option available to the ACP countries that might have failed to sign an EPA in 2007 is the EU GSP. The ACP least developed countries (LDCs) can already

benefit from the everything-but-arms (EBA) initiative under which their exports can enter the EU market duty- and quota-free. However, ACP non-LDCs automatically qualify only to the standard EU GSP, a regime far less advantageous than the Lomé/Cotonou preferences. For these countries to be no worse off, as required by the CPA core objectives of development and poverty alleviation and its trade provisions (CPA Articles 1, 19(1), 34(1) and 37(6)), the GSP+ arrangement might be amended in 2007 to include the concerned ACP non-LDCs as of 1 January 2008. Apparently, ACP non-LDCs already meet the vulnerability criteria to qualify for the GSP+, and many of them have started ratifying and implementing several of the international conventions stipulated under the governance-related criteria. While the GSP+ (including the fixed list of temporarily qualifying countries) is legally not up for review until 2008, to be in place by 1 January 2009, the EC can amend it before that (as it apparently already intends to do in 2007 on technical procedural issues not related to the ACP countries and EPA negotiations). The EU could thus also decide to extend the list of qualifying countries to include relevant ACP countries as of 1 January 2008, if only on a temporary basis, pending the ratification of the remaining international conventions and the start of their implementation. A similar, although not identical, precedent was set in 2005 with the introduction of the GSP+ for the former GSP drug-combating regimes. The GSP+ could also be expanded to avoid a loss of preferences on a selected number of key products where the current GSP+ is less favourable than the Lomé/Cotonou preferences. Reforming the GSP would not require any waiver, although it could still be challenged under the WTO dispute settlement mechanism (like any trade provision challenged by a WTO member).

The failure by one ACP country to sign or ratify an EPA along with its regional partners could have serious adverse consequences on the coherence and, possibly, relevance of the regional integration process in the EPA configuration to which it belongs. In particular, it might lead to complications in terms of commitments to market access with the EU and within the region, the deepening of integration, institutional development within the region and conditions for development assistance.

In bringing the EPA negotiations to a close, all parties should keep in mind the words of European Trade Commissioner Peter Mandelson, that the 'real challenge is not signing EPAs on time but signing EPAs that deliver development'.

Q&A on the legal and institutional consequences of not signing an EPA

Cotonou Partnership Agreement (CPA)

- 1) What is the legal status of the export regime after 31 December 2007 for countries that have not signed an economic partnership agreement (EPA)?**

Do the Cotonou preferences still apply?

CPA Article 36(3) provides for Lomé/Cotonou preferences, detailed in Annex V of the CPA, to apply during the preparatory period for the conclusion of EPAs. According to CPA Article 37(1), this ends by 31 December 2007 at the latest; hence, in accordance with the CPA, and unless otherwise agreed by the parties, the Lomé/Cotonou preferences would cease to apply as of 1 January 2008.

- 2) If the Cotonou preferences do not apply, does GSP apply automatically or does it require a political decision? How does this relate to article 37(6), which suggests that non-LDCs ought to be provided with a new framework for trade that is in conformity with WTO rules and equivalent to their existing situation?**

In the absence of any decision to the contrary, the regime available to the ACP countries that have not concluded an EPA by the end of 2007 will be the EU GSP (Council Regulation (EC) No 980/2005 of 27 June 2005, which covers the period 2006-2008). All ACP countries can already benefit from the GSP, so no specific decision is required should they not be part of an EPA by 1 January 2008. ACP LDCs benefit from the special regime for all LDCs, known as the everything-but-arms (EBA) initiative in the EU GSP. Other ACP non-LDCs will automatically fall under the standard GSP, as none of them is currently listed on the list of the beneficiary countries that qualify for the special incentive arrangement for sustainable development and good governance, which would give them enhanced preferential access known as GSP+ (Commission Decision 2005/924/EC of 21 December 2005). It would require a political decision by the Council (under qualified majority) to amend the GSP+ so as to include ACP non-LDCs as of 1 January 2008.

The CPA does not foresee the possibility of EPA negotiations being delayed and, thus, extended past 31 December 2007. This does not mean, however, that the CPA provisions would prevent the negotiations from being extended. CPA Article 37(6) also foresees that for ACP countries that would not be in a position to conclude an EPA, the EU provides 'a new framework for trade which is equivalent to their existing situation and in conformity with WTO rules'. Apparently, the European Commission suggests that this obligation should arise from a formal request by the concerned ACP country (or countries) by 2007 at the latest and that the only WTO-compatible alternative is the standard GSP for ACP non-LDCs.

However, for the ACP non-LDCs to be no worse off than they are under their existing situation, either of the following should occur:

- (i) The Lomé/Cotonou preferences should be maintained, which would require a new waiver, which may be difficult to obtain at the WTO.
- (ii) Or, they should qualify under the GSP+, and preferably under an enhanced form of it. This would require an early amendment to the GSP+ regulation, initially due to be reviewed only by the end of 2008, in a manner compatible with WTO rules, which might perhaps be done together with the technical amendments to the GSP+ apparently envisaged in 2007.

3) What is the legal status of the Commodity Protocols (sugar, bananas, beef) after 31 December 2007 for countries that have not signed an EPA?

The legal status of the Commodity Protocols is independent of the EPA negotiations. The Sugar Protocol is for an indefinite period of time. The Second Banana Protocol does not foresee any explicit mechanism for granting preferences to ACP banana countries, but only that 'the Community agrees to examine and where necessary take measures aimed at ensuring the continued viability of their banana export industries and the continuing outlet for their bananas on the Community market' (Article 1 of Protocol 5, Annex V, CPA). Some aspects of the EU banana regime were covered by a waiver at the WTO until the end of 2005 and have since been challenged at the WTO. The Protocol on beef and veal is provided for a fixed duration (i.e., the EPA preparatory period until 31 December 2007), arguably covered by the WTO waiver for the Lomé/Cotonou preferences.

In the context of an EPA, CPA Article 36(4) stipulates that ‘the Parties reaffirm the importance of the commodity protocols. . . . They agree on the need to review them in the context of the new trading arrangements, in particular as regards their compatibility with WTO rules, with a view to safeguarding the benefits derived therefrom, bearing in mind the special legal status of the Sugar Protocol.’ In principle, two venues are possible: The first one would preserve the Protocols by extending their duration when required (e.g., on beef and banana). The other option would safeguard the benefits of the preferences provided under the Protocols by including relevant provisions within an EPA framework in a way that is compatible with WTO rules. In this latter case, countries that do not sign an EPA might lose these benefits.

Regional integration and cohesion

4) What are the effects on regional integration when some countries within a region sign an EPA but others do not?

The effects would be to seriously complicate the regional integration process and jeopardise its coherence in terms of commitments to market access, deepening of integration, institutional development and development assistance. The EPA framework might also have to be adjusted to reflect the reduced membership in the EPA configuration.

5) In regard to rules of origin (cumulation), what are the consequences if some countries do not sign an EPA, whereas others in their region do? What is legally possible?

The answer to this question depends on the rules of origin that will ultimately be adopted in each EPA, currently under negotiation (for the exports to the EU originating from the EPA countries), and the alternative trade regime available to the country that does not sign an EPA (for the exports originating for the country outside the EPA). Currently, no cumulation is foreseen for exports under different EU preferential regimes. To facilitate regional trade, rules of origin for an EPA and the alternative trade regime for the non-EPA country concerned should thus allow for regional cumulation for all countries belonging to the same regional grouping, irrespective of whether they belong to an EPA.

6) What happens with the programming of EDF when countries do not sign an EPA? Are the RIPs in any way conditional upon signing an EPA?

Regional integration programmes (RIPs) under the European Development Fund (EDF) are a priori not conditional upon the signing of an EPA. However, assistance for accompanying EPA-related measures at the regional level will be programmed under the 10th EDF, for which only the countries that have signed an EPA will be eligible. In practice, with EPA measures closely related to the regional integration process, the eligibility for EPA-related support versus support related to regional integration might be somewhat arbitrary (i.e., dependent on earmarking in the programming). The impact on the effective delivery of assistance to countries that have signed an EPA and those that have not will greatly depend on the outcome of the current programming exercise, the modalities of application and the use of the incentives.

WTO and the waiver

7) How 'hard' is the deadline of the waiver in the WTO?

The decision on the waiver (WT/MIN(01)/15) clearly indicates 31 December 2007 as the expiry date. This date is binding under WTO rules. To be WTO-compatible, any extension of the Lomé/Cotonou transitional regime of preferences would require the granting of a new waiver or extension of the current waiver.

8) What are the chances for the EU to get a new waiver?

Obtaining a new waiver will be difficult, as several countries competing with ACP exports in the EU market might oppose an extension of the Lomé/Cotonou preferences (e.g., some Latin American and Asian countries). Other countries might also use the EU waiver request as a means to leverage their own interests on other issues, as part of the Doha Round or other WTO objectives (e.g., China, on achieving the Market Economy Status; some Latin American countries, on achieving recognition by the EU of their beneficiary status under GATT Article XXVIII regarding EU enlargement).

In practice, the WTO members have not been responsive to recent requests for waivers. In 2001, the current waiver was granted only after lengthy discussions and through links with the launching of the Doha Round. The US has still not

obtained a waiver for AGOA, requested in 2005. And the waiver extension for the EU banana regime, requested by the EU in 2005, has not been granted either.

As a result, obtaining a new waiver might be unlikely by the end of 2007 and, in any case, could be a costly process. The EU would have to make concessions to those developing countries disadvantaged by preferences to some ACP products, thus further eroding the ACP margin of preference. The EU might also have to make further concessions in the context of the Doha Round and on other WTO matters in exchange for a favourable decision on the waiver.

9) What are the chances of a panel against the EU when preferences for the ACP continue after 31 December 2007? For which commodities and by which countries?

There is a credible risk of a challenge against the Lomé/Cotonou preferences if they are continued after 2007 without a waiver. Any WTO member (notably those that would oppose an extension of the waiver) could complain against an extension of the Lomé/Cotonou preferential regime. This is particularly the case for (developing) countries whose exports to the EU directly compete with ACP exports, but who do not enjoy a similar preferential margin in the EU market. These might include, for instance, Latin American banana producers; beef exporters in Argentina, Brazil and the US who face higher trade barriers than the less competitively priced beef from Botswana and Namibia; or cocoa exports from Indonesia and Malaysia that are at a disadvantage in regard to Ghanaian cocoa.

It is worth noting that WTO litigation is a lengthy process that generally takes well over one year to be completed. The risk of a complaint would thus be mitigated by the credible prospect of an early conclusion of an EPA after 2007.

10) What are the chances of a panel against the Cotonou Commodity Protocols after 31 December 2007? For which commodities and by which countries?

The Commodity Protocols are prone to challenge at the WTO. The reform of the EU sugar regime was initiated in 2005 following complaints by Australia, Brazil and Thailand (initiated in 2002 and 2003, with a ruling by the Appellate Body

in 2005), and the EU banana regime was challenged again at the beginning of 2007 by Ecuador and Colombia. As for beef, a challenge could come from Argentina, Brazil or the US, as indicated above.

Skeleton agreement/process EPA/framework agreement

11) What would be the minimum requirements for such an agreement in order to be WTO-compatible (just agreeing on market access or more, intentions versus timeframes, etc.)?

The need to conclude the EPA negotiations by the end of 2007 is mainly driven by the requirement for the EU-ACP preferential trade regime to comply with WTO rules. In the absence of a waiver, due to expire on 31 December 2007, the new trade regime will have to comply with either the enabling clause, in the case of non-reciprocal preferences under the EU GSP, or WTO rules on RTAs in the case of an EPA (Article XXIV of GATT for trade in goods and Article V of GATS for services).

For an EPA to be WTO-compatible, the minimum requirement is that it comply with Article XXIV of GATT 1994, which, in essence, requires that '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' with 'a plan and schedule for the formation . . . of such a free-trade area within a reasonable length of time' (GATT Article XXIV:8(b)&5(c)). In other words, an EPA must entail a schedule for full reciprocal liberalisation of tariffs on substantially all goods traded between the parties. It does not need to cover services or any trade-related measures.



Chapter 1

Introduction



1 Introduction

The Economic Partnership Agreements (EPAs) are due to be concluded by 31 December 2007, so as to enter into force by 1 January 2008. All parties are currently committed to the timely conclusion of the EPA negotiations this year. However, some African, Caribbean and Pacific (ACP) regions or countries may not find themselves in a position to do so. The negotiations have been marred by delays, with numerous issues remaining to be addressed by the negotiators. The ACP countries and regions have faced serious constraints in their capacity to prepare for EPA negotiations and implementation. In addition, the European Union (EU) has not always responded as promptly as expected to various ACP requests and positions during the negotiations. As a result, EPA negotiations have generally progressed at a pace much slower than initially anticipated in the respective regional road maps.

In this context, this study reviews the legal commitments and institutional arrangements necessary for the timely conclusion of the EPA negotiations and their application by 2008. It also considers the legal and institutional consequences of the failure by an ACP country or EPA regional grouping to sign an EPA by the end of 2007 or, later, to ratify it. This is related, among other things, to the legal status of the trade paragraphs and annexes of the Cotonou Partnership Agreement (CPA), the waiver at the WTO, and cohesive aspects of regional integration. It is important to gain insight into these questions to determine the legal and institutional framework for the timely conclusion of the EPA negotiations so as to ensure that the EPAs start being implemented as of 1 January 2008, as well as to identify the legally available options if the EPA negotiations are not finished in time or if some ACP countries decide not to join an EPA. In looking at these questions, careful consideration must be given to the requirements of WTO compatibility as well as the development objectives of the CPA.

