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A CRITICAL ANALYSIS OF THE AGREEMENT ESTABLISHING A FRAMEWORK FOR AN ECONOMIC PARTNERSHIP AGREEMENT BETWEEN THE EAST AFRICAN COMMUNITY PARTNER STATES ON ONE PART AND THE EUROPEAN COMMUNITY AND ITS MEMBER STATES ON THE OTHER PART: THE MOST FAVOURED NATION CLAUSE- A UGANDAN PERSPECTIVE

A Research paper submitted in partial fulfillment of the requirements for the LLM Degree in International Trade and Investment Law, University of Pretoria, South Africa

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Declaration

I, SUSAN KARUNGI, declare that this dissertation is my original work. It has not been submitted before to any other university or institution. Where works of other people are used, references have been provided. I hereby present this work in partial fulfillment for the award of the LLM degree in International Trade and Investment Law in Africa.

Signed

.....

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Abbreviations and Acronyms

ACP	Africa Caribbean and Pacific countries
AU	African Union
COMESA	Common Market for Eastern and Southern Africa
CPA	Cotonou Partnership Agreement
CU	Customs Union
DCs	Developing Countries
EA	East Africa
EAC	East African Community
EBA	Everything But Arms
EC	European Commission
ECDPM	European Centre for Development Policy Management
EDF	European Development Fund
EEC	European Economic Community
EPAs	Economic Partnership Agreements
ESA	East and Southern Africa
EU	European Union
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
GSP	Generalized System of Preferences
LDCs	Least Developing Countries
MFN	Most Favoured Nation
RTAs	Regional Trading Agreements
RoOs	Rules of Origin
SADC	Southern African Development Community
S&D	Special and Differential Treatment
TRALAC	Trade Law Centre for Southern Africa
SADC	Southern Africa Development Community

TDCA	Trade and Development Co-operation Agreement
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization
VCLT	Vienna Convention on the Law of Treaties 1969

Abstract

After years of intense negotiations between member states of the East African Community (EAC) and the European Union, an interim Economic Partnership Agreement was finally initialled on the 27 November 2007. This interim agreement is intended to be an instrument for development by furthering poverty reduction, sustainable development, regional integration and integration of EAC countries into the world economy. However provisions contained in the interim agreement have raised legitimate concerns as to their ability to address these development issues. The African ministers of trade identified nine contentious provisions which are regarded as both legally and developmentally problematic. One of these issues is the most favoured nation (MFN) clause under which parties are required to extend to each other any better or more favourable treatment granted to other countries, which are either developed countries or major trading economies. The urgency behind the negotiation of Economic partnership agreements between the EU and the African Caribbean and Pacific Countries (within which category fall the EAC member states) was the requirement for a WTO compliant legal regime to govern the relationship between both parties. Previous trade regimes were challenged by other WTO members for being discriminatory. However provisions in the interim agreement such as the contentious MFN clause are more than what is required for WTO compatible regional trade agreements. The inclusion of the MFN clause poses major challenges to the trade and development needs of the EAC countries especially the least developed among them. This dissertation will attempt to critically analyze the potential implications of the MFN clause to the East African countries particularly Uganda as one of the least developed member states in the region.

CHAPTER 1

INTRODUCTION

1.0 Background

The last five years have seen the European Union (EU) and its former colonies in the African Caribbean and Pacific (herein ACP) group engaging rigorously in far reaching trade and development negotiations called Economic Partnership Agreements (EPAs) under which merchandise trade between the EU and ACP countries will be reciprocal. In September 2002, negotiations for the World Trade Organization (herein WTO) complaint EPAs, governing trade between the EU and ACP countries were launched.¹ Between November and December 2007, the EU and eighteen African countries had initialed interim EPAs providing for mutual liberalization of trade between the two parties.² The East African Community (herein EAC) was the only exception whose member states negotiated an interim agreement with a common external tariff. An analysis of the EPAs necessitates a broader discussion of the EU's strong historical ties with the ACP countries.

1.1 Historical background on the EU-Africa trade relations

The EU-Africa trade relations have evolved through a series of successive agreements dating back to the Treaty of Rome of 1957 which established an association framework between the European Economic Commission (EEC) and the French territories in Africa.³ At the time, signatories to the Treaty of Rome which established the EEC were France, Italy, Belgium, Netherlands, Luxembourg and West Germany. This was followed by the signing of the Yaoundé

¹ World Bank Summary Report: AFRICA, Economic Partnership Agreements between Africa and the European Union: *What to do now?* October 2008, No. 45945-AFR available at www.ebcam.org/documents/WB_Africa-EPAs-What-to-do-Now.pdf (accessed 11 November 2009)

² *Ibid*

³ Banthia A. (2007) "Success or Failure? An Evaluation of Fifty Years (1957-2007) of European Union Development Policy in Africa, Caribbean, and the Pacific" *Journal of Political Perspectives* EPRU 2007 Issue 2 (1) at 2 available at www.politicalperspectives.org.uk/General/.../EPRU-2007-S1-01.pdf (accessed 6 November 2009)

I and II Conventions in 1963 and 1969 respectively. The Yaoundé Conventions maintained a reciprocal or mutual trade liberalization relationship between the EEC and eighteen “ex-colonial” French territories which was initially began under the Treaty of Rome.⁴ The 1969 Yaoundé Convention was later replaced by the Lomé I Convention of 1975 which was subsequently renegotiated and signed to produce Lomé II in 1985 and Lomé IV in 1989,⁵ each time introducing new issues which have shaped the gradual evolvement of the EU-Africa relations.⁶ Lomé I introduced ground-breaking changes among which was the inclusion of a larger set of nations from Africa, the Caribbean, and the Pacific, thus creating the ACP group as is known today.⁷ Lomé also established a system of non-reciprocal trade preferences between the ACP and the growing European Community (EC).⁸ Non-reciprocity meant that the ACP could export freely into the EC while the EC was required to pay tariffs for exports into the ACP. The non-reciprocity arrangement between the two parties later on came under the most criticism of all the European trade policies.⁹

The Lomé IV Convention remained in force until 2000. Twenty-five years of privileged concessions under the Lomé arrangements were unable to deliver significant economic transformation to the majority of ACP countries.¹⁰ Subsequently on 23 June 2000 the Cotonou Partnership Agreement (hereafter called CPA or the Cotonou Agreement) was entered between the EU and the ACP. The Cotonou Agreement introduced substantive reforms in the relations between the EU and ACP countries. These reforms focused on poverty eradication, sustainable development and the gradual integration of the ACP countries into the world economy, as key goals driving the EU-ACP relations.¹¹ The Cotonou Agreement is to remain in force until 2010.

⁴ *Ibid*

⁵ At the time of signing the Lomé IV agreement, the EEC membership had grown to 15 countries while the ACP group then constituted 70 countries.

⁶ Strydom H. (2007) “From mandates to Economic Partnerships: The return to proper statehood” *African Human Rights Law Journal* (2007)7 at 91

⁷ Banthia A. (2007) *supra* n. 3 at 6

⁸ *Ibid* at 10

⁹ Banthia A. (2007) at 10, Babarinde & Faber (2005) in Strydom H. (2007) *supra* n.6 at 91

¹⁰ Babarinde and Faber in Strydom H. (2007) *supra* n.6 at 94

¹¹ Articles 1, 34 and 37(7) of the CPA

Notably the ACP group constitutes both developing and least developing countries. In this regard the Cotonou agreement's made a significant departure from the Lomé by the introducing the principle of differentiation among ACP states. It gave recognition to the distinction between the ACP countries which were able to compete in the global economy, on one hand, and the LDCs on the other hand, which are economically disadvantaged.¹²

As was the case with previous Lomé agreements, the Cotonou agreements also gave ACP countries preferential access to the EU markets. Under the WTO trade regime, preferential treatment must be granted to the all developing countries without discrimination. However this preference system discriminated against other developing countries that did not fall within the ACP group contrary to the non-discrimination principle enshrined in Article I.1 of the General Agreement on Tariffs and Trade (herein referred to as GATT) 1994.

