

**What type of dialogue can help the
EPA negotiations out of the current impasse?¹**

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Background

In the light of the deadlock in the EPA negotiations, which began in 2002, it is clear that there is still a long way to go for the regions that have not yet finalized them, in the light of the points of divergence which have gradually become clearer. From the ACP standpoint, and in view of their intrinsic vulnerability, the structure and content of the EPAs must serve as catalysts for their development, with due regard for their needs and constraints. Some ACP negotiators are of the view that the main thrust of the European approach to the EPA negotiating process has been focused on dismantling all the restrictions and obstacles to free trade. This has given the impression that the European side has structured the negotiations around the aim of deriving a maximum of economic and trade concessions from the ACP countries under the guise of ensuring compliance with the WTO rules.

Over time, the ACP and European negotiating entities have gradually stopped listening to each other, displaying a particular lack of flexibility, which has left the ACP side no other alternative than to call for political dialogue to try to move the process forward.

Following the meeting of the Council of Ministers of Foreign Affairs/ Trade of the European Union held on Friday 10 September 2010, there emerged a general willingness to allow the Commission greater flexibility to jump-start the stalled negotiations. In fact, several factors seem to have now conspired to create the conditions for this search for flexibility:

- The growing impatience of some members of the European Union: some of the 27 EU Member States believe that the fact that certain ACP countries enjoy market access by virtue of Regulation 1528/2007 of 20 December 2007, can be called into question at any time by the WTO;
- The unhurried pace of many ACP countries which see no reason to conclude EPAs which will modify their rights and, in exchange, impose more restrictive and less economically beneficial obligations than those which they enjoy under the WTO rules (e.g. the LDCs) or at least within the framework of the "Everything But Arms" Initiative. For those countries, the absence of an EPA is better than accepting poorly structured agreements that could slow their progress towards achieving the Millennium Development Goals, as well as their regional integration process;
- The constraints and implementation problems encountered by the only ACP region to have signed a complete EPA;

- The European Union's determination to strengthen its partnership with Africa in the new context of intensified global competition for access to raw materials. As such, it is important to nurture its partnership with Africa, including through initiatives such as the forthcoming EU-Africa Summit to be held in Libya.

To jump-start the negotiations, there is need, first of all, to restore trust between the ACP negotiators and their European counterparts and so lay the foundation for reaching agreement on a common set of issues. It is essential, therefore, to relinquish the idea of engaging in the futile exchange of memoranda on the contentious issues between the negotiating sides (the common position adopted by the Commission of the African Union and the Regional Economic Communities (REC) on the EPAs, presented at the meeting of the EU Commissioners and their AU counterparts in Addis Ababa last 8 June, received an unequivocal response from the European Commission on 20 July 2010; the African side is on the verge of making a new submission) to move forward.

To date, the negotiations between the Commission and the ACP regions have focused mainly on the chapters dealing with trade in goods and development. It is important, therefore to iron out the points of disagreement on these common areas before we can move on calmly with the negotiations.

By building on this element that is common to all the ACP regions, this analysis aims, therefore, to suggest a number of options and scenarios the ACP side could discuss with the European side on 22 October 2010. Furthermore, the Commission is expected to publish a new communication at the end of the year to relaunch the EPAs; it is expected that the conclusions of the open and constructive dialogue of the ACP-EU JMTC of 22 October be reflected in that document.

Frank dialogue will require (i) consideration of the status of the contentious issues by approaching them in a context of constructive dialogue with the European side; (ii) identification of the implementation-related aspects to ensure that the EPAs fulfill their potential as development tools; and, (iii) strategies to push forward the discussion on the EPAs during the JMTC session.

I. Status of the contentious issues: situation and momentum

The list of contentious issues mentioned here is far from exhaustive because, for the purposes of this analysis, we have only considered those common to all the ACP regions, placing them in a context to encourage constructive discussion with the European side to find ways out of the impasse. We need, therefore, to look at three types of issues:

A. Issues highlighted by some the ACP regions as potentially contrary or as violating the spirit of certain provisions in WTO law

Most Favoured Nation (MFN) Clause

Included in all the EPAs (complete and interim), the Most Favoured Nation Clause violates the spirit of the Enabling Clause which does not oblige a developing country to extend to a developed partner the same concessions as those that it grants to another trading partner considered a developing country. This potentially hinders the development of trade and economic relations between ACP States and the emerging countries, and limits the diversification of ACP countries' trading partners in an ever-changing economic environment.