It is also important to stress what this study is not about. It is not the purpose of this study to assess whether EPAs should be concluded or not, and by when. Nor does it intend to assess the merits of an EPA or any alternative trading arrangement.

1.1 Legal framework for EPA negotiations

In September 2002, the EU and the ACP States initiated negotiations on economic partnership agreements, 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.

Following a one-year initial phase of negotiations at the all-ACP level, EPA negotiations have been carried out at the regional level, with the six self-determined EPA regional groupings:

- from 4 October 2003 with Central Africa
- 6 October 2003 with West Africa
- 7 February 2004 with East and Southern Africa (ESA)
- 16 April 2004 with the Caribbean ACP
- 8 July 2004 with the Southern African Development Community (SADC)
- 10 September 2004 with the Pacific ACP

The Cotonou Partnership Agreement sets out the basic parameters for the EPA negotiations, particularly the key timeline and procedures (CPA Article 37). 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)).

The more than 7-year-long preparatory period was critical for the effective preparation of the ACP, for timely conclusion of the negotiations and for the smooth transition to an EPA. In this regard, ‘[a]ll the necessary measures shall be taken so as to ensure that the negotiations are successfully concluded within the prepara-

tory period' (CPA Article 37(2)). Trade-related capacity-building initiatives should support the ACP efforts during this period (CPA Article 37(3)):

The preparatory period shall also be used for capacity-building in the public and private sectors of ACP countries, including measures to enhance competitiveness, for strengthening of regional organisations and for support to 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.

The EPA negotiations shall be regularly reviewed in terms of progress in the preparation and the negotiation process, whereas a 'formal and comprehensive review' shall take place in 2006, notably 'to ensure that no further time is needed for preparations or negotiations' (CPA Article 37(4)).

It is also important to note that the ACP countries are under no obligation to conclude an EPA. Least-developed countries (LDCs) benefit from the everything-but-arms (EBA) initiative under the EU Generalised System of Preferences (GSP), which gives their products duty-free quota-free market access to the EU, in line with the provisions made by CPA Article 37(9). This regime, available to ACP LDCs, guarantees them nominal access to the EU that is superior to the one available under the Lomé/Cotonou preferential regime.¹ For those non-LDC ACP countries that would not consider themselves to be in a position to conclude an EPA, 'alternative possibilities' will be examined 'in order to provide these countries with a new framework for trade which is equivalent to their existing situation and in conformity with WTO rules' (CPA Article 37(6)). No ACP country has so far indicated that it will not be in a position to enter into an EPA.²

¹ Many observers have argued that in practice, however, the EBA regime might not be superior to the Lomé/Cotonou regime because of more restrictive rules of origin.

² CPA Article 37(6) indicates that the assessment and possible request to consider alternative arrangements should be made in 2004. At the 29th ACP Council of Ministers held in Gaborone, Botswana, in May 2004, the ACP decided to postpone this assessment exercise to have it coincide with and be conducted in conjunction with the 2006 formal and comprehensive review provided for under CPA Article 37(4). The European Commission responded by indicating that alternatives could be discussed whenever appropriate, at the request of any ACP State. See also Sections 4.3 and 4.4 below.

1.2 *Concluding EPA negotiations: basic scenarios*

The negotiations have been marked by an intense debate, notably on the scope of the agreement, its impact on development, whether it is opportune and, if so, to what extent should specific development provisions be included in an EPA. In addition, ACP countries and regions have faced serious constraints in their capacity to prepare for EPA negotiations and implementation, and the EU has not always responded as promptly as expected to various ACP requests and positions during the negotiations.³ Consequently, the EPA negotiations have faced significant delays in most regions.

Nonetheless, all parties remain committed to conclude the negotiations in line with the timeframe provided by the Cotonou Partnership Agreement, so as to have the EPAs enter into force by 1 January 2008.⁴

In this context, two fundamental questions must be raised:

- (1) What is the procedure for EPAs to be concluded and applied?
- (2) What will happen if EPA negotiations are not concluded in time to apply as of 1 January 2008?

This study aims to address these two questions.

In theory, four basic scenarios can be envisaged, illustrated by Figure 1. In the first case (scenario 1), EPA negotiations are concluded during the second half of 2007 and EPAs are applied as of 1 January 2008. This is the scenario envisaged by the Cotonou Partnership Agreement and to which all parties are formally committed. At this stage, it thus appears to be the outcome aimed at by all the negotiators.

³ For instance, it took almost one year for the EU to respond to the EPA framework proposed by SADC, which required revising the negotiation directives of the European Commission.

⁴ See for instance the joint press release of the German EU Presidency and the ACP of 14 March 2007 on Consensus on Economic Partnership Agreements between EU and ACP Countries, following the informal ACP-EU meeting organised by the German Presidency in Bonn on 13 March 2007, which states that 'In order to ensure that there is no legal vacuum in the trade arrangements, the ACP and EU committed themselves to make every effort to conclude the negotiations by 31 December 2007, mindful of the importance of ensuring that ACP development concerns are fully addressed as an integral part of the Economic Partnership Agreements' (www.eu2007.de/en/News/Press_Releases/March/0314BMZEU-AKP.html and www.acp.int/en/epa/pr_EPA_Bonn_14-3-07_e.htm).

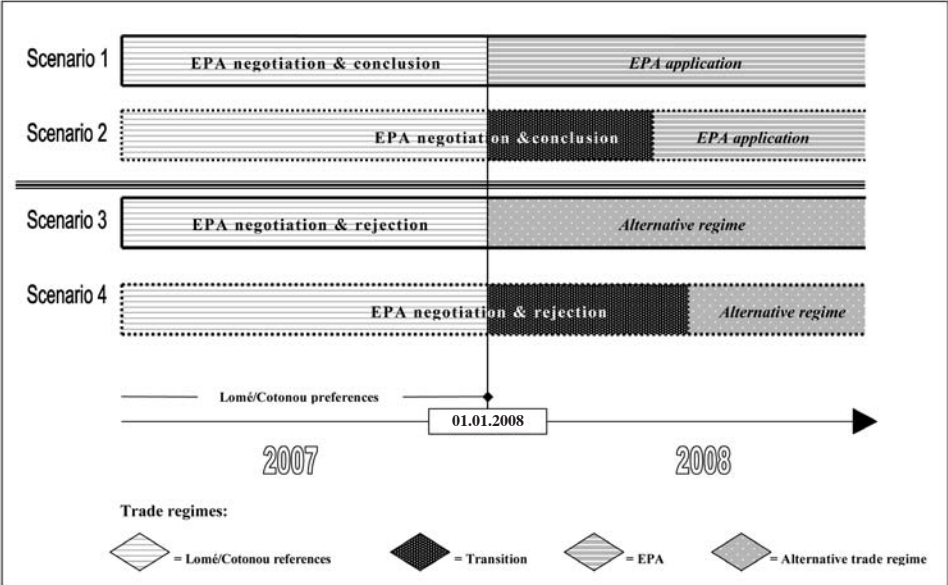
However, for negotiations to be concluded, the EU and the ACP countries of each EPA regional grouping must reach an agreement. It is conceivable that one or more ACP regions negotiating an EPA might not be in a position to reach an agreement with the EU on schedule. In this case, it is possible to envisage that EPA negotiations might continue after 2007 to allow adequate time for their proper conclusion. In this second scenario, the issue is whether it is legally and politically possible to continue negotiating in 2008 and, if so, which transitional trade regime will prevail during this prolonged negotiation period. These two questions are at the centre of this study.

An alternative case would consist of the parties to an EPA negotiation failing to reach an agreement and renouncing the conclusion of an EPA, in which case an alternative trading arrangement must be found. This could happen either within the envisaged framework for the negotiations, i.e., in 2007, as illustrated by scenario 3, or beyond, as illustrated by scenario 4, assuming that negotiations drag on for some time in 2008 before failing. The question of what such an alternative trading arrangement would be does not fall within the scope of this study.⁵

Further complications might arise in the situation where a country within a region might not agree to conclude an EPA, while its regional partners would enter into one. Possible implications are considered in Section 5 of this study. Another nightmare scenario would be for one or several ACP countries to conclude an EPA, which could provisionally be applied, but then fail to ratify the agreement, thus preventing its full entry into force. In this case, trade would take place under an EPA only for a temporary period; failing ratification, an alternative trading arrangement would have to be found.

5 See, for instance, Bilal, Sanoussi and Rampa (2006), ODI (2007), TWN Africa and Oxfam International (2007) and ActionAid (2005).

Figure 1. Basic scenarios for the timing of the conclusion of EPA negotiations



Chapter 2

Baseline scenario: towards a timely conclusion of EPA negotiations and entry into force

2 **Baseline scenario: towards a timely conclusion of EPA negotiations and entry into force**

While the Cotonou Partnership Agreement clearly sets out guiding principles, modalities and procedures for the EPA negotiations, it does not provide any procedure for the conclusion of these new trade agreements. No guidelines have been publicly issued by either the EU or the ACP on this important issue.⁶ What are then the legal requirements?

2.1 Decision-making process

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.⁷ 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;

⁶ For a preliminary discussion, see ACP-EC (2003).

⁷ 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.

- 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.⁸

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.

2.2 *Parties to an EPA*

An important element of consideration in this context is the determination of 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

⁸ 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.

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.⁹

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.'¹⁰

In principle, it appears that the parties to an EPA should be, on the European side, the EC and the EU Member States, in line with their respective areas of competence (as defined by the TEC), 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.

2.3 Provisional application and ratification processes

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.¹¹

9 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, as discussed in Section 5.

10 See African Trade Policy Centre (2007).

11 See Europa (2005) and RNM (2007).

With now 27 EU Member States and at least 6 EPA regional groupings,¹² 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.¹³

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.¹⁴ 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. 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.¹⁵

12 The High Level Task Force of the East African Community (EAC), which currently comprises Kenya, Tanzania and Uganda and will include Burundi and Rwanda, has recommended that the EAC conclude an EPA as one regional entity, independent of the ESA region. Tanzania will have to withdraw from the SADC configuration, while the EAC-EPA configuration will form part of the Accession Treaty by Burundi and Rwanda, due to enter into force in July 2007 (see East African Business Council – EABC Newsflash, 13 April 2007, www.eabc-online.com).

13 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.

14 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.

15 Specific provisions indicating this procedure have been proposed in the draft legal text for an EPA.

In this respect, while it might be convenient to conclude the EPA negotiations by the summer of 2007 (as planned for the Caribbean–EU EPA) so as to allow sufficient time to prepare for the EPA's entry into force on 1 January 2008, at least on a provisional basis, it might be sufficient to conclude the negotiations as late as October or November 2007.

2.4 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).¹⁶ 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 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.

¹⁶ WT/L/671, 18 December 2006, www.wto.org

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.¹⁷ 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.¹⁸



¹⁷ 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.

¹⁸ 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).

Chapter 3

Postponing the deadline to conclude EPA negotiations



3 Postponing the deadline to conclude EPA negotiations

3.1 What does the CPA say?

The Cotonou Partnership Agreement leaves no ambiguity as to the time frame for EPA negotiations. Article 37(1) clearly states the following (*emphasis added*):

Economic partnership agreements shall be negotiated during the *preparatory period which shall end by 31 December 2007 at the latest*. Formal negotiations of the new trading arrangements shall start in September 2002 and *the new trading arrangements shall enter into force by 1 January 2008*, unless earlier dates are agreed between the Parties.

While negotiations could be concluded before the end of 2007, this deadline is binding on all parties engaged in EPA negotiations, and EPAs, if agreed upon, should enter into force no later than 1 January 2008. In first signing and then ratifying the CPA, the EU (i.e., the European Community and Member States) and the ACP States committed to this time frame.

The CPA does not envisage that negotiations could be extended. However, in the situation where a party to the CPA would not consider itself in a position to conclude an EPA negotiation, this deadline could be postponed.

The CPA foresees the possibility for any party to request, after each five-year period and with some time limits, the review of some provisions, which, upon agreement by the parties, could be amended. CPA Article 95(3) specifies the following:

This shall not apply, however, to the provisions on economic and trade cooperation, for which a special review procedure is provided.

Arguably, the special review procedure is the one envisaged by CPA Article 37(4) on the mid-term review of EPAs, according to which (*emphasis added*)

The Parties will regularly review the progress of the preparations and negotiations and will in 2006 carry out a formal and comprehensive review of the arrangements planned for all countries *to ensure that no further time is needed for preparations or negotiations*.

Clearly, the CPA Article 37(4) review provides an opportunity for the parties to consider measures required when necessary to complete the negotiations within the agreed timeframe and, if necessary, to extend it in the case where it would not be possible *‘to ensure that no further time is needed for preparations or negotiations’*.

This is the understanding of the parties to the CPA, who, in a joint declaration on the EPA Article 37(4) Review,¹⁹ indicated that while they would make the appropriate effort for a timely conclusion of the negotiations,²⁰ the review should explicitly assess ‘whether more time is needed to effectively conduct the negotiations’.²¹

3.2 Committed, but not certain

In spite of the fact that all parties are currently committed to the timely conclusion of the EPA negotiations this year,²² some ACP regions or countries may not find themselves in a position to do so. The likeliness of this deadline being met has already been questioned at several levels and on different occasions, not only by civil-society organisations and the private sector, but also at an official level. At the end of 2006, the Economic Community of West African States (ECOWAS) EPA Ministerial Monitoring Committee endorsed a proposal for a three-year extension ‘based on the volume of outstanding tasks, the completion of which determines the viability of the EPA’.²³ However, the ECOWAS-EU negotiators agreed with the European Commission on 4 February 2007 to aim at concluding the negotiations

¹⁹ See ACP-EU (2006).