Consequently the WTO dispute, *European Communities - Regime for the Importation, Sale and Distribution of Bananas WT/DS27/1 (EC-Bananas III)*, declared the Lomé preferences incompatible with EC (European Community) commitments under the WTO Agreement as they provided discriminatory preferences to a subset of ACP countries among a larger group of developing countries.¹³ The Panel found that preference granted by the European Communities to an annual duty-free tariffs on imported bananas originating in ACP countries constituted an advantage for this category of bananas, which is not accorded to like bananas originating in non-ACP WTO Members, and was therefore inconsistent with Article I:1 of GATT 1994. Following this decision, the EU sought a waiver from WTO members to permit the granting of discriminatory preferences to ACP states. Article IX.3 of the Marrakesh Agreement Establishing the WTO provides for the waiving of obligations of WTO members. The waiver was granted with the 31December 2007 set as the deadline for its expiration and for the EU to commence with negotiation of WTO a compatible agreement.¹⁴ Article 36 of the Cotonou agreement,

¹² Article 35(5) CPA

¹³ *EC-Bananas III* available at http://0-www.wto.org.innopac.uatac.za/english/tratop_e/dispu_e/cases_e/ds27_e.htm (accessed 23 October 2009)

¹⁴ Killander M.(2007) "Europe and the return to 'proper statehood' in Africa- A reply to Strydom" *African Human Rights Law Journal* (2007)7 at 579

called for negotiation of WTO compliant non-reciprocal Economic Partnership Agreements (EPAs) between the EU and the ACP.¹⁵

Following this, EPA negotiations were launched in September 2002, with the 31 December 2007 set as the deadline for their conclusion, corresponding with the expiry of the WTO waiver.¹⁶ This was followed by separate negotiations with six ACP regional blocs configured for purposes of these negotiations. They include the Caribbean, West Africa, Central Africa, Eastern and Southern Africa. By October 2007, it became apparent that EPAs would not be concluded by the target date. Even up to 1 January 2008, the Caribbean was the only region that had initialed a full EPA with the EU.¹⁷ As a result a number of interim agreements, also called framework EPAs, were introduced and initialed between the EC and individual countries or sub-regions within Africa as temporary stepping-stone agreements that would bridge the gap between the loss of the Cotonou preferences and the conclusion of final or full EPAs.¹⁸ In November to December 2007, the European Union and eighteen African countries initialed interim EPAs providing for reciprocal liberalization of merchandise trade.¹⁹

1.2 East African Community and EPA Negotiations

Most Africa countries initialed interim EPAs individually with one exception the EAC whose member countries entered into an interim EPA as a customs union with one common schedule of imports from the EU to be liberalized.²⁰ This was done so as to reinforce the process of regional integration in the EAC.

¹⁵ Art. 36(1) of the Cotonou Agreement provides "...the Parties agree to conclude new World Trade Organization (WTO) compatible trading arrangements, removing progressively barriers to trade between them."

¹⁶ Article 37(1) of the CPA set 31 December 2007 as the deadline for the conclusion of EPAs. See also European Centre for Development Policy Management (ECDPM) Briefing note, "EPA Negotiations: Where do we stand?" Available at www.acp-eu-trade.org/epa/ (accessed 22 November 2009)

¹⁷ "State of EPA Negotiations in May 2009" Briefing Note Prepared by ECDPM, May 2009 available at www.ecdpm.org/epa www.acp-eu-trade.org/epa (accessed 22 November 2009)

¹⁸ Bilal S. (2009) "EPAs: To be or not to be?" available at [www.acp-eu-trade.org/.../Bilal EN 09 EPAs](http://www.acp-eu-trade.org/.../Bilal_EN_09_EPAs) (accessed 25 November 2009)

¹⁹ World Bank Summary Report (2008) *supra* n.1

²⁰ In Southern Africa, Botswana, Lesotho, Swaziland and Namibia initialled interim EPAs as individual countries as well as Cameroon in Central Africa, Cote d'Ivoire and Ghana in West Africa. see ECDPM Briefing Note May 2009 (*supra* n.17)

East Africa is a geographically and economically homogeneous region committed to regional integration. It consists of Burundi, Rwanda, Tanzania, Uganda (all of which are least developed countries) and Kenya (which is developing country). Kenya, Tanzania, and Uganda have a long history of regional integration dating back to the creation of the original EAC in 1917, which collapsed in 1977 due to political and economic reasons.²¹

Regional integration efforts were revived with the signing of the Treaty for the Establishment of the East African Community on 30 November 1999 between the states of Kenya, Tanzania and Uganda. It came into force on 7 July 2000.²² Rwanda and Burundi were granted membership in December 2006 which became effective from 1 July 2007 after the conclusion of an accession treaty.²³

The EAC members also signed the Protocol for the Establishment of the East African Customs Union which entered into force on 1 January 2005. Under this Protocol, the customs union was to be established progressively over a period of five years from the date of entry into force of the Protocol.²⁴ On 1 January 2010 the common external tariff (CET) came into full implementation among all EAC states. The common external tariff three tariff bands, namely, zero percent (raw materials, capital goods and essential imports such as medicines); 10 percent (intermediate goods); and 25 percent (finished goods).²⁵ The EAC is fast tracking its economic integration process and its members recently signed a Common Market Protocol 20 November 2009 which is yet to be ratified by individual states.²⁶

²¹ World Trade Organization: Trade Policy Review of the East African Community 31 January 2007 available on line http://0-www.wto.org.innopac.uatac.za/english/thewto_e/countries_e/uganda_e.htm#top (accessed 18 January 2010)

²² Oluoch W. LO (2009) "Legitimacy of the East African Community" *Journal of African Law*, 53, 2 (2009), 194–221, at 194 Cambridge Journals, <http://journals.cambridge.org> accessed 02 Dec 2009, see EAC Treaty www.eac.int

²³ Braude W. (2008) "Regional Integration in Africa- Lessons from the East African Community" at 63 Southern African Institute of International Affairs (SAIIA)

²⁴ Article 11 EAC Customs Union Protocol

²⁵ Article 12 EAC Customs Union Protocol

²⁶ Cronje JB (2010) "The Integration Process in the East African Community" 2010-01-20 posted on TRALAC website www.tralac.org/cgi-bin/giga.cgi?cmd=cause (accessed 10 February 2010)

The East African Customs Union with a common external tariff strengthened the reasons for the EAC countries to negotiate with the EU.²⁷ However, persuading partner states to abandon their other configurations was initially difficult. Kenya and Uganda were configured under Eastern and Southern African (ESA) group, while Tanzania was initially under the Southern African Development Community (SADC) group.²⁸ The customs union looked set to have two different trading regimes with the EU, its largest trade partner, if the partner states signed two different EPAs. Within the EAC it was widely recognized that such a situation would undermine the foundation of the community and lead to its ultimate demise again.²⁹

The decision for the EAC member states to negotiate an EPA with the EU goes back to 11 April 2002, when a regional summit directed that the EAC countries should negotiate as one bloc.³⁰ Subsequent consultations between the EAC and the Common Market for Eastern and Southern Africa (herein COMESA) resolved that the EAC should present an independent market access offer to the EU under the EAC customs union framework which implied that the EAC members would be excluded from the sub-regional and national market access offers to be made by ESA.³¹ Efforts to negotiate as a bloc bore fruit on 11 October 2007 resulting into the initialing of the Agreement Establishing a Framework for an Economic Partnership Agreement between the East African Community partner states on one part and the European Community and its Member States on the other part (herein referred to as EAC-EU interim EPA or interim agreement interchangeably). This agreement was initialed on the 27 November 2007 in Kampala, Uganda.³²

²⁷ Kiguta P. (2008) "The EAC interim agreement: an overview" ICTSD and ECDPM Trade Negotiations Insights, Vol.7 No.2 March 2008 available at www.ictsd.org/downloads/tni/tni_en_7-2.pdf (accessed 28 November 2009)

²⁸ Overseas Development Institute (ODI) Briefing paper: Economic Partnership Agreements (EPAs): Where We Are June 2006, www.odi.org.uk/resources/download/1942.pdf (accessed 21 November 2009)

²⁹ Haywood K. (2008) "Uganda's EPA: getting the process 'right'" ICTSD and ECDPM Trade Negotiations Insights, Vol.7 No.2 March 2008 available at www.ictsd.org/downloads/tni/tni_en_7-2.pdf (accessed 28 November 2009)

³⁰ Kiguta P. (2008) *supra* n.27 at 7

³¹ Joint Statement by the EAC and COMESA Secretariats on EPAs, Nairobi-Kenya October 24 2007 in Haywood K. (2008) *supra* n.29 at 7

³² *Ibid*

The EAC-EU interim EPA covers trade in goods and fisheries. A commitment was taken by both parties to continue negotiations on services, investment, agriculture, rules of origin, Sanitary and Phyto-sanitary Standards (SPS), Technical Barriers to Trade (TBT), customs and trade facilitation and other trade-related rules in order to conclude a full EPA.³³