The European side believes that if it offers duty-free and quota-free access under the EPAs while accepting that for developmental reasons the ACP side excludes a significant portion of its trade, in that case, the EU is not pursuing a trade logic in the EPAs. It has reiterated, furthermore, that it does not understand why the ACP countries remain willing to engage in a trade arrangement with the emerging economies and that the MFN clause does not in any way exclude the possibility for the developing countries to conclude preferential trade agreements, particularly since several WTO developing Member States have done so. The European side has indicated its willingness to seek the most appropriate solution for each of the regions.

One of the realities that needs to be taken into consideration is the EU's generally low MFN tariffs and the proliferation of free-trade agreements to which the EU is party and which do not include the MFN clause. For example, it has been reported that the Mexico-EU Free Trade Agreement in which Mexico is required to liberalise only 54.1%, does not include any MFN clause although this FTA is more asymmetrical than that offered by the EC to several ACP regions through the EPAs. So, for example, for a region like the EAC where four of the five members are LDCs, it would be difficult to maintain the MFN clause. This criterion where at least half of the members of an economic regional configuration are LDCs can be explored to determine whether or not to maintain the MFN Clause.

Recommendation:

In view of the foregoing, a decision can be taken to maintain the principle of abolishing the MFN clause owing to its counter-productive nature for the prospects of immediate development of most of the ACP regions, given that it limits their policy-space and does not take their intrinsic vulnerabilities into account.

Modifying the list of tariff concessions

It must be noted that although this option is provided for in WTO law (Article XXVIII of GATT 1994) which authorises a country to modify its tariff commitment lists following negotiation or in exchange for compensation, this option is fixed in the EPAs by the so-called "status quo" clause which aims to ensure that after an EPA comes into force, the parties will either not apply new tariffs; not strengthen those that already exist; or not re-establish those that have been abolished.

However, in its response of 20 July 2010 to the African position on the contentious issues, the European side affirmed that Article XXVIII was also applicable to the EPAs, on condition that future tariff modifications would be jointly examined by the ACP and EU, on a case-by-case basis, on the understanding that any subsequent change to the concession list should not affect compatibility with the WTO rules.

The compatibility to which the Commission alluded should instead lead it to fully re-establish the option for the ACP countries to resort to that instrument provided for under WTO law, which ought to be the rule rather than the exception.

Recommendation:

It is important to incorporate into all the EPAs the provisions relating to the modification of the list of tariff concessions that allow a given country with an activity or production sector that is experiencing problems, to cope with them by modifying its tariffs as necessary.

Export taxes

Nowhere in WTO law is it explicitly stated that it is forbidden to resort to export taxes because every member country, depending on its development priorities and economic and trade policy, has this option. Classic and contemporary economic and trade history is filled with numerous cases where countries resorted to export taxes to stimulate the local manufacturing process and added value to raw products prior to export, thereby promoting the transfer of technologies, job creation and diversification by developing integrated sectors.

The principle in all the EPAs, as called for by the European side, is to forbid the application of export taxes. By adopting this position, the Commission remains consistent with the spirit of its Raw Materials Initiative adopted in November 2008, which consists in dismantling all bilateral and multilateral restrictions that could hinder its access to raw material.

For the ACP countries, renouncing export taxes is not acceptable because these contribute, wherever applied, to shoring up their revenue and creating jobs. Furthermore, in 2004, the WTO Secretariat published a study entitled "the Role of Export Taxes in the field of Primary commodities" which underscored the completely legal nature of export taxes. Consequently, this abolition of export taxes called for by the European Commission is legally baseless and not economically beneficial to the ACP countries.

Recommendation:

It is essentially up to the ACP negotiating entities to decide, in total sovereignty, whether or not to eliminate export taxes.

B. Disputed issues considered an acquis in an EPA, which should be extended to other EPAs for the promotion of ACP interests

Revision Clause

In the EU-CARIFORUM EPA, the revision clause provides for a complete review of the Agreement every five years, but this has not been extended to all the other EPA under negotiation. The clause aims to revise the existing obligations in the light of their consequences on trade flows, with a view to correcting the shortcomings observed and to enable the two partners to derive similar advantages, based on their capacities, from the negotiated Agreement.

Recommendation:

The revision clause inserted into the EPAs would enable the ACP countries to better evaluate the contribution of the EPAs to their development dynamic based on development criteria to be determined by the negotiating entities.

Food security clause

It would seem that while certain EPAs are equipped with a food security clause enabling a country to occasionally take measures to meet food security requirements of their populations, others are not.

Recommendation:

Harmonisation is absolutely necessary given the agricultural base of several ACP countries and the risks induced by the food crises which ACP countries occasionally suffer.