²⁰ Point 4 of the Joint Declaration reads: ‘The parties to each regional EPA negotiation shall assess jointly the work plan of negotiations, in order to identify any necessary measures to support the timely completion of the negotiations before the January 1st 2008 deadline for entry into force of the new arrangements. Furthermore, the review shall identify any ratification procedures necessary to support the effective implementation of the EPAs in ACP regions.’

²¹ Point 5.6 of the Joint ACP-EU Declaration.

²² See footnote 4.

²³ ECOWAS-UEMOA (2006); see also official press release No 119/2006, 1 December 2006, <http://news.ecowas.int/en/presseshow.php?nb=119&lang=en&annee=2006>

by the end of 2007, given a set of conditions to be met prior to the signing.²⁴ While no other region has officially considered extending the negotiation deadline, the internal Article 37(4) review exercises conducted in Africa revealed that there remain serious challenges to concluding the negotiations in time if EPAs are to be truly development-friendly; negotiations in all regions have suffered major delays due to technical and financial shortcomings and an overall lack of preparedness at the country and regional level. In the ESA and SADC regions, the EC's lack of responsiveness to proposals tabled by the regions has also been highlighted as a factor further hindering the progress of EPA negotiations.

Paramount to these concerns is the need to conclude EPAs that deliver on development objectives, rather than meeting arbitrary deadlines. For instance, earlier this year, Jamaica's Foreign Minister Anthony Hilton reiterated the region's commitment to conclude EPAs as early as September 2007, if possible. At the same time, he highlighted some of the remaining challenges and indicated that 'we will not, however, be forced to adhere to a timeline if we are not satisfied that we have negotiated the best possible agreement for stakeholders in Jamaica and the wider CARIFORUM'.²⁵ More recently, Dr Paul Kalenga, trade policy adviser with the Regional Trade Facilitation Programme and SADC Secretariat, suggested that, in the context of the SADC-EU EPA, 'the likelihood of a deal before the end of the

24 In their conclusions, ECOWAS, UEMOA and the European Commission jointly state the following:

Concerning the end of the 2007 deadline for the signing of the agreement, West Africa and the EC reaffirmed their commitment as a prior condition:

- to define jointly the EPA accompanying programs and their funding by the EC,
- to formulate the market access schedules for the two sides,
- to draft the text of the agreement.

See Negotiation of an Economic Partnership Agreement between West Africa and the European Community, Conclusion of the Meeting of Chief Negotiators, Brussels, 5 February 2007, http://trade.ec.europa.eu/doclib/docs/2007/february/tradoc_133250.pdf

25 In particular, Mr Hylton was quoted by the Jamaica Observer (2007) as saying:

While I am pleased to report that considerable progress has been made in a number of areas, significant challenges remain and which must be overcome if we are to attain the critical objectives that have been established. . . .

It is hoped that the 2007 EPA negotiating schedule will be sufficient to allow for the conclusion and entry into force of the agreement by January 2008. Ministers have agreed to the scheduling of a series of technical negotiating group sessions which will culminate with a ministerial meeting in September where, if possible, they will be in a position to sign the agreement.

In this context, I must emphasise that this remains the goal to be pursued by both sides in the negotiations. We will not, however, be forced to adhere to a timeline if we are not satisfied that we have negotiated the best possible agreement for stakeholders in Jamaica and the wider CARIFORUM, since this agreement will constitute the regime for trade with the European Union for the foreseeable future.'

year appears remote'.²⁶ In this context, it is telling that the European Commission seems to finally acknowledge that a short extension might be necessary for West Africa.²⁷

3.3 *The CPA Article 37(4) EPA review*

The CPA Article 37(4) EPA review in each of the six EPA regional groupings could lead in principle to three different possible outcomes:

- (1) **Case 1:** *No extension of the negotiations is sought as a result of the review. Negotiations are concluded in 2007 and EPAs provisionally enter into force as of 1 January 2008. This is the scenario to which the ACP and the EU seem to adhere, in line with their CPA commitment (see Section 2).*
- (2) **Case 2:** *The review calls for more time for the negotiations, to be continued in 2008. A solution must be found within the legal logic of the CPA.*
- (3) **Case 3:** *No additional time for EPA negotiations is requested by the review, but some ACP countries or region(s) fail to reach an agreement with the EU on EPAs before the end of 2007. A solution must be found within the spirit of the CPA.*

Only cases 2 and 3 would raise legal and institutional concerns.

In case 2, the EU and the ACP would have agreed that they were no longer in a position to conclude an agreement, according to the timeline prescribed in CPA Article 37(1). While this is the logical conclusion of the application of CPA Article 37(4) on the review, the CPA is silent as to whether, and if so how, the preparatory period for the application of an EPA can be extended. The parties would have had to agree on the modalities to extend the negotiations. In practice, a decision by the joint ACP-EU Council of Ministers (CPA Articles 14 & 15) should have been sufficient to pursue the negotiations beyond 2007. The decision could even have been taken in writing, by a formal exchange of letters, upon recommendation by the Joint

²⁶ In Business Day (2007).

²⁷ See Thomson (2007).

ACP-EC Ministerial Trade Committee (CPA Article 38). This would have required a prior decision by the appropriate ACP institutions/bodies in the EPA regional grouping concerned and by the Council on the EU side. Provided this decision would have been non-controversial, a written procedure might have sufficed, possibly through the Committee of Permanent Representatives (Coreper),²⁸ Formal approval by EU Member States might not have had to be requested, unless a Member State would have opposed the decision by arguing that extending the deadline for the EPA negotiations would be in breach of CPA Article 37(1) and thus would require a formal amendment of that provision.

In case 3, the legal situation is *a priori* more complex, as not foreseen in any way in the framework of the CPA. The EU would be put in the position of having to confront a kind of *fait accompli*, with the concerned ACP party indicating its inability or unwillingness to conclude the negotiations by the time set by CPA Article 37(1). In this case, either

- (i) the EU would refuse to continue the negotiations, and the ACP country(ies) or region(s) concerned would have to abandon the prospect of signing an EPA with the EU in the context of the CPA, in which case an alternative trade regime would have to be found;²⁹ or
- (ii) the EU would agree with the ACP request and a way would have to be found to pursue the negotiations in 2008. Arguably, however, such a situation is not covered by the CPA.

²⁸ The Council decision should give the Commission the mandate to negotiate beyond 2007, *de facto* amending the Council Directives to the European Commission for the negotiations of EPAs, which states, in line with CPA Article 37(1), that 'Negotiations should be concluded in 2007, at the latest'. Although not a public document, the EC mandate for EPAs has been posted by NGOs on <http://server2.matematici.com/epa-watch/index.jsp?id=137>

²⁹ This situation would then refer to scenario 3 illustrated in Figure 1.

By not raising the issue during the comprehensive EPA review under CPA Article 37(4), the parties would have legally bound themselves to concluding the negotiations by the end of 2007.³⁰ Yet, as this is ultimately a political decision, the concerned parties could agree to pursue the negotiations following a joint decision.

The texts of the joint ACP-EU review of the EPA negotiations for the 6 EPA regional groupings have been approved by the ACP-EC Council of Ministers meeting in Brussels on 25 May 2007.³¹ With respect to the schedule of negotiations, the ACP and the EU jointly stated that

The ACP and EC recognize that the negotiations are behind schedule and that they have fallen behind the previously agreed roadmaps and timelines. The ACP and EC agree that the capacity of the ACP States to assume obligations needs to be taken into account in defining the length of transition periods. However, the ACP and the EC have expressed their commitment to make every effort to address outstanding issues and conclude on time in order to avoid any disruption of trade.

The parties recognize that some difficulties have been encountered and that a number of steps need to be undertaken to accelerate the negotiations in 2007 for their timely conclusion. Yet, the parties have made no suggestion 'further time is needed to effectively conduct the negotiations'. Case 2 is therefore no longer relevant. It remains to be seen which of case 1 or case 3 will materialise. Informally, many ACP stakeholders and observers have warned of the likelihood that some ACP countries will not be able to conclude an EPA by the end of 2007.

³⁰ This reasoning is based on the interpretation that CPA Article 37(4) is the only way explicitly foreseen in the CPA to possibly extend the preparatory period and negotiations, should the parties be unable to ensure that no further time is needed, and that this assessment can be carried out only during the 2006 formal and comprehensive review. According CPA Article 37(4):

The Parties will regularly review the progress of the preparations and negotiations and, will in 2006 carry out a formal and comprehensive review of the arrangements planned for all countries to ensure that no further time is needed for preparations or negotiations.

In this case, the reading of CPA Article 37(4) is that 'The Parties . . . will in 2006 carry out a formal and comprehensive review of the arrangements planned for all countries to ensure that no further time is needed for preparations or negotiations.' However, a different legal interpretation is conceivable, where CPA Article 37(4) could be read as follows: 'The Parties will regularly review the progress of the preparations and negotiations . . . to ensure that no further time is needed for preparations or negotiations.' This would suggest that the review on the progress of the negotiations could be carried out at any time (i.e., 'regularly') and would not need to be either comprehensive or formal. However, the comma after the second 'and' in this Article suggests that it is indeed only in the formal review that the time issue will be assessed.

³¹ See ACP-EC (2007) and Council of the European Union (2007).

3.4 *The trade-regime transition*

The main challenge related to the extension of EPA negotiations into 2008 does not rest, however, on legalistic considerations regarding the negotiation process. The main issue at stake is the trade regime that would be available during the prolonged negotiations to the ACP countries that will not have signed an EPA by 1 January 2008.

In an attempt to tackle what he refers to as the ‘myths about EPAs’, EU Trade Commissioner Peter Mandelson (2007) has argued the following (*emphasis added*):³²

... the EU isn't steamrolling ACP regions into having these negotiations completed by the start of next year. *That deadline is imposed by the expiry of the legal protection at the WTO for our existing trade agreements which are based on preferential access and break WTO rules.* Our goal is to put a new system in place that finally puts an end to preference systems that divide ACP regions with different duties for different countries. If we don't have the new system in place we will have to fall back on alternatives with less generous market access. Meeting the deadline is not just about complying with WTO rules. It means not having to go, cap in hand, to other WTO members – asking for further concessions that they are likely to refuse.

So the importance of a new agreement by 2008 is not a threat – it's a reality. That is why *both the EU and ACP governments agree we can deliver pro-development agreements on time* and have said so publicly. *We also agree our real challenge is not signing EPAs on time but signing EPAs that deliver development.*

³² See Mandelson (2007).

His remarks result from the following key considerations:

- The Cotonou Partnership Agreement provides for a preparatory period (2000–2007) during which the EPA negotiations take place (CPA Article 37(1)) and the non-reciprocal preferential trade regime of Lomé/Cotonou is maintained (CPA Article 36(3) and CPA Annex V and its attached Protocols).
- The Lomé/Cotonou types of preferences are non-reciprocal and arbitrarily discriminatory, thus in violation of the non-discrimination and most-favoured nation (MFN) principles of GATT Article 1 and not covered by the Enabling Clause on trade preferences in favour of developing countries or by GATT Article XXIV on RTAs.
- In order to comply with its WTO obligations, the EU sought a waiver in 2000 (which was granted by WTO members on 14 November 2001) for the continuation of the Lomé/Cotonou preferential regime during a temporary period (i.e., until 31 December 2007 and, under specific conditions, until 31 December 2005 for the banana regime).³³
- Membership in the WTO and the Cotonou Partnership Agreement (e.g., CPA Articles 34(4), 36(1) and 37(6&7)) require the trade regime of the EU and the ACP to conform with WTO rules.
- Therefore, from 2008, either the ACP-EU trade regime must be in compliance with WTO rules or a new WTO waiver must be obtained.
- A new WTO waiver is unlikely to be granted, or granted at a very high cost, since some WTO members are strongly opposed to the EU regime of preferences to the ACP, and the EU is not willing to pay that price.
- Hence, the EU preferential trade regimes available for ACP countries in 2008 will be either WTO-compatible EPAs in the sense of GATT Article XXIV or the EU GSP, which falls under the Enabling Clause.

³³ See WT/MIN(01)/15 and WT/MIN(01)/16, respectively, 14 November 2001, www.wto.org

3.5 CPA and WTO obligations regarding the transitional regime

The loss of Lomé/Cotonou preferences in 2008, while fully complying with the WTO rules, may, however, seriously undermine some of the core objectives of the CPA, notably:

The partnership shall be centred on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy. [CPA Article 1; emphasis added]

By offering a transitional trade regime, albeit for a temporary period, under which the ACP countries that have not signed an EPA by 2008 would be worse off than they are under their current situation, the EU could be perceived as adopting a strategy that runs counter to the central CPA objective of poverty reduction.³⁴ In independent legal advice, Cook (2005: p.12) has suggested the following:³⁵

Taken together with Article 18, which requires the development strategies and economic and trade cooperation to be ‘interlinked and complimentary’, it is clear in my view that any action pursuant to the Agreement which tended to undermine the effort towards poverty eradication would be inconsistent with the central objective of the Agreement. Article 18 confirms, in my view, that action taken in the field of economic and trade cooperation must in any event aim to fulfil the objectives of the development strategy (set out in Article 19).....

In this respect, the alleged EU unwillingness to consider trade regimes that would seek to maintain preferences for the non-LDC ACP states could suggest that the EU is not taking all appropriate measures to facilitate the attainment of the CPA objective, contrary to the requirements of CPA Article 3:

The Parties shall, each as far as it is concerned in the framework of this Agreement, take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement and to

³⁴ See also CPA Second Recital to the Preamble and CPA Articles 19(1) and 34(1).