1.2.1 The EAC liberalization offer to the EU

The EAC has liberalized 82 percent of the products it trades with the Europe while the remaining 18 percent was excluded from liberalization. The 82 percent is based on the EAC common external tariff.³⁴

On the other hand, European Union granted the EAC states duty free, quota-free market access with transitional arrangements for rice and sugar from 1 January 2008.³⁵ On its part, the EAC agreed to gradually open its market for goods from the EU over twenty years, with a two year moratorium. This suspension was intended to allow all the five East African countries to start full implementation of the common external tariff. Tariff elimination by members of the EAC commenced on 1 January 2010 with full liberalization for trade in goods to be achieved by 2033.³⁶ Over a period of 25 years, EAC will liberalize 82.6 percent of imports from the EU by value (65 percent by 2010, 80percent by 2023 and the remainder by 2033).³⁷

1.3 Uganda: why the EPA?

Under the new EPA arrangement, Uganda would still retain preferential access to European markets without opening its borders to exports from the EU. LDCs were not obliged to negotiate EPAs because they still enjoyed preferential market access to the EU. In March 2001,

³³ Article 37 of the EAC-EU Interim EPA

³⁴ Kiguta P.(2008) *supra* n.27 at 7, by initialing it means that the agreement was authentic and the parties signified their intention to sign the agreement

³⁵ Par.2 of Annex 1 of the EAC-EU Interim EPA titled "Customs Duties on Products Originating in the EAC Party"

³⁶ *Ibid*

³⁷ Annex 1 of the EAC-EU Interim EPA

the EU introduced the Everything But Arms (EBA) initiative under which all ACP LDCs were granted a non-reciprocal market access for all their exports except arms and ammunition.³⁸

Although Uganda is entitled to trade preferences under the EU-EBA scheme, it was important for the country to get involved in the EPA negotiations, first as a member of the EAC Customs Union since the region negotiated under a common external tariff.³⁹ For the LDCs, Lenaghan writes, the EBA alternative seemed only a theoretical option if their non-LDC neighbors opted for EPAs since this would isolate the LDCs and certainly fragment trade relations with non-LDC regional counterparts.⁴⁰ For the EAC this would put the LDCs at a disadvantage because they rely on Kenya as the manufacturing hub. The second reason was the need for a predictable and transparent trade regime as an enabling environment for private sector growth.⁴¹ The EBA alternative was unilateral granted under terms and conditions decided by the EU. It can thus be withdrawn or modified any time. In addition, countries are assessed periodically to ascertain whether they remain eligible to benefit from the EBA thus creating uncertainties for the country's export sector.⁴²

Thirdly, an assessment of Uganda's export trade figures to the EU indicates that about 99 percent of Ugandan exports to the EU preferred the Cotonou arrangement over the EBA mainly because of the stringent rules of origin under the EBA.⁴³ The stringency arises because under EBA, cumulation is only between the beneficiaries which are only LDCs. This implies that if Ugandan exporter uses inputs sourced from (Kenya a developing country) which are above a

³⁸ Banthia A. (2007) *supra* n.3 at11, This was in line with Article 37(9) of the Cotonou Agreement under which the European Community was required to start, a process which would allow duty free access for essentially all products from all LDC.

³⁹ Mutahunga E. (2010) "An Overview of the East African Community (EAC) - European Union (EU) Framework Economic Partnership Agreement (EPA); what is in it for Uganda?" *The Uganda Trade Review*, April - June 2008 Vol. 1 at 3 available at www.mtti.go.ug/EPA.pdf (accessed 15 March 2010)

⁴⁰ Lenaghan M.P. (2006) "Trade Negotiations or Trade Capitulations: An African Experience," Presented at the Tenth Annual LatCrit Conference held in San Juan, Puerto Rico, October 6-10, 2005. *BERKELEY LA RAZA LAW JOURNAL* Vol. 17:117 (2006) at138 available at <http://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/berklarlj17> (accessed 8 December 2009)

⁴¹ Mutahunga E. (2010) *supra* n.39 at 4

⁴² Mutahunga E. (2010) n.39 *supra* at 4

⁴³ *Ibid*

certain threshold, that exporter loses preferential treatment under EBA. Thus the exporter would have to pay the normal taxes levied on similar products from other countries such as Brazil, provided that such countries have no preferential trade agreement with the EU. On the other hand, under the Cotonou Agreement, such a product would be eligible for preferential treatment since Kenya is a member of the ACP countries.

It was therefore important to choose the option that presented the Ugandan business community with predictability and transparency, and one which would enable them get preferential treatment on the EU market given the high level of sourcing of intermediate inputs in the production process.

Apart from the challenges associated with the EBA scheme, this dissertation will focus on Uganda for specific reasons. Uganda is a landlocked country implying that all prices of traded goods have to cover additional transport costs, not only for imported inputs, but also for the shipment to international markets. Industries that export are not numerous in Uganda and, although some may have comparative advantage, they face several major obstacles to export competitiveness.⁴⁴ Ugandan industries are disadvantaged, in comparison to Kenya, by their smaller domestic markets and higher transport cost of imported inputs⁴⁵ hence the reason for selecting Uganda as the focus of this dissertation on Uganda.

1.4 Objective of the study

The purpose of this paper is to analyze the implications of a particular provision stated in the recently concluded interim EPA agreement. Article 16 of the interim EPA which provides for the Most Favoured Nation (MFN) clause has become a bone of contention in debates surrounding EPAs. This study will attempt to examine the implications of this clause on the growth of trade

⁴⁴Eckhard S. & Ssemogerere G. (2004) "Uganda's policy reforms, industry competitiveness and regional integration: a comparison with Kenya", *The Journal of International Trade & Economic Development*, 13: 3, 325 – 357, at351 available at <http://www.informaworld.com/smpp/title~db=all~content=g713792309> (accessed 18 December 2009)

⁴⁵Findings in Eckhard S. *et al* (2004) *supra* are based a conclusion reached by three different studies, EPAU (1995) "Investment and Export Promotion Strategy", IFO (1997) "Impact of East African Regional Integration on the East African Economy", UNDP (1996) "East African Open Borders Potential Trade Impact on the Uganda Economy"

and development in the region, but more specifically on Uganda. The analysis will show the potential risks and challenges that may arise from the inclusion of the MFN Clause in the interim EPA and possible benefits that may be derived from the inclusion of this provision.

1.6 Statement of the problem

EPAs are meant to be “instruments for development” furthering poverty reduction, sustainable development, regional integration and integration of ACP countries into the world economy.⁴⁶ Nevertheless, the negotiations have been fraught with disagreements, difficulties and delays in reaching full EPAs due to fears that these objectives may not be achieved under the current EPA arrangements.

In Africa negotiations are progressing at an extremely slow pace and their conclusion is not yet clear. However the EU on its parts has commenced with provisional application of the interim EPA. According to Bilal, these interim agreements are fully-fledged free trade agreements in the sense of Article XXIV of the GATT 1994, which should thus be notified to the WTO and followed by signing and ratification by the parties.⁴⁷ In case they are amended, the amendments would have to be notified to the WTO and signed and ratified by the parties as well.⁴⁸ Further, Article 43 of interim EPA provides that the interim agreement shall remain in force until a comprehensive EPA enters into force. These imply implies that if a comprehensive agreement is not reached soon, the interim EPAs will be the permanent legal regime governing the EU-EAC trade.⁴⁹

Several African negotiators have voiced concerns over a number of provisions appearing within the interim agreements which they view as ‘contentious’ and which they demand to be

⁴⁶ McCarthy C. L, Kruger AT & Fourie J. (2007) “Benchmarking EPA negotiations between EU and SADC”, Trade Law Centre for Southern Africa (Tralac) available at www.aprodev.net/.../BM%20SADC (accessed 15 January 2010)

⁴⁷ Bilal S. (2009) *supra* n.18 at 4

⁴⁸ *Ibid*

⁴⁹ Most of these agreements have only been initialed and not signed the therefore their ability to bind the parties is still questionable

reviewed before conclusion of full EPAs.⁵⁰ These issues include; among others; the definition of substantially all trade, transitional periods, export taxes, the standstill clause, free circulation of goods, national treatment, bilateral safeguard, infant industry provisions, non-execution clause, the most-favoured nation clause and rules of origin.⁵¹ These nine issues were identified as contentious issues by the African Union Ministers of Trade on 3rd April 2008.⁵²

1.6.1 The Most Favoured Nation Clause (MFN)

In the East African region, contentious issues arising from the interim EPA negotiations (such as the standstill clause, antidumping and countervailing measures and safeguard measures) have been discussed and a solution found except for the non discrimination "MFN" clause and export duties.⁵³ The inclusion of the MFN clause in the interim EPAs has been widely criticized and perceived as 'both legally and developmentally problematic'⁵⁴ and is a departure from development objectives of the Cotonou Partnership Agreement.⁵⁵ The study will show that the inclusion of the MFN provision is not necessary for WTO compatibility nor is it desirable for trade diversification policies and may become an impediment to achieving development.⁵⁶ LDCs have been granted preferential tariff treatment in the markets of developed countries under a number of schemes and arrangements such as the *Enabling Clause* and therefore the inclusion of the MFN provision under the EPAs would defeat the purpose of such preferences.