Protecting infant industries

Although some EPAs contain provisions for measures to protect infant industries, as well as long-established ones, that can be activated at any time in their lifecycle, certain EPAs have limited this activation to a maximum of 15 years after implementation of the EPA.

Recommendation:

This provision is of vital importance because it is important to give ACP countries the legal capacity to shape the development and expansion of infant industries so as to establish the foundation for gradual industrialization of their countries, the main factor for generating wealth.

Dismantling agricultural subsidies

Certain EPAs contain provisions that provide for the abolition of agricultural subsidies, notably export subsidies, whereas others do not.

Recommendation:

It is important to extend this provision to all the EPAs and for the EU to undertake to abolish its agricultural export subsidies in compliance with the multilateral rules.

C. Issues that disrupt the balance between the rights and obligations of the ACP countries in the EPAs and undermine the basis of the development partnership.

These are issues that disrupt the balance between the rights and obligations of the ACP countries in the EPAs and which we rightly believe do not form part of the spirit of partnership for development, which has always been the main thrust of the relationship between the ACP Group and Europe.

Community levies

In the Commission's view, community levies must be dismantled because they contradict the spirit of Article XXIV of the GATT. This is perhaps debatable because there is no legal obligation to abolish these levies in order to conform to Article XXIV of the GATT, which is tacit confirmation that the ACP RECs which maintain them are not acting illegally.

Are the EPAs possible without strong, self-financing ACP regional institutions, capable of formulating and implementing community policies designed to achieve a significant degree of integration? The EU has repeatedly called for the abolition of community levies in the general thrust to eliminate customs duties. Without these levies, the financial health of several ACP regional integration institutions may be jeopardised. The same holds true for the financing of regional mechanisms.

Even if the European side might be willing to seek alternative sources to finance the abolition of community levies, its true commitment to development and regional integration ought to make it less demanding on this matter. This is because dismantling these levies runs counter to the goal of making the EPAs into tools for strengthening regional integration.

Recommendation:

It is in the interest of the European side to strengthen these RECs which it has undertaken to promote as direct and credible interlocutors in the framework of its new regional development strategies.

Substantially All Trade and liberalisation deadlines

These issues are not rigidly regulated under WTO law and are treated even less uniformly in the EPAs, with the volume of trade and tariff lines percentage taken into account for the definition of substantially all trade varying from one EPA to the other. It is in this same spirit that the liberalisation deadlines also vary, each region presenting distinct economic and trade structures and trade configurations with the European Union.

What makes this a delicate issue is the existence of a battery of special provisions for LDCs under WTO law when these countries are involved in a free-trade agreement under the provisions of Article XXIV, and the review process as envisaged by the new transparency mechanism for regional trade agreements. A recent ECDPM analysis on the subject stressed that "discussions with the EC must place emphasis on the means of granting LCDs and vulnerable countries flexibility that is both acceptable from a political standpoint and defensible before the WTO".

On this point, we believe, however, that the European side could review its analysis structure so as to better qualify the basis of the concept of substantially all trade which serves the development priorities of the ACP countries, so as to avoid adversely affecting the search for a balance between the rights and obligations of the ACP countries and regions.

The Mexico-EU Trade Agreement requires Mexico to liberalise only 54.1% of EU imports. That FTA was notified in the framework of Article XXIV and was never called into question before the WTO for reasons of non-conformity with the rules of Article XXIV of the GATT with reference to substantially all trade. It has been noted, furthermore, that the non-reciprocal cooperation agreements concluded in 1976/1977 between the EEC and the 7 Mediterranean countries never required any sort of liberalization from those countries. Nonetheless, they were notified in the framework of Article XXIV of the GATT and have never been denounced as being in violation of the rule on substantially all trade.

Recommendation:

It is in the EC's interest to keep its promise to make the EPAs tools for stimulating the trade capacities of the ACP countries, and providing duty- and quota-free access offered to the ACP States, instead of limiting itself to demanding a very ambitious level of openness that would stifle these weak and vulnerable economies.

Rules of origin

The ACP side has always been in favour of formulating common rules of origin for all the negotiating entities in the framework of the work done by the Group of Experts in charge of Rules of Origin. Although this harmonization has proved difficult due to the specificities of certain regions, the negotiating bodies have, nonetheless, negotiated rules of origin that limit the All-ACP cumulation, which constituted an *acquis* under Cotonou and was potentially a means of strengthening intra-ACP trade.

Some ACP negotiators are of the view that if the rules of origin proposed by the European side are more favourable than those of the Cotonou Agreement, they do not favour All-ACP cumulation and are not asymmetrical to take account of the difference in the levels of development between the ACP and EU Member States.