³⁵ See Cook (2005).

facilitate the attainment of the objectives thereof. They shall refrain from any measures liable to jeopardise these objectives.

Conversely, the EU could argue that by negotiating an EPA in good faith since September 2002 and by accepting to continue the negotiations after the 2007 deadline to respond to the needs and wishes of the concerned ACP State(s) and/or region(s), the EU ‘take[s] account of the different needs and levels of development of the ACP countries and regions’ (CPA Article 35(3)), ‘thereby promoting [ACP States’] sustainable development and contributing to poverty eradication in the ACP countries’ (CPA Article 34(1)), in line with the core objective of the CPA of poverty eradication. It could further be argued that since no ACP country has formally requested the consideration of alternative possibilities to EPAs, the EU is under no obligation under CPA Article 37(6) to examine such alternatives ‘in order to provide these countries with a new framework for trade which is equivalent to their existing situation’. However, the EU and the ACP have jointly committed to a trade regime that conforms to WTO rules (CPA Articles 34(4), 36(1&4) and 37(6&7)), and that following the expiry of the WTO waiver, the only WTO-compatible preferential trade regime is the GSP (see Section 4.3). Hence, the EU could claim to have taken all appropriate measures to achieve the CPA objectives while respecting its international commitments (at both WTO and CPA levels).

In its legal opinion on the preferential regime applicable to non-LDC ACP products in the absence of an EPA by 1 January 2008,³⁶ the Commonwealth Secretariat has made several other relevant arguments, centred on three main considerations:

- (i) the deadline for the preparatory period during which an EPA should be negotiated;
- (ii) the requirement to provide a preferential trade regime equivalent to their existing situation to those ACP non-LDCs that are not in an EPA;
- (iii) the balance of commitments between the WTO and CPA.

(i) Deadline of the preparatory period

As previously mentioned, the CPA provides for a preparatory period (2000-2007) during which preparation and negotiation of EPAs should take place. The Commonwealth Secretariat notes that the deadline of the preparatory (or

³⁶ Commonwealth Secretariat (2007).

transitional) period is dependent on a number of factors, including capacity-building initiatives as listed in CPA Article 37(3), which should be reviewed according to CPA Article 37(4), notably with regard to the time needed for the completion of the negotiations. Hence, the deadline is not a fixed one.

(ii) Equivalent trade regime

According to CPA Article 36(3), the Lomé/Cotonou preferences are maintained during the preparatory period 'in order to facilitate the transition to the new trading arrangements'. Should the preparatory period be extended, the need to facilitate the transition to EPAs remains. Thus, Lomé/Cotonou types of preferences, or an equivalent WTO-compatible trade regime (CPA Article 37(6)), should be provided.

The Commonwealth Secretariat reaches a similar conclusion, arguing that:

The fundamental undertaking of the EC in terms of the Cotonou Agreement is, in fact, clear. It is on the one hand, to facilitate the necessary preparations so as to ensure the entry into force of EPAs by 1 January 2008 or, on the other, to ensure, for those ACP non-LDCs which have decided that they are not in a position to enter into EPAs, that alternative trading arrangements are in place to provide for their exports a trading regime which is equivalent to the existing situation.

It would seem incongruous to argue that an ACP country negotiating an EPA in good faith but failing to conclude arrangements by 1 January 2008 should be treated worse off than another, with perhaps greater foresight, which decided it was not in a position to enter into such arrangements. The mere fact that no ACP State in 2004 indicated that it was not in a position to enter into EPAs does not allow for the suggestion that Article 37(6) has fallen into desuetude or is somehow now obsolete.

To support this view, one could further argue that the 2004 deadline is merely indicative, as apparently agreed in 2004 by the European Commission, which indicated that alternatives could be discussed whenever appropriate, at the request of the ACP.³⁷ An ACP country that intended to conclude an EPA but failed to do so by

³⁷ See footnote 2.

the end of 2007 would de facto ‘not [be] in a position to enter into [an] economic partnership agreement’, and would thus require ‘a new framework for trade which is equivalent to their existing situation’ (CPA Article 36(6)).

It follows that the EU would not be in compliance with its CPA obligations if, after 2007, it did not grant a transitional trade regime to ACP non-LDCs that had not yet signed an EPA – a trade regime, such as the standard GSP, that was not at least equivalent to the Lomé/Cotonou preferences.³⁸

(iii) The balance of commitments between the WTO and CPA

Starting from the observation that the EU gives primary importance to its commitment to comply with WTO rules, the Commonwealth Secretariat Opinion assesses the EU obligation to the WTO in view of its CPA commitments. This is of particular relevance here because several CPA trade provisions refer simultaneously to development-related objectives and the requirement for WTO compliance.

The Legal Opinion starts by noting that international agreements ‘shall be binding on the institutions of the Community and on the Member States’ (TEC Article 300(7)), in the sense that they form an integral part of Community law. It goes on by arguing that in Community jurisprudence, the ACP-EC partnership agreements (or at least some of their provisions) have been regarded as having a ‘direct effect’ (i.e., giving rights to individuals to invoke the provision in national court), whereas such direct effect has been denied for the GATT 1947:

The status of the Lomé *acquis* within Community law, now represented by the Cotonou Agreement, is well recognized and provides a basis for asserting rights as well as a standard of review of the legality of Commission and/or Member States’ actions. Conversely, the WTO Agreements do not provide a general standard against which Community laws are to be tested. They are a relevant reference only where Community legislation, expressly or by implication, is aimed at implementing particular WTO obligations.

In the context of CPA Article 37(6), the EU might have ‘to provide these countries with a new framework for trade which is equivalent to their existing situation

³⁸ See Commonwealth Secretariat (2007); this is also the conclusion reached by ODI (2007).

and in conformity with WTO rules' (*emphasis added*); hence, the Opinion argues that in relying on the standard GSP for non-LDCs that have failed to conclude an EPA before 2008, the EU wrongly gives preference to the WTO compatibility of the alternative trade regime over the requirement for equivalent preferences:

Annex I of Council Regulation (EC) No 980/2005 lists ACP non-LDC countries as among the potential beneficiaries of the standard EC GSP scheme. It is therefore argued that in the absence of an express extension of the preferential regime of the Cotonou Agreement by the Commission or conclusion and entry into force of EPAs, the GSP regime would apply as the relevant WTO-compatible option.

The argument, however, is flawed. It gives precedence to the requirement of WTO-compatibility in defining new trading arrangements, and fails to recognize the continuing validity of the Cotonou Agreement (including the commitment to provide Cotonou equivalent preferences even after 1 January 2008) in Community law.

It is not clear why the Opinion stresses the 'direct effect' argument. First, to have a direct effect, a CPA trade provision would have to be directly related to a specific trade measure, not a general intention. Whether or not CPA Article 37(6) has direct effect or not would ultimately have to be decided by the European Court of Justice. But more importantly, irrespective of whether a trader can directly challenge a trade measure under that Article, it is still binding under Community law.

Aside from these specific legal considerations, the key argument remains that the EU has a dual obligation under CPA Article 37(6) to provide an equivalent trade regime and to comply with WTO rules. As suggested in the Opinion:

WTO-compatibility in the post-1 January 2008 ACP-EC economic and trading relations, failing entry into force of EPAs by that date, could be sought through an appropriate WTO waiver extending the transitional period. The challenges this may present do not absolve the Parties of their obligations under the Cotonou Agreement.

In the absence of an equivalent alternative trade regime, the EU might thus have an obligation to request an extension of the waiver. Only if the waiver extension is not granted could the EU then claim that it has no further obligation to provide an equivalent trade regime since it cannot comply with WTO rules.³⁹

From a development perspective, it also appears necessary to ensure the smooth transition of trade regimes between 2007 and 2008, so that ACP exports do not face any sudden (although temporary) loss of preferences. To this end, the African Trade Ministers have urged ‘all the parties to take stock of the negotiations and explore all alternatives to ensure that there is no disruption of mutual trade, including whether to extend the period of negotiations’.⁴⁰ Similarly, members of the European Parliament have raised similar concerns. The EP Committee on International Trade, in its report on EPAs, called⁴¹

... on the Commission not to exert undue pressure and – in the event of negotiations not being completed by 1 January 2008 – make efforts at WTO level to seek to ensure that disruption of existing ACP exports to the EU is avoided pending a final settlement.

Whereas, the Socialist Group in the European Parliament, in an open letter,⁴² requested the following:

the Commission must ensure that if negotiations cannot be completed before the end of 2007, arrangements will be made to avoid uncertainty for our ACP partners. This requires a guarantee that, regardless of the state of EPA negotiations at that time, ACP terms and conditions of access to the EU market will remain unchanged. If the negotiations need more time, time should be taken.

The next Section will review and assess the legal standing of possible EU preferential-trade regimes for the ACP should the EPA negotiations continue after 2007.

³⁹ See Section 4.4 for further discussion on the waiver.

⁴⁰ *Addis Ababa Ministerial Declaration on Economic Partnership Agreements Negotiations* at the 3rd Extraordinary Session of the Conference of Ministers of Trade of the African Union, in Addis Ababa, 15-16 January 2007, www.uneca.org/eca_resources/news/2007/EPA_Addis_Ababa_Ministerial_Declaration.pdf

⁴¹ Committee on International Trade (2007).

⁴² Napoletano et al. (2007).



Chapter 4

Potential transitional trade regimes for the ACP during EPA negotiations after 2007



4 Potential transitional trade regimes for the ACP during EPA negotiations after 2007

What are the options for ACP countries or regions that would have difficulties in concluding an EPA by the end of 2007?

4.1 *Option 1: a comprehensive EPA*

The officially and publicly favoured option by the EU and ACP negotiators is to enhance their efforts to surmount any obstacle faced during the negotiations, speed up the preparation for an EPA and ensure the successful conclusion of the negotiations before the end of 2007. This is the baseline scenario discussed in Section 2 and illustrated in Figure 2 as option 1.

However, this option might be perceived as undesirable by some if the timely conclusion of the EPA negotiations were achieved at the cost of the development objectives of an EPA. In this respect, the Commonwealth Secretariat has observed as follows:⁴³

Admittedly an impending deadline can introduce pressures into the negotiations that are in part psychological. Such pressures though have a greater impact on and exacerbate the vulnerability of those with relatively more at stake, particularly when they are in weaker bargaining positions. A looming deadline can certainly help focus negotiations and expedite agreement, but it can also have an autonomous adverse impact on the process particularly if a party feels that in order to avoid the unwanted consequences of delay it is obliged to make concessions so as to reach an accord even if on unsatisfactory terms.

While concessions are inherent in any trade negotiation, they should not be to the detriment of well-elaborated development considerations. In the words of EU Trade Commissioner Peter Mandelson (2007), the ‘real challenge is not signing

43 Commonwealth Secretariat (2007).

EPAs on time but signing EPAs that deliver development'. In taking the decision to delay the conclusion of an EPA, the party concerned must weigh the advantages of additional time (likely to be a few weeks or months) for the preparation and negotiation of an EPA against the potential inconvenience in terms of delay in the implementation of an EPA, as well as the stability and certainty of the transitional trade regime and other legal, institutional and political implications. A small delay in the application of an EPA might be worthwhile if it results in a more development-enhancing EPA over the long run. Conversely, the prospect of marginal amendments of no substantive value to a proposed EPA might not warrant the institutional hassle or temporary disruption of trade that the continuation of EPA negotiations into 2008 could entail.

The aim of this study is not to assess the potential merits of continuing the EPA negotiations after the end of 2007. It is only to outline the potential options and their main legal and institutional implications. Assuming that an ACP country or EPA regional grouping should not be in a position to sign an EPA before 2008, several options (presented schematically in Figure 2) can be identified.

4.2 Option 2: a narrow or phased EPA

The proposed EPAs cover a large number of areas, reaching far beyond standard trade issues and ranging from eliminating trade barriers on substantially all trade between the parties, to addressing technical barriers to trade, standardisation, certification, sanitary and phytosanitary measures, to simplifying rules of origin to some trade-related issues, possibly including aspects of trade facilitation, investment, competition, government procurement, intellectual property, environment and labour, etc. The scope and depth of the proposed agenda has created numerous challenges for ACP negotiators. While such elements are considered by some as fundamental if EPAs are to deliver on their development promises, they may also have crystallised tensions between the negotiators and stretched the negotiating capacity of some ACP countries and regions.⁴⁴

⁴⁴ For an overview of the capacity constraints experienced by the ACP countries and regions in conducting EPA negotiations, see ECDPM (2007) and Bilal et al. (2006).