⁵⁰ Bilal S. & Stevens C. (eds.) (2009) "The Interim Economic Partnership Agreements between the EU and African States: Contents, challenges and prospects" ECDPM Policy Management Report 17, Maastricht. available at <http://www.fes.de/cotonou/DocumentsEN/Official%20ACP-EU> (accessed 14 December 2009)

⁵¹ Lui D. & Bilal S. (2009) "Contentious Issues in the interim EPAs, Potential flexibility in the negotiations, ECDPM Discussion Paper No. 89 March 2009 available at www.ecdpm.org/89 (accessed 14 December 2009)

⁵² Addis Ababa Declaration on EPA Negotiations, Adopted at the African Union Conference of Ministers of Trade and Finance, 1-3 April 2008, Addis Ababa, Ethiopia available at www.acp-eu-trade.org/library/files/AU-Ministers-of-TradeandFinanceEN_030408AUAddi-Ababa-Declaration-on-EPA-Negotiations.pdf(accessed 26 November 2009)

⁵³ Factual Sheet on the Interim Economic Partnership Agreements: The East African Community January 2009 http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142194.pdf (accessed 13 November 2009)

⁵⁴ Ochieng C. M. (2009) "Legal and systemic contested issues in Economic Partnership Agreements (EPAs) and WTO Rules: Which Way Now?", at 12 International Centre for Trade and Sustainable Development (ICTSD): EPAs and Regionalism Series September 2009 available at www.ictsd.org/downloads/2009/11/ochieng_web_final.pdf (accessed 12 November 2009)

⁵⁵ Cotonou Partnership Agreement ACP-EC, European Commission, 23 June 2000, available at http://ec.europa.eu/development/icenter/repository/Cotonou_EN_2006_en.pdf (accessed 30 October 2009)

⁵⁶ Dièye C. T. & Hanson V. (2008) "MFN provisions in EPAs: a threat to South-South trade? International Centre for Trade and Sustainable Development ICTSD, Trade Negotiations Insights, Vol. 7 No.2 March 2008, at3 available at http://ictsd.org/downloads/tni/tni_en_7-2.pdf (accessed 12 December 2009)

1.6.2 Possibility of Revising the Interim EPA

The EAC would like to see the interim EPA amended but the EU is willing to consider revisions in the context of negotiations towards final and comprehensive EPAs only. EAC also put forward proposals to amend the IEPA text in the negotiations towards a full EPA. Whether the European Commission will honour these requests or maintain their positions taken throughout the IEPA negotiations remains to be seen.⁵⁷

In early July 2009 the EAC postponed the signature of the Interim EPA because “*the EC has consistently been non-committal and non-responsive on economic and development issues.*”⁵⁸ According to Bilal, the debate over contentious issues has crystallized tensions because it reflects a divergence of views over some specific content of the agreements, which when considered of strategic importance by one of the parties may block progress in the negotiations or the signing of the agreement.⁵⁹ Therefore there is a need to scrutinize the implication these issues in greater detail before the conclusion of a final EPA.

1.7 Research questions:

The main questions that this thesis seeks to answer are;

1. What are the legal implications of the MFN clause on development of trade in the country?
2. How can this provision be modified to match trade and development needs in Uganda?

1.8 Significance of the study

If these interim agreements are to become binding, certain provisions if taken in their current form are likely to cause serious detriment in the EAC region. Comment on the potential impact

⁵⁷ Julian M.(2008) “EPA negotiations update” ECDPM Trade Negotiation Insights Vol. 7 No. 10 December 2008/ January 2009 Available online at: www.ictsd.net/tni www.acp-eu-trade.org/tni (accessed 12 December 2009)

⁵⁸ Report of the EAC-EC-EPA Ministerial Preparatory Meeting, (Permanent Secretaries Session) 1st -2nd July 2009, (Ref. No. EAC/SR 37/2009), EAC Secretariat, Arusha, Tanzania, July 2009

⁵⁹ Bilal S. (2009) *supra* n.18 at 3

of EPAs has been hindered so far because their character remains sketchy.⁶⁰ This study seeks to contribute to the ongoing debate on the implications of the EPAs. In the academia the study will also give a legal perspective of the EPAs since most studies have been pre-dominantly from the economic view point.

The aim is to clarify some of the controversial issues posed by interim EPAs and to provide a basis on which full EPAs should be concluded. To the governments in the EA region, the study offers them an opportunity to be aware of what to expect from the EPA agreement on goods once concluded and in force although the greatest delay in observing the effects of what is agreed will be because governments will alter some of their policies only over a period of twelve or more years.⁶¹

1.9 Definition of concepts

In this paper the term trade development means increasing export performance, improving market access, overcoming supply side constraints. From an African perspective the development policy concerns hinge on two interconnected challenges: overcoming supply-side constraints and addressing market access constraints which require good trade liberalization policies, notably with respect to manufactured goods.⁶² The study will not divulge into the different dimensions to development such as sustainability.

1.10 Literature review

A wide array of literature on economic partnership agreements has been published. Authors, from within and outside Africa, have tackled different aspects of the EPA negotiations.

⁶⁰ Stevens C. (2006) "The EU, Africa and Economic Partnership Agreements: Unintended consequences of policy leverage" *Journal of Modern African Studies*, 44, 3 (2006), pat 441–458, at442 Cambridge Journals available online <http://Ojournals.cambridge.org.innopac.uatac.za/action/displayFulltext?type>

⁶¹ *Ibid*

⁶² Draper P, (2007). "EU-Africa Trade Relations: The Political Economy of Economic Partnership Agreements," Jan Tumlrir Policy Issues No. 02/2007 at18 available at www.oecd.org/dataoecd/6/6/38780784.pdf (accessed 10 October 2009)

Reputable institutions and organizations have made significant contribution to the on-going debate on EPAs through a number of publications. WTO agreements specifically the GATT 1994 provide the framework for this study.

A study by D. Lui and S. Bilal, *Contentious issues in the interim EPAs: Potential flexibility in the negotiations*⁶³ highlights the advantages and disadvantages of the 'contentious' issues which were raised by the ACP countries. The key argument advanced in this study is that these issues bear significant economic and political consequences for the development of these countries and unless some way is found of overcoming disagreements, there is a real risk that negotiations on comprehensive EPAs will not be concluded. Issues arising from this discussion are placed in the context of the EAC to examine the extent to which they impact on the development of trade.

Ochieng C. M demonstrates that the EPAs contain more restrictive legal provisions than necessary for the WTO compatibility or desirable for development, financial and trade needs of ACP countries.⁶⁴ His discussion provides a legal analysis of the 'contentious issues' such as the MFN clause which he argues is a potential threat to the multilateral trading system. This study draws from Ochieng's arguments to show that the MFN clause may become counterproductive especially to the development needs of least developed countries such as Uganda.

EPAs and the Doha Round: Development or discontent, by Senona J shows that the EPA negotiating processes are failing to meet the development expectations and objectives set out in the respective mandates. In this paper, Senona applies the concept of sustainable development as the yardstick to assess the outcomes of the EPA negotiations. Although the sustainable development forms the gist of this discussion, the author also addresses development concerns of EPAs which will be relevant to this study.

⁶³ Sanoussi Bilal S. & Lui D. (2009) *supra* n.51

⁶⁴ Ochieng C. M (2009) 'Legal and Systemic Contested issues in Economic Partnership Agreements (EPAs) and WTO Rules: Which Way Now?' ICTSD, EPAs and Regionalism Series September 2009. www.ictsd.org accessed 11 December 2009

Draper P, in his study on EPA negotiations in Africa, *EU-Africa Trade Relations; The Political Economy of Economic Partnership Agreements*,⁶⁵ makes a case for trade liberalization. He however he argues that the EPAs agenda which it covers goods services, intellectual property rights, competition policy and government procurement is too broad. He makes a case for a sequenced negotiating agenda, which is to secure a goods market access first. Although the focus of the study was the SADC region, the same controversial issues in interim EPAs such as MFN treatment cut across all regions in Africa.