Recommendation:

The ACP side must continue to request greater flexibility from the European side on cumulation and asymmetry, which are critical to the development of the ACP countries and intra-ACP trade, as well as their trade with the EU.

II. Implementation-related issues

In the joint letter from Commissioners Pielbags and De Gucht sent on 6 September 2010 to the Belgian Foreign Affairs Minister in view of the meeting of the Council of Ministers of Foreign Affairs/Trade held on Friday 10 September 2010, it was stated that implementation of the CARIFORUM-EU EPA had not yet actually begun. Is this due to difficulties experienced by the region or to the slow deployment of the mechanisms meant to effectively trigger its implementation? This is yet to be clarified and the report to be presented by CARIFORUM at the meetings in Brussels will help to give a clearer picture of the situation.

In their Ministerial Declaration on the EPAs, which was adopted in Ouagadougou, the ACP States reiterated their call for adequate development support to help them meet their commitments under the EPAs, in particular to improve the competitiveness and production capacities of the ACP States and regions. In that context, we have noted the creation of EPA programmes or matrices for development in certain regions, which aim to mobilise additional resources and all the regions have been invited to do likewise. There is also growing unease in certain regions like West Africa, for instance, where instruments like the PAPED have been experiencing difficulties with the EU's capacity to provide new or additional resources to meet their legitimate needs and expectations.

It must be reiterated that development criteria exist for judging the relevance of the EPAs to development, and the discussions with the EU Ministers in charge of development, who will participate in the meeting on 22 October, is the most appropriate forum in which to raise these concerns.

It is through consensual analysis of these concerns that we will be able to ensure that the EPAs fulfill their potential as tools for development. In the Final Report on the public consultation process undertaken by the European Commission on the EU's Future Trade Policy published in September 2010, and which followed on from the Commission's publication of its document entitled "Europe 2020" on 3 March 2010, the arguments put forward by the ACP side were included in the section dealing with relations with third countries. Page 42 states that "the EU should show certain degree of flexibility and should not unilaterally interpret WTO rules to extract market access commitments ...The impression from respondents is that that the EPA has undermined not only the ACP Group as a group but also the regional integration process within the ACP"

Recommendation:

Benefits to be derived from EPA implementation must manifest in the building and strengthening supply-side capacities and the competitiveness of ACP economies. EPA provisions must include massive aid and investment programmes so as to stimulate regional integration and make the EPAs true vectors for development.

III. Suggested strategies for preparing the JMTC

The ACP side effectively has room to manoeuvre, to highlight its concerns regarding the EPAs at the high-level dialogue scheduled for 22 October 2010 during the ACP-EU JMTC meeting.

Following a Special EU Council session of the Ministers of Foreign Affairs and Trade on 10 September 2010, Commissioners Pielbags and De Gucht were asked to draft a "Reflections paper". That internal document will provide details of proposed avenues to be followed by the EU for the EPAs, which will be discussed by the Development Ministers during the morning of 22 October, prior to a meeting with the ACP Ministers in the afternoon. It must be pointed out that the JMTC is not a negotiating forum but represents an ideal arena in which the ACP countries can promote well-articulated concerns within a robust, coherent political message.

To enable the ACP side to hold a productive and informed discussion with the EU Ministers and the two Commissioners on 22 October, the following suggestions are made:

- The Senior Officials should examine a number of issues in detail, and to propose precise recommendations to their Ministers who will convene for the JMTC. Such issues will include the likely consequences of the possible disregard by the RECs of the new deadlines that will be featured in the Communication on the EPAs to be issued by the European Commission towards the end of 2010; the set of concrete concessions that the regions are awaiting from the Commission to fully relaunch the negotiations; and If the European side were to withdraw Regulation 1528/2007 of 20 December 2007, what would be the economic and trade consequences for ACP countries and what alternatives could be negotiated with the Commission?
- Set up a contact group made up of several ACP Ambassadors who will meet with some of their EU counterparts to heighten awareness to our concerns prior to the joint discussions on the EPAs on 22 October. Some Member States, such as France, Finland, Sweden, Denmark, and Ireland will have less rigid positions than other Member States and, on 10 September, called for more sustained dialogue, and more flexibility on the part of the Commission towards the ACP countries;

- Designate ACP spokespersons for a more robust presentation of the ACP positions on the EPAs during the JMTC session, depending on the matters to be addressed, including contentious issues, development concerns, and implementation problems. These modalities would be defined by the ACP MTC meeting.
 - Submit a draft joint communiqué to the European side or explore the possibility of holding a joint press conference on the EPAs to mark the successful conclusion of the discussions.
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