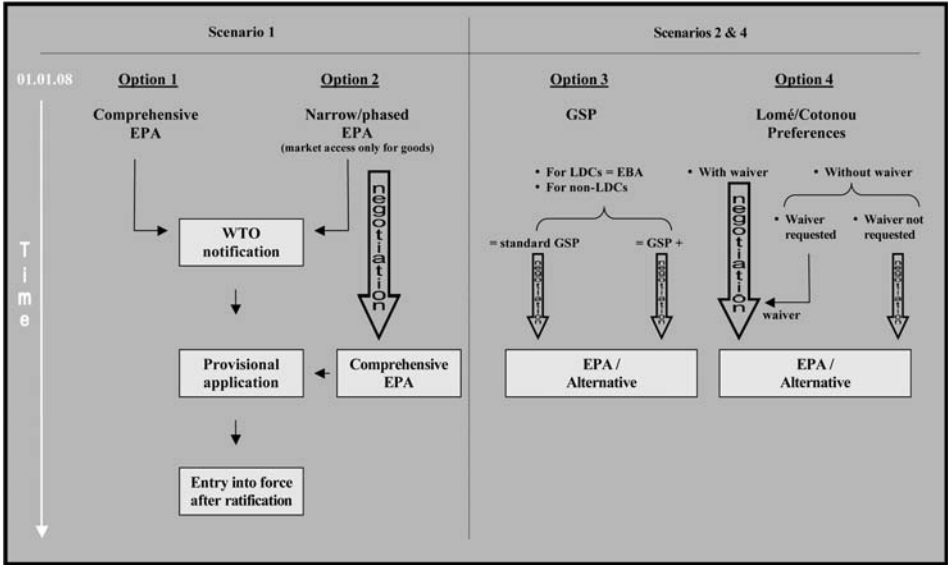
(i) Legal considerations

If more time is required to negotiate these broader trade aspects and complementary development provisions, an option would be to conclude a narrow EPA (also referred to as 'EPA light') by the end of 2007. This narrow EPA would cover only (or at least) the dismantlement of trade barriers on goods, which is the only issue at stake for compatibility with WTO rules (see Option 2 in Figure 2).⁴⁵ In other words, negotiators would only have to agree on the product cover and schedule of liberalisation on goods and agricultural products in conformity with GATT Article XXIV. Other areas where an agreement has been reached could, of course, be included as well but would have no bearing on the WTO compatibility of the new trade regime notified under GATT Article XXIV. To the extent that they do not affect the condition that 'the duties and other restrictive regulation of commerce ... are eliminated on substantially all the trade between the constituent territories in products originating in such territories' (GATT Article XXIV:8(b)), pending issues could be negotiated by the parties after 2007, without preventing the notification of an EPA and its implementation by 1 January 2008.

The 'narrow EPA' option has been favourably considered by several technical experts and some officials in ACP countries. It has, a priori, the merit of removing some of the pressure on ACP negotiators to reach an agreement on a broad range of issues before the end of year, while maintaining or improving the preferences currently enjoyed by the ACP, in a manner compatible with WTO rules. In addition, the prospect of continuing the negotiations and possible built-in agenda could allow the parties to address other trade-related issues and development provisions in a timely manner, if they so wish, and at a speed they would agree to. In this sense, this option might better be referred to as a 'phased EPA'.

⁴⁵ For a discussion on the concept of 'EPA light', see Bilal and Rampa (2006).

Figure 2. Possible (transitional) trade regimes after 2007



Yet, a problem faced by some ACP countries is identification of their sensitive products, consolidation of a common list of products at the regional level to be excluded from liberalisation and a common schedule of liberalisation for other products. Should an EPA regional grouping fail to reach agreement on a detailed product-specific schedule, a possible option would be to agree on only a liberalisation framework as part of an EPA, which could be notified to the WTO by 1 December 2008. Indeed, Article XXIV:5(c) requires that an interim agreement leading to the formation of an RTA ‘shall include a plan and schedule for the formation of such [an RTA] within a reasonable length of time’. How detailed such a plan and schedule should be is not specified. Accordingly, it might be sufficient for the ACP and the EU to agree on the phasing-in of their liberalisation commitments, identifying stages of tariff dismantlement by categories of products over the transitional period. A list of products could be specified for the initial period but could remain open for negotiation for the following periods. This could, for instance, follow European Commissioner Peter Mandelson’s recent suggestion that the EPA schedule for the ACP could comprise bands of liberalisation – one for immediate liberalisation, one with a transition period up to 10 years, transition periods up to 15 years and finally one with sensitive items for periods of liberalisation transition

up to 25 years.⁴⁶ The EU has already outlined its market-access offer.⁴⁷ In due time (i.e., at dates that may be enshrined in a legal provision of the EPA), further specification of the liberalisation schedule could then be agreed upon by the parties and then notified to the WTO, in the spirit of GATT Article XXIV:7(c) and paragraph 14 of the WTO Transparency Mechanism for RTAs (WT/L/671).

It is important, however, that a concrete plan and schedule for liberation be notified to the WTO. Otherwise, WTO members may determine the liberalisation schedule that the EPA parties will have to follow, an obviously undesirable perspective for both the ACP and the EU. Indeed, the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 indicates that (paragraph 10):

Should an interim agreement notified under paragraph 7(a) of Article XXIV not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall in its report recommend such a plan and schedule. 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. Provision shall be made for subsequent review of the implementation of the recommendations.

As a consequence, all RTAs notified to the WTO, even though in the form of an interim agreement, provide for a plan and schedule of liberalisation, as specified by the parties and in accordance to GATT Article XXIV:5(c). Interestingly, the WTO decision of 14 December 2006 on the transparency mechanism for RTAs does require, in paragraph 2(a)(ii) of its Annex, that the parties shall submit, at the tariff-line level ‘when the agreement is to be implemented by stages, a full listing of each party’s preferential duties to be applied over the transition period’. Strictly interpreted, this might suggest that a liberalisation schedule fully specified for substantially all trade covered by the RTA should be provided. However, since subsequent changes affecting the implementation of the RTA are possible, some leeway might be offered in determining the specific product coverage and liberalisation schedule when the RTA is initially notified. Ultimately, in the absence of a WTO ruling, these

⁴⁶ Suggestion made at the Joint ACP EU Development Council meeting in Bonn on the 13th March 2007 in Bonn; see Julian (2007).

⁴⁷ See EC (2007a).

considerations are subject to legal interpretation. Should a WTO member be of the opinion that the plan and schedule framework in an EPA is not sufficiently specified, it would then have to challenge it under the WTO mechanism for settling disputes, thus engaging what could be a lengthy litigation process (see Section 4.4 and, notably, Figure 3).

(ii) Political considerations

This option, however, has several potential side-effects, which might make it less attractive to some parties. For instance, the potential synergies and trade-offs between the various dimensions of an EPA would be lost. From the EU perspective, EU negotiators might have more difficulty bringing some ACP negotiators back to the negotiating table – those that might be reluctant to take some trade-related issues on board and include them in a revised, extended EPA after 2007. The momentum of the negotiations might also be diminished. In addition, by agreeing to sign a narrow free-trade agreement with some ACP countries, the EU would set a precedent while, at the same time, they are initiating broad free-trade negotiations with other developing partners in Latin America and Asia. From an ACP perspective, trade-offs and cross-bargaining between concessions on market access and other trade(-related) issues would no longer be possible.

Interpretations might diverge as to whether such a narrow EPA would comply with all the provisions of the CPA. The EU has long argued that EPAs are an integral element of the CPA provisions for economic and trade cooperation, and that they should therefore address the broader issues of cooperation outlined in CPA Articles 34 to 54. Hence, EPAs should aim not only at ‘removing progressively barriers to trade between [the Parties]’, which a narrow EPA would do, but also at ‘enhancing cooperation in all areas relevant to trade’ (CPA Article 36(1)), which arguably only a ‘comprehensive EPA’ would achieve. In addition, the CPA does not foresee a multi-stage negotiation process for EPAs, but one single preparatory period with the conclusion of formal negotiations by the end of 2007 (CPA Article 37(1)).

Others might argue, on the contrary, that ‘economic and trade cooperation shall build on regional integration initiatives of ACP States’ (CPA Article 35(2)), which might not entail some elements of the economic and trade cooperation outlined in the CPA, and that such ‘[e]conomic and trade cooperation shall take account of

the different needs and levels of development of the ACP countries and regions' (CPA Article 35(3)). As a consequence, the coverage of an EPA does not have to include specific provisions on all the trade areas mentioned in the CPA; enhanced cooperation in these areas might rest on best endeavour and simple reference to the relevant CPA provisions. In addition, the fact that the CPA does not explicitly provide for further EPA (built-in or parallel) negotiations to be pursued after the conclusion of a basic (i.e., narrow) EPA in 2007 does not prevent this from taking place.

Ultimately, the willingness to adopt this option will depend on the political will and agreement among the parties.

Should some ACP countries or EPA regional groupings not be able to finalise their EPA negotiations by the end of the year, what could the possible transitional trade regimes be while they continue negotiating?

Two additional sets of options can be envisaged, as outlined in Figure 2:

- Option 3, whereby the ACP countries that have not concluded an EPA would benefit from the one of the schemes provided under the EU generalised system of preferences; this option emphasises the notion of compliance with WTO rules;
- Option 4, whereby the ACP countries that are still negotiating an EPA in 2008 could continue to benefit from the current Lomé/Cotonou trade regime of preferences; this option stresses the notion of a transitional trade regime in 2008 equivalent to their existing situation.

4.3 Option 3: GSP as transitional regime

As discussed in previous Sections, the current Lomé/Cotonou regime of preferences applies through the preparatory period, starting from March 2000 (the date of CPA application) until 31 December 2007. Since 14 November 2001, these preferences have been covered by a waiver.⁴⁸ From 1 January 2008, the current

⁴⁸ See footnote 33.

Lomé/Cotonou trade regime will automatically be suspended, unless otherwise decided by the EU.

(i) The GSP framework

Under the existing EU policy framework for external trade, the ACP countries not part of an EPA will be able to export their products to the EU under either the MFN regime (i.e., without any preference) or the EU GSP, which provides a graduated system of arrangements, in increasing order of preference:⁴⁹

- the general arrangement (or standard GSP): available to all developing countries (DCs) in a graduated manner, depending on the sensitivity of products and the competitiveness of the DC concerned;
- the special incentive arrangement for sustainable development and good governance, which targets vulnerable countries (or GSP+): available as an exception to the general arrangement since 2005 and for the period 2006-2008 to DCs that
 - (i) have made a valid request to that end to the Commission by 31 October 2005;
 - (ii) are considered to be vulnerable due to their lack of diversification and insufficient integration into the international trading system;
 - (iii) have ratified and effectively implemented most of the 27 international conventions (in principle, all of the 16 conventions on core human and labour rights, and at least seven of the conventions related to the environment and governance principles, and all by the end of 2008).
- the special arrangement for LDCs (or EBA): providing duty- and quota-free market access, available to all LDCs (with some minor product exceptions until 2009).

Under the current system, the ACP countries, which already qualify under the EU GSP, are able to export their products to the EU under:

- the EBA regime for ACP LDCs;
- the standard GSP for ACP non-LDCs.

⁴⁹ See Regulation (EC) No 980/2005.

(ii) Switching from the Lomé/Cotonou regime to the standard GSP: loss of preferences

This is the fall-back option currently considered by the European Commission should an ACP fail to conclude an EPA by the end of this year. It will not require any specific decision by the EU or the ACP and no transitional arrangement will be needed. This regime is also fully compatible with WTO rules and does not depend on any waiver.

While this is certainly the simplest option for the EU, it is also the most damaging for ACP countries from a development perspective (at least for the non-LDCs), as preferences will be significantly eroded. In a report parallel to this one, also conducted for the Dutch Ministry of Foreign Affairs by the Overseas Development Institute (ODI), Dr Chris Stevens concluded the following from his minimalist estimations of the costs to the ACP of exporting to the EU under the GSP:⁵⁰

. . . application of the Standard GSP regime does not fulfil the commitment made by the EU in Article 37 (6) of the Cotonou Agreement. It would result in the EU taxing ACP exports, generating revenue that compares unfavourably with aspects of Union-level aid, and is likely to result in the complete cessation of some ACP exports to the EU with significant adverse economic effects.⁵¹

⁵⁰ ODI (2007).

⁵¹ In particular, assessing the immediate costs of the standard GSP for ACP non-LDCs, the ODI report estimates the following:

If the tariffs of 10 percent or less imposed on non-LDC ACP states were absorbed by exporters in order to avoid any decline in exports compared to 2005, there would be a transfer from the ACP to the European treasuries of some € 156 million per year (equivalent, for example, to 2.6 times EuropeAid's commitments to health projects in all ACP states in 2005).

This would be the minimum cost to the ACP on those products facing relatively moderate tariff hikes since it assumes that the EU tax increase can be absorbed without a decline in exports. More probably, at least over the medium term, some exports of some items from some countries will decline as production moves to locations which do not need to pay the import tax and, hence, are more profitable.

But the precise pattern of change is not predictable.

In another study on Namibia, ODI estimates the costs of switching from Lomé/Cotonou preferences to the standard GSP as € 45.15 million per year, which is more than four times the aid annually received by Namibia under the 9th EDF. See Stevens, Meyn and Kennan (2007) and Tjaronda (2007).

Another conclusion is that application of the Standard GSP would not put the ACP on a level playing field with other suppliers to the EU. In many cases competitors receive more favourable, non-reciprocal access than would the non-LDC ACP. The ACP would be disadvantaged compared to some other developing countries, increasing the likelihood that exports will slump.

Oxfam International and Third World Network (TWN) Africa reached similar conclusions in their study, noting the following:⁵²

The EC's offer of standard-GSP to ACP countries if they do not meet the December deadline is not an option. The costs of switching back from Cotonou preferences to standard GSP tariffs would be very high and ACP countries have reason to be concerned.

In a recent paper on EPAs, the European Commission has recognised the magnitude of the potential costs as of 1 January 2008 of shifting from the Lomé/Cotonou preferences to the GSP for West and Central African countries, estimating that 'more than € 1 billion of trade would potentially be lost, as the average tariff to be paid under GSP is on average 20%' in West African non-LDCs and 'about € 360 million of exports would potentially be lost' for Central African countries.⁵³

These cost estimates refer to simple calculations based on variations in the preference margin (lower under the standard GSP compared to the Lomé/Cotonou preferences), and thus concern principally non-LDC ACP states. It is suggested, however, that ACP LDCs may also be negatively affected by a shift from Lomé/Cotonou preferences to EBA, as the latter, in spite of its greater margin of preferences, is governed by far less favourable rules of origin, thus de facto limiting the access of some ACP exports to the EU market.