Other studies, reports or discussions which analyze potential implications of the contentious issues especially the MFN provision are also explored in this study. Some of these include Trade Negotiations Insights by the International Centre for Trade and Sustainable Development (ICTSD) and the European Centre for Policy Management (ECDPM)⁶⁶.

1.11 Research methodology and chapter overview

This paper is both a desk review and library based research. A wide range of literature which includes both primary and secondary sources is surveyed. WTO legal texts, agreements governing EU-ACP relations and treaties or protocols of the East African Community have been explored as key primary sources. The paper also examines relevant books, scholarly articles and publications of recognized international organizations as secondary sources. Internet sources are widely utilized because they currently constitute a wealth of analyses on the recent EPA negotiations.

The paper has four chapters. The first chapter gives general background of the study with the view to introduce the readers to the context of the work. The chapter traces the evolvement of the EU-ACP relations up to the current status of the recently negotiated interim EPA between the EU and East African states.

⁶⁵ Draper P. (2007) *supra* n.62

⁶⁶ Jones E. & Perez J.(2008) "Partnership or power play? EPAs fail the development tests" Trade Negotiations Insights Vol. 7 No.4 May 2008 available at http://ictsd.org/downloads/tni/tni_en_7-4.pdf (accessed 22 November 2009)

Chapter two entails a discussion of the concept of the MFN principle as enshrined in the Article I (1) GATT 1994 and exceptions thereto focusing on the *Enabling Clause* as the key exception relevant to this study.

Chapter three which is the main theme of the study analyses the MFN clause and its potential implications on the growth of trade and economic development in the EAC drawing specific examples from Uganda. The discussion attempts to show that the MFN provision is not required for WTO-legal regional trade agreements and the extent to which the provision is in contradiction with Article XXIV as well as an impediment to south- south trade are addressed under this chapter.

The fourth and last chapter draws conclusions and also provides recommendations on how the MFN provision can be modified to suit developing needs of EAC states such as Uganda.

1.12 Scope and Delineation

A detailed analysis of the implications of the MFN clause on the East African region in particular Uganda can hardly be achieved in this thesis owing to the time and space limitations. This study does not provide the in-depths of the implications on the economy but is rather limited to general legal implications in the context WTO legal framework governing regional trade arrangements. Owing to time and space, implications on the whole of the East African region will not be covered in this paper. Also this research was conducted while in Pretoria, South Africa which made it impossible to access specific information on Uganda.

CHAPTER 2

2.0 INTRODUCTION

Non-discrimination is the fundamental principle which underlies the world trading system governed by the World Trade Organization (WTO).⁶⁷ The Preamble of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter called the Marrakesh Agreement) states “the elimination of discriminatory treatment in international trade relations” as a core objective of the WTO.⁶⁸ The most-favoured-nation obligation (hence forth MFN) is the prohibits a country from discriminating between other countries although there are recognized exceptions to this provision. Certain exceptions to the MFN requirement such as the *Enabling Clause* were built into the WTO legal framework as “*positive efforts designed to ensure that developing countries, especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.*”⁶⁹ This chapter briefly discusses the concept of the MFN principle and some of the exceptions to it particularly the *Enabling Clause*.

2.1 The concept of the Most-Favoured-Nation treatment under the WTO

The MFN principle is enshrined in Article I.1 of the GATT 1994. It is essentially an obligation under which a WTO member agrees to accord to the other members treatment that is no less favourable than that which it accords to any another country. The purpose of this provision is to ensure that non-discrimination prevails in trade among countries.⁷⁰ This principle has been used in trade between states over a long period of time. Its origins date back to the early treaties of Friendship, Commerce and Navigation.⁷¹ For example, in a 1654 Treaty between Great Britain and Sweden, the MFN clause provided:

⁶⁷ Bossche Van P (2005) “The Law and Policy of the World Trade Organization: Texts, Cases and Materials” at 308

⁶⁸ Par. 3 of the Preamble of the Marrakesh Agreement Establishing the World Trade Organization, WTO Legal texts at 4, see Julia Ya Qin (2005). “Defining non-discrimination under the Law of the World Trade Organization” *Boston University International Law Journal* Vol. 23:215:2005, 215-297 at 216

⁶⁹ Par. 2 Preamble of the Marrakesh Agreement

⁷⁰ Lui D. & Bilal S. (2009) *supra* n.51at 27

⁷¹ Commonly referred to as the “FCN treaties”

*The people, subjects and inhabitants of both confederates shall have, and enjoy in each other's kingdoms, countries, lands, and dominions, as large and ample privileges, relations, liberties and immunities, as any other foreigner at present doth and hereafter shall enjoy.*⁷²

MFN clauses in these agreements were intended to facilitate economic activities of the subjects of each state within the territories of the other states.⁷³ This principle is however not meant to produce equality among states but rather to give equal trading opportunity to all WTO members.⁷⁴

The MFN rule gradually evolved and is now incorporated in the WTO legal framework. Under the GATT 1994, it is used as a means to liberalize trade.⁷⁵ All instruments of trade including tariffs (which are the WTO accepted means of liberalisation) as well as any domestic instruments which affect trade have to respect this principle.⁷⁶ The Appellate Body in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (EC – Tariff Preferences)* stated that the MFN treatment obligation is the ‘cornerstone of the GATT’ and ‘one of the pillars of the WTO trading system.’⁷⁷ Article I.1 of the GATT 1994 essentially requires that any trade advantage granted to products of any country with respect to exportation or importation must ‘immediately and unconditionally’ be offered to *like* products of all WTO members. Article I.1 states;

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for

⁷² Treaty of Peace and Commerce between Great Britain and Sweden, 11 April 1654 (BSP 1/69)1 in United Nations Report of the Working Group of the UN General Assembly, International Law Commission Fifty-ninth session Geneva, 7 May-8 June & 9 July-10 August 2007 available at www.un.org/ilc/documentation/english/a_cn4_l719.pdf (accessed 10 January 2010)

⁷³ *Ibid*

⁷⁴ This view is shared by Van de Bossche (2005) *supra* n.67 at 310

⁷⁵ Matsushita M *et al* (2006) “The World Trade Organization: Law, Practice and Policy” at 202

⁷⁶ *Ibid*

⁷⁷ Appellate Body Report, *EC-Tariff Preferences* WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, 925EC, available at www.wto.org/english/tratop_e/dispu_e/246_arb_e.doc-2004-09-19 par. 101at 40

*imports or exports, with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and respect to all matters referred to in paragraph 2 and 4 of Article III, any advantage, favour privilege or immunity granted by any contracting party to any product originating or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of other contracting parties.*⁷⁸

The concept of the MFN treatment has a three-tier test;

- a) Whether the governmental measure at issue confers a trade advantage of the kind covered by Article I:1
- b) Whether the products concerned are “like products”
- c) Whether the advantage at issue is granted immediately and unconditionally to all ‘like products’ originating in other WTO Members.⁷⁹

The term ‘advantage’ has been broadly interpreted by WTO panels and the appellate body to encompass not only tax or customs advantages, but also laws, regulations and requirements that affect importation and exportation and alter the scales of competition. The concept of ‘any advantage’ covers a wide scope of measures which include procedural and administrative requirements relating to the importation or exportation of goods⁸⁰ as well as safeguard measures, anti-dumping and countervailing duties⁸¹, among others. The provision does not contain an exhaustive list of policies that should come under its ambit rather it establishes standards that will provide interested parties with legislative guidance as to its scope.⁸² Matsushita further argues that from the scope of measures that have been brought for dispute

⁷⁸ Art. I.1 GATT 1994 WTO Legal Texts, Results of the Uruguay Round of Multi Lateral Trade Negotiations at 424

⁷⁹ Bossche P. (2005) *supra* n.67, at 317

⁸⁰ *European Communities - Regime for the Importation, Sale and Distribution of Bananas WT/DS27/1 (EC-Bananas III) supra* n.13

⁸¹ Bossche Van P. (2005) *supra* n.67, at 317

⁸² Matsushita M. *et al* (2006) *supra* n.75 at 204

settlement so far, there is no reported case where the panel decided that such a measure was not covered by Article I.1 of the GATT.⁸³

Article I.1 also requires that like products should be treated equally irrespective of their country of origin.⁸⁴ The term ‘like products’ is not defined in the GATT, but guidance on this is provided by case law. The Appellate Body in *EC- Asbestos*⁸⁵ gave four general criteria that should be employed to determine the ‘likenesses of products. These include; (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits in respect of the product; (iv) the tariff classification of the products.⁸⁶ The Appellate Body was however quick to add that while these general criteria provide the framework for analysing the ‘likeness’ of particular products they are simply tools to assist in examining the products and are ‘neither a treaty mandated nor a closed list of criteria that will determine the legal characterisation of products’.⁸⁷ In *Japan-Alcoholic Beverages*, the Appellate Body likened the concept of “likeness” to an accordion, which “stretches and squeezes in different places.”⁸⁸ The concept of likeness has to be analysed on a case by case basis.