A switch from Lomé/Cotonou preferences to the standard GSP regime in 2008, while fully complying with WTO rules, would arguably put the EU at odds with its CPA obligations because it would seriously undermine some of the core objectives of the CPA, as extensively discussed in Section 3.5, above.

⁵² TWN Africa and Oxfam International (2007).

⁵³ See EC (2007b). For a discussion, see also ERO (2007).

(iii) The GSP+ option

An alternative trade regime that is closer to the current Lomé/Cotonou preferential regime might exist: the GSP+ arrangement. The ODI report suggests that while the GSP+ treatment of ACP non-LDCs exports would not be strictly equivalent to the Lomé/Cotonou preference, the loss of preferences would be small.⁵⁴ The problem rests in the qualification to the GSP+ of the ACP countries that would potentially be concerned. The current conditions for a country to qualify for GSP+ are outlined at the beginning of Section 4.3. Apparently, all ACP non-LDCs could meet the two vulnerability criteria. However, they should also have ratified and implement most of the 27 conventions stipulated for the GSP+. Apparently, many ACP countries are currently doing this, but most have not yet completed it.⁵⁵ In addition, the list of beneficiaries has been closed and is not due to be reviewed before 2009. Hence, in the current situation, the GSP+ is not available to ACP countries.

A solution depends on both legal considerations and the political will. The EU could continue to adopt a strict interpretation of the CPA provisions and its WTO obligations. For instance, it could argue that the request for and consideration of equivalent alternatives provided for in CPA Article 37(6) should have taken place in 2004, as stipulated in the Article, or, at the latest, as an outcome of the Article 37(4) joint EPA review, so that there would have been time to envisage and formulate alternative arrangements. If no ACP country makes such a request before the concluding stage of the EPA negotiations, the EU could then argue that it is under no obligation to find an equivalent alternative arrangement, and that such an alternative, compatible to WTO rules, does not currently exist. This view is, of course, open to challenge, based on some of the legal arguments outlined in this study (notably Section 3.5).

But the EU could also adopt a more flexible approach and could try to find appropriate alternative arrangements. For instance, the GSP regulation could be amended before the end of 2008, so as to accommodate the interests of ACP non-LDCs. Apparently the EU GSP will have to be amended later this year anyway, on issues not related to the ACP countries. This can be done at anytime and simply requires the approval of the Council by qualified majority. The decision could be taken by

⁵⁴ See ODI (2007).

⁵⁵ See TWN Africa and Oxfam International (2007).

the Article 133 Committee with the Commission. So time might not be an issue. What remains is the issue of including ACP countries in the list of beneficiaries, for which they would have to meet some criteria, notably regarding the ratification and implementation of some of the 27 conventions. As mentioned above, several ACP non-LDCs have already ratified and started implementing several of the required conventions, but this is not the case for all.⁵⁶ The ODI report recalls that

when GSP+ was introduced, the beneficiaries of the EU's previous, favourable GSP regimes (for antinarcotics crops) were deemed automatically to fulfil all of the labour, human rights and environmental conditions in order that GSP treatment could be applied to their exports immediately, pending detailed country-by-country scrutiny in due course. This has set a precedent that it would be appropriate for the treatment of non-EPA ACP states to follow.

It remains to be seen how this could take place in practice. Some additional criteria might be envisaged to accommodate the ACP non-LDCs, or the GSP+ might be simultaneously open to other developing countries, under conditions identical to those applied for the ACP non-LDCs, so as to comply with the requirements of the Enabling Clause. This may possibly be at the expense of further eroding the ACP's margin of preferences, but it would limit the risk of a challenge at the WTO, which might be greater should the GSP+ be granted arbitrarily to some ACP non-LDCs.⁵⁷

In this way, the ODI report concludes that, under the GSP regime,

The most plausible way to satisfy Cotonou Article 37 (6) – including the requirement for WTO conformity – is to apply the GSP+ to the ACP from the end of 2007, following the precedent established for the Andean and Central American states, and to make special provisions for the handful of products not covered (which could include extending the GSP+ regime in some cases). This would provide a breathing space – which some ACP states may use to complete EPA negotiations.

⁵⁶ See TWN Africa and Oxfam International (2007), Table 3.

⁵⁷ Some observers have argued, however, that the risk of a legal challenge to the GSP+ under the WTO mechanism for settling disputes remains limited, as 20 of the 21 developing countries that do not yet qualify for the GSP+ are currently negotiating a free-trade agreement with the EU. The only country left behind is Pakistan, which is currently seeking inclusion in the GSP+.

4.4 Option 4: continuation of Lomé/Cotonou preferences

As indicated in previous Sections, the best way to prevent disruption of the flow of trade while continuing to negotiate EPAs after 2007 would be to maintain the existing Lomé/Cotonou preferential trade regime. This was indeed the solution adopted by the parties to the CPA for the transitional period expected to end by 31 December 2007, three years after the conclusion of the Doha Round, which was due to end by 1 January 2005.

This option raises several key issues, related, first, to the extension of the preferences and, second, to the question of compliance with WTO rules and a possible waiver, as illustrated by option 4 in Figure 2.

(i) The extension of Lomé/Cotonou preferences

Regarding the Lomé/Cotonou preferences, as noted earlier, they are in effect only until the end of the preparatory period, i.e. 31 December 2007 (CPA Articles 36(3) and 37(1) and Annex V). To apply after 2007, they will have to be explicitly extended. In principle, this could be proposed by the Commission and adopted by a qualified majority to the Council, since such a revision falls under the sole competence of the Community. However, this extension might arguably also be regarded as a modification of the CPA, in which case, the European Member States would have to give their unanimous approval. Then, after possible consultation by the Joint ACP-EC Ministerial Trade Committee, the ACP-EC joint Council of Ministers would also have to approve the extension. Ratification might also be envisaged, and the assent of the European Parliament might be sought. This would be a lengthy process, though not absolutely necessary.

The extension of the Lomé/Cotonou preferences would, in any case, be limited in time, arguably however long after 2007 it might be necessary to conclude the EPA negotiations. Provisional application of the extension could suffice, preferably with a unanimous decision from the Council and Member States and by common agreement in the ACP-EC joint Council of Ministers. All this can be done fairly quickly, by a simple exchange of letters if so required.

(ii) A waiver request

The major hurdle, however, remains the obligation to comply with WTO rules. The Lomé/Cotonou preferences clearly deviate from the non-discriminatory and MFN principles stated in GATT Article I, and would thus be subject to a waiver.

Following an initial waiver in 1995, covering some of the trade preferences under Lomé Convention IVbis, two new waivers were granted on 14 November 2001 to cover the following:

- the Lomé/Cotonou preferences under CPA Article 36(3) and Annex V, valid until 31 December 2007 at the latest (WT/MIN(01)/15);
- the transitional regime for the autonomous tariff quotas applied to banana imports, as from 1 January 2002 until 31 December 2005 (WT/MIN(01)/16).

The EC banana regime has been further challenged since 26 February 2007 by Ecuador, pursuant to Article 21.5 of the Dispute Settlement Understanding (DSU) (WT/DS27/80); whereas, Colombia has requested consultation under DSU Article 4, on 26 March 2007 (WT/DS361/1 G/L/818).

If the EU wishes to continue granting the Lomé/Cotonou preferences provided for under CPA Article 36(3) and Annex V to ACP products after 2007, it should ask for an extension of its waiver or request a new waiver.⁵⁸ The 2001 waiver was granted, 'Considering that the Agreement establishes a preparatory period extending until 31 December 2007, by the end of which new trading arrangements shall be concluded between the Parties to the Agreement' (WT/MIN(01)/15). The EU could now justify the extension of the waiver, arguing that some ACP countries have not been able to conclude such agreements in time, due to a number of factors related to the following, among other things:

- their capacity to prepare for an EPA;
- their capacity to negotiate an EPA;
- other development considerations;
- the necessity to ensure coherence between an EPA and their regional integration process;

⁵⁸ The decision-making process for granting an extension of a waiver or a new waiver is the same; the only difference is that an extension of a waiver continues to waive obligations under conditions similar to those of the initial waiver, whereas new conditions can apply for a new waiver.

- the delay in the conclusion of the Doha Round negotiations, which were due to be concluded three years before the entry into force of EPAs, thus stretching the capacity of ACP trade negotiators as well as raising uncertainty regarding the coherence and compliance of an EPA with the multilateral trading system.

(iii) Waiver requests in practice

The problem is that the request for a waiver could be a lengthy and cumbersome process. There is no time limit for WTO members to decide on a waiver request, and decisions are traditionally taken by consensus.⁵⁹ Article IX(3) of the WTO Agreement on decision making states that:

In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph.

(a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths of the Members.

(b) A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C⁶⁰ and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.

⁵⁹ See for instance Nottage and Sebastian (2006).

⁶⁰ This refers to the Multilateral Agreements on Trade in Goods, the General Agreement on Trade in Services (GATS) and the Trade-Related Aspects of Intellectual Property Rights (TRIPS), respectively.

In other words, a decision on an extension of the Cotonou waiver might take six months: no more than three months for examination of the request by the Council for Trade in Goods and another maximum of three months for the Ministerial Conference 'to consider' the request. But the WTO members are under no obligation to reach a decision within a specific time frame; it is only the majority required that can be different after three months (from consensus to a three-fourths majority). Since, in practice, decisions are always taken by consensus, a final decision on a waiver request might take a long time, with no guarantee of being accepted.

In practice, the Goods Council has not been responsive to recent requests for waivers.⁶¹ To prevent any challenge of its banana regime after the expiration of its waiver to the tariff quota applicable to bananas from ACP countries on 31 December 2005, the EC submitted a new request for a waiver to the Goods Council on 11 October 2005.⁶² In spite of a series of meetings (in November 2005, March 2006, May 2006 and July 2006), where several WTO members expressed diverging views on the waiver request, the Goods Council has failed to provide a response. Various aspects of the banana regime are now challenged by Ecuador and Colombia.

Another negative precedent is the waiver request by the United States for its African Growth and Opportunity Act (AGOA). Although this preferential regime has been in place since 2000, an official request for a waiver was submitted to the Goods Council only in February 2005. Initial questions were raised by China, India, Pakistan and Brazil but, due to the sole opposition of Paraguay, the waiver has still not been addressed.⁶³ Similarly, the US request in 2005 for a waiver extension and broadening of its Caribbean Basin Initiative to September 2008 has not yet been granted, while the US continues to grant preferential access to imports from the Caribbean.⁶⁴

⁶¹ For a more detailed discussion, see Bassilekin (2007).

⁶² This is the EC's request for extension of the Article XIII waiver regarding a tariff-rate quota for bananas of ACP origin, G/C/W/529, 11 October 2005.

⁶³ In parallel, the waiver granted to the US for the Caribbean Basin Initiative (31S/20 WT/L/104) lapsed at the end of 2005 without being renewed.

⁶⁴ The US request for a waiver regarding the Caribbean Basin Economic Recovery Act (CBERA as amended), G/C/W/508, was made on 1 March 2005, with Addendum G/C/W/508/Add.1 on 17 March 2005.

(iv) What are the lessons for the EU?

First, the granting of a waiver is most uncertain; according to the European Commission, it might require a lot of compensatory effort to persuade some of the other WTO members, particularly some developing countries from Latin America (such as Ecuador, Colombia and Guatemala) and Asia (such as Thailand, Indonesia and Malaysia), to agree to a waiver extension. This could come at the cost of a further erosion of the margin of preference enjoyed by some ACP products over the competing exports of these other developing countries (as in the case of tuna for the 2001 waiver). It might also come at a political cost to the EU, in terms of further concessions to be made in the context of the Doha Round and on other WTO matters, as a possible price to pay for a favourable decision on the waiver.

Second, even if the EU were to request an extension of the waiver now, it might not be granted in time for Lomé/Cotonou preferences to be continued in 2008. This would most certainly be the case if the EU waits until October or November 2007 to ask for a waiver for 2008 (as illustrated by the EC waiver request on bananas in October 2005 for January 2006). Yet, requesting a waiver now when no ACP country has indicated its need to continue the EPA negotiations after 2007 might be unfounded and send a counterproductive signal, both to ACP negotiators eager to conclude an agreement by the end of the year and to other developing countries that may be eager to challenge the Lomé/Cotonou preferences as of 2008, should the EU extend them.

Third, there are several precedents of preferences granted in the absence of a waiver. AGOA is a case in point, where preferences have been granted since 2000 to a variable sub-set of African countries on a somewhat arbitrary basis. A waiver was requested only in 2005 and still has not been granted, while AGOA is still in place. The EU has also granted preferences in the absence of a waiver.⁶⁵ This was the case, for example, during the initial period of the CPA, where the CPA trade provisions had been applied since 1 March 2000 and the waiver was granted only on 14 November 2001. As pointed out by the Commonwealth Secretariat:⁶⁶

65 Whether or not some aspects of the EC banana regime comply with WTO rules might have to be decided by a WTO ruling as part of the dispute settlement mechanism, unless the parties come to an agreement before that.

66 See Commonwealth Secretariat (2007).

During the initial period, i.e., before Doha, it would have been unthinkable to suggest that the EC had no obligation to provide preferences to the ACP on the basis of their WTO-incompatibility.

The waiver was the means through which the EC reconciled any potentially conflicting obligations.

The delay to obtain the waiver did not prevent the EU from granting these preferences, although this was obviously not in conformity with WTO rules.

Finally, some observers (notably from civil society) have suggested that a waiver could be obtained by ignoring the opposition of WTO members, as long as three-quarters of the WTO members did not oppose it. While this would comply with the provisions of Article IX of the WTO Agreement, it would mark a sharp departure from the tradition at the WTO, based on a consensual decision-making process, and might not be a politically wise move.

(v) Possible ways forward

What, then, are the conceivable venues for the Lomé/Cotonou preferences to continue being granted after 2007 for the ACP countries that have failed to conclude the EPA negotiations before 2008?

The EU could request a waiver as soon as possible in 2007, in the hope that it would be granted by 1 January 2008 to allow the Lomé/Cotonou preferences to continue in a manner compatible with WTO rules. If the waiver is granted before 2008, there is no problem. If it is not, the EU will have to assess whether it could keep granting these preferences anyway, on a provisional basis, to ensure a smooth transition to the conclusion of the EPA negotiations and entry into force. The EU could also choose to wait until the normal conclusion of the EPA negotiations, due to occur before 2008. If ACP countries were not able to conclude in time, the EU could then assess the problems and needs of those ACP countries that had prevented the timely conclusion of the negotiations, and on this basis, decide (or not) to request a waiver extension to cover these countries. In this event, which would most likely occur in autumn 2007, it is unlikely that a waiver extension could be granted by 2008. But the EU would be acting in good faith. It could then choose to grant preferences on a temporary basis without a formal waiver from the WTO, or opt

instead for another preferential trade regime that would be expected to comply with WTO rules.

Ultimately, the decision will be a political one. On the one hand, it will depend on the combined legal requirements and objectives aimed to promote development and reduce poverty in the ACP, while, on the other hand, it will abide by the WTO commitments. It could also be influenced by the risk that an extension of the Lomé/Cotonou preferences after 2007 would be opposed or challenged by other WTO members.

In the case of a challenge, the process of settling a dispute can be quite complex and time consuming; Figure 3 sketches the main steps involved and suggests indicative time frames. In practice, the period between the request for consultation and the establishment of a panel is normally of 60 days.⁶⁷ A typical litigation process in the WTO can then take an average of 14 months between the time a panel is established and the date the Dispute Settlement Body considers the panel report for adoption. An appeal process can add another three months.⁶⁸ Thus, the litigation process can easily take 19 months, without considering the compliance period (normally within a reasonable period of time) and other related challenges. Even with faster cases, it can easily take up to one year for a dispute to be addressed by the WTO dispute settlement system.

The practical consequence of this lengthy WTO litigation process for the ACP-EU relationship is that it might not have any direct effect on a temporary trade regime, should the EPA negotiations be concluded shortly after 1 January 2008. Indeed, once an EPA is concluded, any complaint from a WTO member would no longer have any basis. The key guiding principle, however, would be for the ACP and the EU to act in good faith with a view to complying with their WTO obligations.

4.5 The commodity protocols

Should the EPA negotiations carry over to 2008, how would the preferences to

67 It can be between 10 and 60 days in exceptional circumstances (see DSU Article 4).

68 See Nottage and Bohanes (2007).

sugar, bananas, beef and veal, currently covered by specific commodity protocols, be affected?

In the context of an EPA, CPA Article 36(4) stipulates that

the Parties reaffirm the importance of the commodity protocols, attached to Annex V of this Agreement. They agree on the need to review them in the context of the new trading arrangements, in particular as regards their compatibility with WTO rules, with a view to safeguarding the benefits derived therefrom, bearing in mind the special legal status of the Sugar Protocol.

The challenge is thus to ‘safeguard the benefits’ of the preferences provided under the protocols in a manner compatible with WTO rules.⁶⁹

The Sugar Protocol, under which the EU imports specific quantities of cane sugar from ACP countries at guaranteed prices, applies for an indefinite period (Article 13 of Annex V of the CPA).⁷⁰ However, following complaints about its sugar regime by Australia, Brazil and Thailand at the WTO,⁷¹ the EU undertook a reform of its Common Market Organisation for sugar, which would cut the internal European price, from which the ACP countries benefit by 36%. In spite of this reform, the EU sugar regime, from which the ACP benefits, could still be challenged at the WTO. Sugar preferences can either

- be incorporated into an EPA, an option proposed by the European Commission (and at least some ACP regions⁷²), which would lead to an end of the Sugar Protocol as of October 2009
- or remain available under the existing Sugar Protocol, but in a revised form.⁷³

⁶⁹ For further discussion on the Commodity Protocols and EPAs, see Alpha and Fautrel (2007).

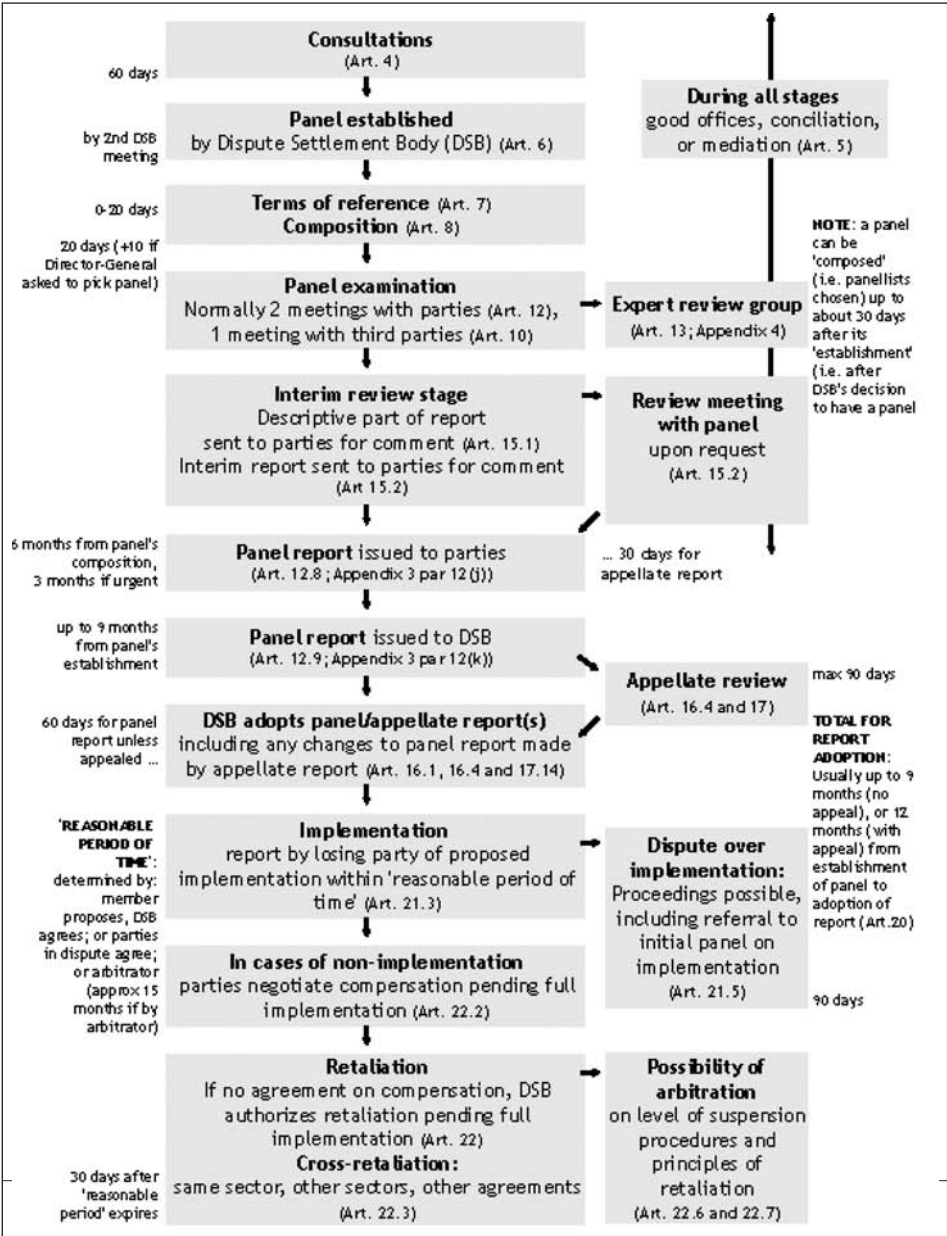
⁷⁰ ‘Article 10 of the Sugar Protocol stipulates that it may be denounced by the Community with respect to each ACP State subject to two years’ notice. However, in a Declaration annexed to the Protocol the Community formally declares that Article 10 is for juridical security and does not represent for the Community any qualification or limitation of the principle enunciated in Article 1(1), viz. the undertaking to purchase sugar for an indefinite period.’ ACP Sugar Group, www.acpsugar.org/Sugar%20Protocol.html

⁷¹ WT/DS265, WT/DS266 and WT/DS283, respectively, www.wto.org

⁷² See Europa (2005).

⁷³ It is beyond the scope of this study to discuss the future of the Commodity Protocols. On sugar, see Thornhill (2007). See also ACP (2007).

Figure 3. Panel process to settle disputes at the WTO



Source: WTO website, www.wto.org/english/thewto_e/whatis_e/tif_e/disps2_e.htm

Note: Some specified times are maximums, some are minimums, some binding, some not.

The preferential banana regime has been under challenge since before the establishment of the WTO.⁷⁴ Following the EC-ACP request for a waiver covering the transitory Lomé/Cotonou preferences, special conditions were granted by WTO members regarding the banana regime, under a waiver that expired on 31 December 2005 – two years before the end of the preparatory period for EPA negotiations. Since then, some aspects of the EC banana regime have been challenged by Ecuador and Colombia.⁷⁵ The current banana regime can be maintained unless the panel (appellate body if required) rules against the EC or the EC finds a different arrangement with the complainants before that. As for sugar, preferences under an EPA could also cover bananas. In this context, it is important to recall that the CPA does not provide for any specific commitment to market access for banana exports to the EU. Article 1 of Protocol 5 on bananas (Annex V of the CPA) only states that

The Community agrees to examine and where necessary take measures aimed at ensuring the continued viability of their banana export industries and the continuing outlet for their bananas on the Community market.

The Protocol on beef and veal has a fixed duration (i.e., for the preparatory period up to 31 December 2007). This is covered by the WTO waiver for the Lomé/Cotonou preferences. If not covered by an EPA, the benefits from the beef and veal Protocol would be subject to the same challenge as the general Lomé/Cotonou preferences after 2007, unless the waiver is extended.

If the benefits of the preferences provided under the Protocols are safeguarded by including relevant provisions within an EPA, compatible with WTO rules, thus replacing the Protocols, countries that do not sign an EPA would no longer be able to benefit from these preferences.



⁷⁴ The conclusions of the first two banana panels under GATT in 1993 and 1994, following complaints brought forward jointly by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela, were not adopted by the GATT contracting parties.

⁷⁵ As indicated in Section 4.4, see waiver of 14 November 2001 (WT/MIN(01)/16) and dispute by Ecuador of 26 February 2007 (WT/DS27/80) and by Colombia of 26 March 2007 (WT/DS361/1 G/L/818), www.wto.org

Chapter 5

Possible legal and institutional quandaries following a rushed conclusion of the negotiations



5 Possible legal and institutional quandaries following a rushed conclusion of the negotiations

Concluding the EPA negotiations by the end of 2007, as foreseen by the CPA, would appear to be the most straightforward solution from a legal and institutional perspective. No provisions would have to be made for an extension of the negotiations to 2008. No transitory alternative trade regime would have to be identified. No specific considerations would have to be provided regarding compliance with WTO rules aside from the WTO compatibility of the EPAs.

Abstracting from any development consideration, in one way or another, and focusing on these legal considerations, it might thus be tempting to pressure all parties to respect the timetable defined in their respective road map so as to ensure that EPAs enter into force by 1 January 2008, at least provisionally.

This is certainly true if the pressure to conclude the negotiations is self-generated by each of the parties to an EPA and its respective constituents, and if it results from a proper appropriation of the EPA agenda and related reforms.

If this is not the case, however, a more cautious approach might be recommended. Indeed, the failure of an ACP country to conclude an EPA or to ratify it may have serious legal and institutional consequences, potentially damaging to regional integration.

5.1 The 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,⁷⁶ 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. This case is illustrated by Country C in Figure 4.

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 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).

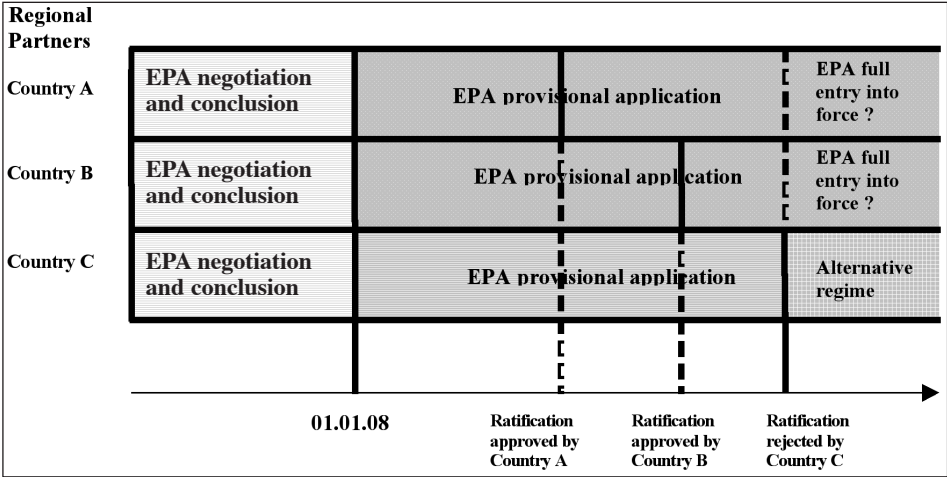
⁷⁶ See EU market offer (EC, 2007a) as endorsed by the General Affairs and External Relations Council of 15 May 2007 (GAERC, 2007).