The MFN provision further requires that any advantage granted by a WTO member to imports from any country must be granted ‘immediately and unconditionally’ to imports from all other WTO members.⁸⁹ The term ‘immediately’ would mean that there should be no delay in extending any advantage granted to any country to all WTO members. The word “unconditionally” denotes that extension of MFN treatment cannot be made conditional upon other members undertaking a certain action such as, ‘giving something in return’ or ‘paying’ for

⁸³ *Ibid* at 208

⁸⁴ *EC-Bananas III supra* n.80

⁸⁵ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC- Asbestos)* WT/DS135/AB/R Adopted 5 April 2001, WT/DS135/AB/R

⁸⁶ par.101 Appellate Body Report, *EC- Asbestos* in Leister S. *et al* (2008) “World Trade Law Texts, Materials and Commentary” at 309

⁸⁷ *Ibid*

⁸⁸ *Japan- Taxes on Alcoholic Beverages* (WTO Doc. WT/DS8,10,11/AB/R of 4 October 1996) in Leister S. *et al* (2008) at 308

⁸⁹ Article I.1 of the GATT 1994

the advantage.⁹⁰ The Appellate body in *Canada- Autos*⁹¹ found that the advantage of the import duty exemption accorded to some motor vehicles originating in certain countries without being accorded to the like motor vehicles from all WTO members was inconsistent with Canada's obligations under Article I.1. The Appellate Body found that the measure at issue did not accord the same advantage immediately and unconditionally to like products from all other countries.⁹²

WTO members are required to comply with all requirements of the provision mentioned above. Strict adherence to this provision can be onerous on countries especially those which are less competitive in international trade and hence the development of exceptions to this obligation.

2.3 Exceptions to the MFN Rule

The GATT 1994 contains a number of exceptions to the MFN treatment. These include the general exceptions laid out in Article XX, historical preferences in Article I: 2-4, Regional Trade Agreements which may be free trade areas and customs unions GATT Art. XXIV, the 1979 Decision, the *Enabling Clause* and the waiver under Article IX:3 of the Marrakesh Agreement, among others. Regional Trade Agreements (RTAs) and the *Enabling Clause* are the typical exceptions to the MFN principle.⁹³

2.3.1 Article XXIV GATT 1994

RTAs are permitted as an exception to Article I.1 as long as the conditions stated in Article XXIV of the GATT 1994 are fulfilled. Tariffs and other barriers to trade must be eliminated with respect to "substantially all trade" within the regional trade area.⁹⁴ In addition tariffs and other

⁹⁰ Bossche Van P. (2005) *supra* n.67 at 317

⁹¹ *Canada Certain Measures Affecting the Automotives Industry* (WTO Docs WT/DS 139 & 142/AB/R of adopted 19 June 2000, DSR 2000:VI, 2985) Abbreviated as *Canada- Autos*

⁹² *Ibid*

⁹³ Matsushita M. *et al* (2006) *supra* n.75 at 219

⁹⁴ Article XXIV 8 (a) (i) & 8 (b) GATT 1994 governing Customs Unions and Free Trade Areas respectively

barriers to trade applied to third countries must not be higher or more restrictive than they were prior to the formation of the free trade area or customs union.⁹⁵

2.3.2 The *Enabling Clause*

Another key exception is the *Enabling Clause* whose discussion will provide the contextual background to the analysis in this paper. The *Enabling Clause* is not found in the WTO legal text as one of the provisions. It is rather a decision which came to be incorporated in the WTO legal framework as a result of certain developments at the time. This part of the paper will briefly give a historical background of how the *Enabling Clause* came to be part of the WTO law as an exception to the MFN principle.

Over a period of trading under the GATT arrangement, developing countries were not able to compete for export markets on equal basis with developed countries. The GATT 1947 had no special provisions which took into account the unequal levels of development among contracting parties, (as they were then referred to).⁹⁶ The MFN obligation became a hindrance to developing countries since it required non-discriminatory access to export markets irrespective of a country's level of development.⁹⁷ A different arrangement where developing countries would be exempted from their MFN obligations was therefore necessary to enable them to participate and reap from international trade. This led to the adoption of the 1979 Decision (the *Enabling Clause*) among GATT Contracting Parties which enabled developed members to give differential and more favourable treatment to developing countries.

2.3.4 Historical Development of the *Enabling Clause*

The *Enabling Clause*, more formally called the *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, is contained in the Decision of the

⁹⁵ Article XXIV5 (a) (b) GATT

⁹⁶ Matsushita M. *et al* (2006) *supra* n.75 at 220

⁹⁷ Lenaghan M.P. (2006), *supra* n.40 at 117

Contracting Parties of 28 November 1979.⁹⁸ It allows members to accord differential and more favourable treatment to developing countries without extending such treatment to other WTO members and to that extent it is a relaxation of the MFN provision.⁹⁹ The *Enabling Clause* also restated the principle of non-reciprocity which is provided in part IV of the GATT.

Issues affecting developing countries with respect to their obligations under the MFN rule were first taken up under the auspices of the United Nations Conference on Trade and Development (UNCTAD) where trade preferences for developing countries were first discussed among the developed countries. The discussions gave birth to the Generalized System of Preferences (GSP) which was first adopted under the UNCTAD II Resolution of 1968.¹⁰⁰ Under the GSP, developed countries offer non-reciprocal preferential treatment¹⁰¹ (such as zero or low duties on imports) to products originating in developing countries.¹⁰² Preference-giving countries which are the developed countries unilaterally determine which countries and which products are included in their schemes.

UNCTAD Resolution 21(II), the objectives of the GSP arrangement were to increase their export earnings of developing and least developed countries; to promote their industrialization and to accelerate their rates of economic growth.¹⁰³

⁹⁸Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries *Decision of 28 November 1979 (L/4903)*, WTO *doct'* BISD 26S/203-205 March 1980 in WTO Documentation in Electronic Form,

⁹⁹ Bhagirath Lal Das (1999) "The World Trade Organization: A Guide to the Framework for International Trade." 1999 at 24

¹⁰⁰ Resolution 21 (II) UNCTAD Proceedings of the Conference of 1968, Report and Annexes UN TD/97 in Handbook on Duty-Free Quota-Free and Rules of Origin Part I: Quad Countries: Publication of the United Nations Conference on Trade and Development, UNCTAD/ALDC/2008/4 United Nations New York and Geneva, 2009 available at www.unctad.org/templates/Download.asp?docid=11900&lang=1. (accessed 28 November 2009)

¹⁰¹A non-reciprocal preference arrangement exists when one country offers access to exports originating from another country on terms that are more favourable than the existing tariff, without requesting reciprocal market access. See WTO World Trade Report 2004 at 26

¹⁰² See WTO website Enabling Clause for developing countries (goods) at http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm#enabling_clause

¹⁰³ *Ibid*

This Resolution resulted into the establishment of a Special Committee on Preferences which provided the platform for developed countries to make consultations on issues pertaining to the GSP. Conclusions reached by this committee established *inter alia* the legal nature of the commitments assumed by the preference-giving countries. It was agreed that the preferences would be temporary in nature and would not constitute binding obligations on the preference granting countries.¹⁰⁴ The grant of these preferences was also conditional on a waiver from the other Contracting Parties. GSP schemes were drawn at the national level with each donor country setting its own terms. Accordingly the GSP arrangement did not entail any contractual obligations on part of the preference giving countries and could be withdrawn at any time. A ten-year waiver was subsequently granted on 25 June 1971, allowing for preferential rates to be applied by developed countries to imports from developing countries.¹⁰⁵

To incorporate the GSP preferences into the GATT law contracting parties adopted the 1979 *Enabling Clause* (Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries) as a supplementary rule which permits them to derogate from the MFN clause.¹⁰⁶