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.

5.2 The possible regional imbroglio

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?

Figure 4. Failure to ratify an EPA and the regional quandary



(i) Failure by an individual country or countries to conclude a regional EPA

In the former case, the exclusion of a country from an EPA would de facto undermine the integration process of the region, contrary to the principles pursued by the CPA (notably CPA Article 35(2)). In addition, if that EPA is to be applied on a regional basis, it is questionable whether a country would be able to negotiate an EPA alone in 2008, without its regional partners. Arguably, a country unwilling

to sign an EPA with its regional partners would be forced out of the regional EPA configuration, and would later have to sign an independent EPA. While this would not be incompatible with the regional integration of a free-trade area, separate EPAs within a region would prevent the further integration of the region to a customs union, for instance, at least further integration with the ‘defecting’ country. The need by one country for more time to conclude an EPA, even if only by a few months, could thus have long-lasting detrimental effects on the regional integration process. In addition, the definition of the parties to the regional EPA might have to be redefined, because the regional grouping that was envisaged to be part of the EPA might no longer be possible. This would depend, of course, on the institutional and legal setting of each region.

Alternatively, the EU might refuse to conclude an EPA with an ‘incomplete’ regional grouping and might wait for all the countries in a region to agree on a common EPA. This would allow greater coherence at the regional level and prevent unwarranted disruption of the regional integration process. In order to avoid penalising the countries ready to conclude an EPA, the EU would then have to provide a transitory trade regime for the whole region equivalent to the current Lomé/Cotonou preferences, until the region concluded an EPA as a group.

(ii) Failure by an individual country or countries to ratify an EPA

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 it⁷⁷ – provided that the EU has also completed its own ratification process. Now, should a country decide not to ratify the EPA (as in the case of Country C in Figure 4),⁷⁸ the EPA can-

⁷⁷ 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.

⁷⁸ 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).

not 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.

(iii) Regional implications of an EPA

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. In this respect, rules of origin could play a crucial role. EPA rules of origin should be coherent with regional ones and with the rules of the alternative trade regime available to the country not signing the EPA (for the exports originating from that country outside the EPA). To prevent unwarranted trade deflection and to facilitate regional trade, EPA rules of origin could thus ensure that cumulation is possible for countries belonging to the same regional grouping, irrespective of whether or not they belong to an EPA (or to the same EPA, for that matter). Similarly, the alternative trade regime available to a country not participating in an EPA should also allow for regional cumulation.⁷⁹

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.

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

⁷⁹ Interestingly, such country-specific references to rules of origin are not uncommon in the GSP, for instance.

all trade' requirement refers to the trade between each pair of customs territories or within the group of customs territories as a whole.⁸⁰ 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 study to discuss the WTO requirements for RTAs.⁸¹ 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.

Another concern is the availability of EPA-related development support at the regional level. There is not yet any EU strategy on the principles and modalities

80 In other words, in an RTA comprising three countries (A, B and C), should trade be fully liberalised on substantially all the trade between countries A-B, A-C and B-C, respectively, or should it be on the total trade between A-B-C?

81 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.

of the Aid for Trade commitments by the EC and EU Member States, nor is there any on how the commitment to dedicate a significant share of that Aid for Trade to EPAs will be translated into practice.⁸² Will the failure of an individual country to sign or ratify an EPA affect the availability of development assistance at the regional level? Only the European Commission and Member States can answer this question (see Box 1).

The Regional Indicative Programmes (RIPs) of the European Development Fund (EDF) provide support to regional integration mechanisms and programmes, and thus are natural Community instruments for addressing EPA-related support measures at the regional level. Some EPA-related projects can be funded under the current 9th EDF (2000–2007). A priori the delay in signing an EPA should not affect the availability of support under the RIPs. However, under the 10th EDF (2008–2013), RIPs should include measures to accompany EPAs. While the RIPs are not conditional to an EPA, apparently only the countries that will have signed an EPA will be eligible for those EPA-related regional funds. This will be a case for adjustments linked to the loss of fiscal revenue that results from the dismantlement of tariffs through an EPA. In other areas, it might be more difficult to distinguish between regional and EPA support. For instance, when dealing with institutional capacity-building initiatives (e.g., trade facilitation, compliance to standards, etc.), whether a programme is earmarked as EPA-related or general, support for regional integration becomes more arbitrary and does not really matter in the end. However, it might have significant bearing if such projects are programmed as EPA support and a country that fails to sign or ratify an EPA finds itself excluded from such support.

The 10th EDF is currently being programmed and will most probably not enter into force before mid-2009 or 2010, after ratification by all EU Member States. Its modalities are yet to be defined. In parallel, the EPA provisions on related development support are under negotiation. At this stage, it is not possible to assess the impact on the availability of trade-related regional development assistance for an ACP country that might not sign or ratify an EPA.⁸³

82 A Joint Aid for Trade Strategy is expected from the EU by the end of 2007. See GAERC (2006) and ECDPM (2006) for an overview and discussion.

83 There is a strong perception among some of the ACP countries and some NGOs that the European Commission is using the development assistance carrot to push the conclusion of an EPA before 2008 or to influence the EPA regional configuration. See, for instance, COMESA (2007).

Box 1. Q&A on EC development assistance and EPAs

1) At what stage is the RIP programming process?

All draft RIPs have been prepared and most regions are close to finalising their RIP. EPA-related needs are being integrated as a result of the EPA negotiations and consultation in the regional preparatory task forces (RPTFs).

2) Which countries will be included in the RIPs?

All countries funded from the EDF. This includes all countries negotiating an EPA, except South Africa, for which financial cooperation is supported by the EU budget, not the EDF.

3) Will RIPs be based on EPA regional configurations?

Essentially, yes. But in principle, no country will be excluded from the RIP if it fulfils the CPA provisions on regional cooperation. For instance, in the Pacific region: Timor Leste is merely an observer in current EPA negotiations but will be part of the RIP.

4) Will RIPs be conditional upon signing an EPA?

No, the CPA is the legal basis of the RIPs.

5) Will EPA support be clearly earmarked in the 10th EDF RIPs? If yes, and a country does not sign an EPA, is it correct to assume that they will not have access to the EPA earmarked funding? Or will funding be more broadly earmarked for support to regional integration, trade-related issues, etc., which could be useful and accessed by countries regardless of whether they sign an EPA?

There are no preconceived ideas about this: some activities will be specifically EPA-linked and do not make sense outside an EPA logic, whereas some other actions are linked to broader issues of regional integration and are thus accessible to all countries in the region. Depending on the outcome of EPA negotiations, the share between EPA-related and non-EPA-related funds within a RIP may vary. For instance, the current draft for the Caribbean foresees one focal sector, 'regional integration and cooperation', with a specific sub-component of 'EPA support'.

6) *What will happen during the transition from the 9th to the 10th EDF, notably in terms of funding EPA-related projects?*

EPA negotiations on capacity-building activities could be partly taken over by TradeCom. For the rest, the transition will be managed as for the national indicative programmes (NIPs): the 9th EDF programmes continue to be implemented while the 10th EDF programmes start being constructed and move upstream in the course of 2008. Hence, the faster the ratification of the 10th EDF by the ACP States and EU Member States, the shorter the transition will be. The risk of a gap is, in practice, limited. In the Caribbean, for instance, the financing agreement on regional support programmes under the 9th EDF (including support to regional integration/EPA objectives) was signed in December 2006, so the programme will run until the end of 2009 (N+3).

7) *What happens with EPA funding if a country moves from one regional configuration to another?*

There are no preconceptions about this. Regional programming will certainly be reviewed, as well as funding. This could be done at mid-term or at the end-of-term review or, if necessary, on an ad hoc basis.

Source: Informal consultation with DG Development of the European Commission.



Chapter 6

Concluding remarks



6 Concluding remarks

Although the EU and all the ACP regions are currently committed to the timely conclusion of EPA negotiations by the end of 2007, this remains highly ambitious and challenging for all parties.

The ACP regions are under intense pressure to sign an EPA by the deadline. At best, most ACP EPA regional groupings might not be able to conclude the negotiations before (late) autumn 2007. In this case, EPAs will be provisionally applied as of 1 January 2008, following approval at the ACP and EU levels, a process that could be speedily concluded. Each EPA will have to be notified to the WTO by 1 January 2008. All the parties will then have to agree on ratification, according to their respective domestic legal framework, after which the EPA will fully enter into force.

Notwithstanding their commitments and good intentions, some ACP countries or EPA regional groupings might not find themselves in a position to sign an EPA before 2008 or to successfully complete its ratification process. This prospect creates a serious challenge for the negotiating parties. A solution will have to be found that reconciles the respective obligations of the EU and the ACP under the Cotonou Partnership Agreement and the World Trade Organisation, keeping in mind that the core objectives of the CPA and the EPAs are sustainable development and the reduction of poverty in the ACP countries, building on their regional integration processes and compatible with WTO rules.

A possibility would be to sign a narrow EPA by the end of 2007, focusing on the component of market access for goods, so as to comply with GATT Article XXIV, and leaving other issues for further negotiation at a later stage. Arguably, a phased EPA could be designed, with a built-in agenda, including market access, provided that an initial plan and schedule (to be further specified according to a pre-determined timetable) is notified by 1 January 2008.

If an EPA cannot be concluded before the end of 2007, the EU and the concerned ACP State(s) or region(s) could agree to continue negotiations in 2008. The transitional trade regime available after 2007 could be an arrangement under

the Generalised System of Preferences of the EU or a continuation of the Lomé/Cotonou preferences.

The extension of the current Lomé/Cotonou regime of preferences beyond the expiration date of the WTO waiver on 31 December 2007 would require a new waiver (or a waiver extension) to be granted, which is likely to be resisted by some WTO members, and thus might be costly to obtain. Moreover, it is unlikely to be granted before 2008. In the absence of such a waiver, the risks of a complaint at the WTO are real. While the legal proceedings under the WTO dispute settlement mechanism would probably take more than a year or a year and a half, thus providing some breathing space for the conclusion of an EPA, it would put the EU at odds with its WTO obligations – with the negative political implications this might have, notably in the context of the Doha Round negotiations. This option should therefore be viewed with great caution and perhaps only envisaged in the event of an unexpected delay in EPA negotiations of a few weeks (rather than months) in 2008.

The other option available to ACP countries that might have failed to sign an EPA in 2007 is the EU GSP. The ACP LDCs can already benefit from the everything-but-arms (EBA) initiative under which their exports can enter the EU market duty- and quota-free. However, ACP non-LDCs automatically qualify for only the standard EU GSP, a regime far less advantageous than the Lomé/Cotonou preferences. For these countries to be no worse off, as required by the CPA trade provisions and core objectives of development and poverty alleviation (CPA Articles CPA Articles 1, 19(1), 34(1) and 37(6)), the GSP+ arrangement might be amended in 2007 to include the concerned ACP non-LDCs as of 1 January 2008. Apparently, ACP non-LDCs already meet the vulnerability criteria necessary to qualify for the GSP+, and many of them are in the process of ratifying and implementing several of the international conventions stipulated under the governance-related criteria. While the GSP+ (including the fixed list of temporarily qualifying countries) is legally not up for review until 2008, to be in place by 1 January 2009, it is foreseen that the Council will seek to amend it in 2007 anyway for reasons not related to the ACP countries and EPA negotiations. The EU could thus also decide to extend the list of qualifying countries to include relevant ACP countries as of 1 January 2008, if only on a temporary basis, pending the ratification and start of the implementation of the remaining international

conventions. A similar although not identical precedent was set in 2005 with the introduction of the GSP+ for the former GSP drug-combating regimes. The GSP+ could also be expanded to avoid a loss of preferences on a selected number of key products where the current GSP+ is less favourable than the Lomé/Cotonou preferences. Reforming the GSP would not require any waiver, although it could still be challenged under the WTO dispute settlement mechanism (like any trade provision disputed by a WTO member). In this respect, the GSP+ option could then be considered as the one that offers the most appropriate balance between the need to ensure that ACP countries are no worse off after 2008 in the absence of the timely conclusion of an EPA and the need to meet the development objectives of the ACP-EU partnership and the obligations of all the parties under the CPA and WTO/GATT rules.

The failure by one ACP country to sign or ratify an EPA along with its regional partners could have serious adverse consequences on the coherence and, possibly, relevance of the regional integration process in the EPA configuration it belongs to. In particular, it might lead to complications in terms of commitments to market access with the EU and within the region, the deepening of integration, institutional development within the region and conditions for development assistance.

Arguably, the best way to avoid any disruption in the implementation of an EPA is to negotiate a good EPA – one that responds to the aspiration and key objectives of all the parties, notably in terms of development and poverty alleviation. To do so, it might be more appropriate to focus on the effective conclusion of a truly development-oriented EPA as perceived by all the parties involved rather than on an arbitrary deadline. As stressed by the European Trade Commissioner Peter Mandelson, the ‘real challenge is not signing EPAs on time but signing EPAs that deliver development’.⁸⁴ While the legal and institutional framework constrains the range of options available to the parties should they agree on the need to pursue EPA negotiations after 2007, the solution adopted will ultimately depend on the political will of all the parties, notably the EU. From a development perspective, it is important in this context to ensure that there is no undue disruption in trade between the ACP and the EU after 2007.

84. Mandelson (2007).

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