The *Enabling Clause* now forms an integral part of the GATT legal framework.¹⁰⁷ It basically a set of preferential treatments that can be accorded by developed countries to developing and least developed countries. It gave a legal cover for the GSP scheme which is granted on a non-reciprocal basis.¹⁰⁸ The Appellate Body in *EC-Tariff Preferences* noted that the since the *Enabling Clause* enables WTO members to grant tariff preferences to a subset of the members

¹⁰⁴“Agreed Conclusions of the Special Committee on Preferences”, UNCTAD, Document TD/B/330 in UNCTAD/ALDC/2008/4 *supra* n.97 at 3

¹⁰⁵ Mavroids P.C (2005) “The General Agreement on Tariffs and Trade: A commentary “ Oxford Commentaries on the GATT and the WTO at 246 , see UNCTAD/ALDC/2008/4 at 4

¹⁰⁶ *Ibid*, the official narrative on the coming into force of the enabling Clause is also in Matsushita M. *et al* (2006) *supra* n.75 at 220

¹⁰⁷ Matsushita M. *et al* (2006) *supra* n.73 at 226

¹⁰⁸ Keck A. & Low P. (2004) “Special and Differential Treatment in the WTO: Why,When and How?” WTO Staff Working Paper ERSD-2004-03 May, 2004 at 5 available at www.wto.org/english/res_e/reser_e/ersd200403_e.htm (accessed 15 January 2010)

without extending the same to others, then to that extent is an exception to Article I.1 of GATT 1994.¹⁰⁹

The *Enabling Clause* also sanctioned the establishment of regional arrangements among less developed contracting parties for mutual reduction and elimination of tariffs on products imported from one another.¹¹⁰ This led to the establishment of ‘south-south’ trade as is known today. An example of a developing country RTA under the *Enabling Clause* is AFTA (ASEAN Free Trade Agreement) between China and ASEAN.

This decision of Contracting Parties identified the least developed countries as a separate category of GATT/WTO members which deserve more favourable treatment than other developing countries.¹¹¹ In this regard paragraph 2 (d) thereof specifically calls for special treatment to be accorded to the LDCs. In recognition of the special economic difficulties and the particular development and trade needs of the least-developed countries, the developed countries are also required to exercise the utmost restraint in seeking concessions from these countries.¹¹² On the other hand the least-developed countries are not expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

It is not a fully-fledged framework agreement but rather a set of general principles for various types of preferential treatment for developing and least developing countries.¹¹³ Developed countries do not need to seek permission to grant non-reciprocal preferences to developing

¹⁰⁹ Par. 99 *EC-Tariff Preferences supra* n.77 at 40

¹¹⁰ Par.2 (c) *Decision of 28 November 1979 supra* n.95

¹¹¹ Oyejide T. A (2008) “ Special And Differential Treatment” D. Njinkeu & AT English (eds.) (2008) African Countries in the New Trade Negotiations; Interests Options and Challenges, Africa and the World Trading System, vol. 3, at 19

¹¹² Para.6 of the *Enabling Clause*

¹¹³ Page S.& Kleen P. (2005) “Special and Differential Treatment of Developing Countries in the World Trade Organization” Ministry of Foreign Affairs, Sweden 3 February 2005 available at www.acp-eu-trade.org/.../Page-S-and-Kleen-P_EN_03022005_ODI_Special-and-Differential-Treatment-of-DCs-in-the-WTO.pdf (accessed 15 January 2010)

countries or even better preferences to least-developed countries (LDCs).¹¹⁴ The *Enabling Clause* secured a legal basis for the granting of preferences under the GSP,¹¹⁵ at the same time developed countries are not under any legal obligation to give such treatment to developing countries. The use of the words ‘...contracting parties may accord...’ indicates that it is not a binding obligation on developed countries.

2.3.5 Least Developing Countries and the WTO

The term Least Developing Countries (herein LDCs) is not defined anywhere in the GATT. Under the WTO, LDCs are usually placed in the same category with developing countries, except where specified for purposes of exemptions from certain of the obligations. Within the WTO Legal Text, the definition of LDCs is found Annex VII of the Agreement on Subsidies and Countervailing Measures (SCM). Annex VII thereof defines developing country members¹¹⁶ to include LDCs designated as such by the United Nations (UN) which are members of the WTO.¹¹⁷

The concept of LDCs arose from a UN initiative in 1971, and initially included twenty four different nations with very low per capita income.¹¹⁸ According to the UN Office of the High Representative for Least Developed Countries, out of a total of 49 LDCs 33 of them are in Africa¹¹⁹. The list has grown to 50. Of the 50 countries that are currently classified as LDCs, the majority - 34 in total are found in sub-Saharan Africa.¹²⁰ In East Africa all except Kenya fall in this category, that is, Uganda, Tanzania, Rwanda, and Burundi.

LDCs have been successively marginalized in the global economy. Their share of world trade has shrunk from over one per cent, in 1970s to approximately 0.5 per cent of world exports and 0.6

¹¹⁴ Lenaghan M.P. (2006), *supra* n.40 at 118

¹¹⁵ See E. Kessie (2000), Oyejide T. A (2008), Keck A. & Low P.(2004)

¹¹⁶ The WTO applies a system of self-selection to the categorization of members as developing countries.

¹¹⁷ Annex VII to the Agreement on Safeguards and Countervailing Measures, WTO Legal Text at at 247

¹¹⁸ Stefan V (2007) “The Least Developed Countries and the World Trade – 2nd Ed. Sida studies No. 19, 2007, with contributions from Nycander G.A & Laanatza M at 30

¹¹⁹ UN Office of the High Representative for Least Developed Countries website at

<http://www.unohrls.org/en/ldc/25/> (accessed 20th March 2010)

¹²⁰ Stefan V (2007) *supra* n.118 at 25

per cent of world imports in 2004.¹²¹ Two LDCs – Bangladesh (garments) and Angola (oil) account for over one fourth of all LDC exports.¹²² Stefan De Vylder explains that the main reason for the ‘relative passivity’ of LDCs in the area of trade is that fundamental development problems in the majority of these countries are more to do with supply side constraints than market access issues.¹²³ This group of countries is faced with difficulties in actually producing something to sell. The primary reason for low export earnings is their lack of production capacity and because of this there is substantial gap between LDCs and most of the middle-income countries, whose actions within the WTO focuses on improved market access as opposed to overcoming supply-side constraints.¹²⁴

There is a correlation between trade performance and welfare conditions prevailing in LDCs. The poor export performance has impacted on the welfare conditions in these countries. 45 percent of the LDC population is estimated to be living in extreme poverty and 75 percent have an average income of less than two dollars per day, life expectancy is only 52 years, as against an average of 65 years in developing countries as a whole.¹²⁵

It therefore remains to be seen whether the LDC involvement in EPAs will boost their share in export market or put them in a worse position they are already in. However the legitimate fear is that that these free trade agreements will have severe negative effects on the weaker least developed countries.¹²⁶ EPAs will constitute unprecedented reciprocal free trade arrangements between the world's largest single market, the EU and some of the poorest economic regions. It is therefore important to tackle implications of the EPAs on the LDCs which are grouped together with developing countries in the negotiations and are seemingly ‘going with the flow of

¹²¹ WTO, World Trade Report 2006 in Stefan V: (2007) *supra* n.118 at 27

¹²² *Ibid*

¹²³ *Ibid* at 33

¹²⁴ *Ibid*

¹²⁵ UNDP Human Development Report 2006 at 286 www.undat.org/en/media/HDR06-complete.pdf (accessed 18 January 2010)

¹²⁶ Lenaghan M.P (2005) *supra* n.40 at 136

events'. Obviously, the ACP group is far too large and diverse to generalize the impact that EPA arrangements would have on the poorest of its members.

2.3.6 CONCLUSION

In this chapter the MFN principle and the key exceptions to it (Article XXIV GATT 1994 and the Enabling Clause are) are discussed to provide the contextual background against which the MFN provision in EPAs is analyzed. Emphasis is placed on the *Enabling clause* which covers special and differential treatment provisions as the WTO legal basis upon which the developmental concerns of LDCs revolve. The position of LDCs in the world trading system has been highlighted in order to show the extent to which the MFN clause might effect on them.

CHAPTER 3

3.1 Introduction

The interim Economic Partnership Agreement presents the first time that the MFN principle is being included in Free Trade Agreements (herein FTAs) between the world's largest and most industrialized bloc of countries, the EU, and another group of vulnerable developing and least developing countries, the African Caribbean Pacific (ACP).¹²⁷ The Cotonou Partnership Agreement (CPA) which forms the framework for negotiation of the EPAs does not require MFN treatment from ACP states. Nonetheless, the MFN clause is included in most of the interim EPAs texts that have been signed with ACP countries or regions.¹²⁸ The MFN provision in the interim EPA presents new challenges to the East African region and certainly to Uganda, which do not blend well with the country's development needs.

The inclusion of MFN clause in the interim agreement between the EU and the EAC (herein EAC/EU interim EPA) has stirred up controversy from the region and the African group as a whole.¹²⁹ It is perceived as 'pre-emptive injustice'¹³⁰ for the ACP and most especially the LDCs whose share in world trade continues shrink. This chapter will attempt to examine potential problems associated with the MFN provision for the EAC region focusing on Uganda. This provision will be analysed against the objectives set out in the CPA.

3.2 The MFN provision under the EAC-EU Interim EPA

The basic principle under the MFN clause in the EAC/EU interim EPA is that following the coming into force of the agreement, should the EAC countries conclude a free trade agreement with any developed country or any other country or grouping (other than the EU) which is a

¹²⁷ Ochieng C. M. (2009) *supra* n.54 at 12

¹²⁸ Articles 19, 70 and 79 in the CARIFORUM EPA, Article 28 in the SADC EPA, Article 16 in the EAC EPA, and Article 16 in the EAC region EPA see Ochieng C. M. (2009) *ibid*

¹²⁹ Sean Woolfrey, "South Africa's Concerns over the Interim Economic Partnership Agreement" posted on Tralac website <http://www.tralac.org/cgi-bin/giga.cgi?cat=1052&limit> (accessed 14 December 2009), see AU Addis Ababa Declaration on EPA Negotiations *supra* n.52

¹³⁰ *ibid*

major trading economy, then any more favourable treatment provided to that developed country or major trading economy must also be passed on to the EU.¹³¹

Article 16 (1) stipulates;

With respect to the subject matter covered by this Chapter¹³² the EC Party shall accord to the EAC Party any more favourable treatment applicable as a result of the EC Party becoming party to an economic integration agreement with third Parties after the signature of this Agreement.¹³³

On the part of the EAC it is provided that;

The EAC Party shall accord to the EC Party any more favourable treatment applicable as a result of EAC Party becoming party to an economic integration agreement with any major trading country after the signature of this Agreement.¹³⁴

The provision essentially means that the parties shall not discriminate against each other in any other trade agreements. The EAC member states are required to extend to the EU any more favourable treatment derived from such agreements with respect to customs duties and charges, rules of origin, or any other trade instruments covered by chapter two of the interim agreement. This implies that if EAC grants less restrictive rules of origin or lower tariffs on particular imports from a third party which is a developed country or a major trading economy in an economic integration agreement, the same treatment must be extended to imports from the EU.

An economic integration agreement is defined as “an agreement substantially liberalizing trade and providing for the elimination of substantially all discrimination between parties through

¹³¹ Lui D. & Bilal S. (2009) *supra* n.51at 27

¹³² The Chapter is entitled ‘Trade Regime for Goods’. It includes provisions on duties, fees and other charges, Rules of Origin

¹³³ Article 16 EAC-EU Interim EPA

¹³⁴ *Ibid*

the elimination of existing discriminatory measures and the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame.”¹³⁵ This trade arrangement defined here is akin to a free trade area or customs union envisaged under Article XXIV of GATT 1994. The economic integration agreement must be between the EAC as a region and any major trading economy however any trade policies of the region affect each individual member state.

The term ‘major trading economy’ is defined as any developed country, or any country accounting for a share of world merchandise exports of above 1 percent in the year before the entry into force of the economic integration agreement referred to in paragraph 2, or regional entities (such as a free trade area or customs union) accounting for over 1.5 percent of world merchandise exports.¹³⁶ To determine whether these numerical thresholds have been reached, the EAC-EU EPA stipulates that official WTO data on leading exporters in world merchandise be used.¹³⁷ According to WTO figures, Brazil, India and China all of which are developing countries have a share of world export trade which is above 1 percent,¹³⁸ which puts these countries in the category of ‘major trading economies’.

A broad definition which includes both developed and developing countries casts a wide net on some major trading partners of EAC states. Besides individual countries, it also extends to regional trade agreements established under Article XXIV of the GATT as well as trade agreements between developing countries which are authorized by the *Enabling Clause*. Subsequently any trade concessions that the EAC grants to any of these countries must in turn be transferred to the EU.

¹³⁵ Article 6 (5) EU-EAC Interim EPA

¹³⁶ Article 6 (6)

¹³⁷ See n.1 of the Interim EPA

¹³⁸ Julian Mukiibi (2006) The Most Favoured-Nation provision in the EC/EAC Economic Partnership Agreement and its implications Briefing Paper 1/2009 CUTS international Geneva Resource Centre [www.cuts-grc.org/.../BIEAC-BP09-EC-EAC EPA and its Implications.pdf](http://www.cuts-grc.org/.../BIEAC-BP09-EC-EAC_EPA_and_its_Implications.pdf) (accessed 8 February 2010)

3.3 IMPLICATIONS OF THE MFN CLAUSE

3.3.1 MFN clause represents a departure from the development objectives of the Cotonou Partnership Agreement (CPA)

ACP countries contend that the MFN Clause does not reflect development goals of the framework Cotonou Agreement.¹³⁹ Their argument is that EPAs were meant to focus on ACP interests.¹⁴⁰

Development concerns arising from interim economic partnership agreements can be traced back to the Cotonou Agreement of 2000 which combines politics, trade and development to provide a framework for negotiation of EPAs. By framework, it signifies that the Cotonou agreement development imperatives formed part of the negotiation agenda. Since June 2000, the ACP- EU relations were governed by the Cotonou Agreement. This partnership agreement came into force on April 1, 2003 and is to be effective for a twenty-year period commencing on 1st of March 2000 with reviews to be made every five years¹⁴¹. The CPA reflects a renewed commitment on the part of the EU to promote trade and development of the ACP members after the failure of previous trade regimes to transform the economies of these countries. It is still the legal regime governing the EU-ACP relations while EPAs replaced the trade chapters of this agreement. Indeed EPAs are a continuation of the core principles and fundamental elements of Cotonou Agreement.¹⁴² The CPA thus forms the background against which contentious issues in EPAs can be appreciated.

The CPA is premised on three main pillars for co-operation in trade, development and political issues. Poverty eradication forms the core objective of development co-operation.¹⁴³ It entails

¹³⁹ Ochieng C.M. (2007). "The EU-ACP Economic Partnership Agreements and the 'Development Question-Constraints and opportunities posed by Article XXIV and Special and Differential Treatment Provisions of the WTO.'" *Journal of International Economic Law* 10 (2), 2007 363-395, at 365

¹⁴⁰ *Ibid*

¹⁴¹ Article 95 of the Cotonou Agreement, the first revision was made on June 25th 2005 in Luxembourg

¹⁴² Senona M. J (2009) "EPAs and the Doha Round: development or discontent," *Journal of International Trade Law and Policy*, vol. 8 No. 1, 2009, 60-83 at 67

¹⁴³ Article 1 Cotonou Agreement

a multi-dimensional strategy to development co-operation with respect to the economic, social, political and cultural aspects. The underlying objectives for economic and trade co-operation are to promote a smooth and gradual integration of the ACP economies in the world economy, to enhance production, supply and trading capacities of these countries and ensure full conformity with WTO obligations.¹⁴⁴

Development as a key objective cuts across all issues covered by the agreement. In this regard, the CPA also makes recognition of the difference in the levels of development between the EU and the ACP countries, in which group falls the majority of LDCs. Article 34 (4) states;

*Economic and trade cooperation shall be implemented in full conformity with the provisions of the WTO, including special and differential treatment, taking account of the parties' mutual interests and their respective levels of development.*¹⁴⁵

The CPA further declared that the new trade regime, the EPAs, should foster sustainable economic and social development in ACP countries and promote their gradual integration into the world economy.¹⁴⁶ To this end, Article 37(7) calls for a recognition of the difference in the level of development of ACP members, the socio-economic impact of trade measures on ACP countries, and their capacity to adapt and adjust their economies to the liberalisation process.¹⁴⁷

Additionally, Article 35 (5) of the same agreement reaffirms the parties' commitment to ensure special and differential treatment for all ACP countries and to maintain special treatment for ACP LDCs, taking due account of the vulnerability of small, landlocked and island countries.¹⁴⁸

Uganda is one of the small landlocked countries.

¹⁴⁴ Article 34 Cotonou Agreement

¹⁴⁵ Article 34 Cotonou Agreement

¹⁴⁶ Article 34.1 Cotonou Agreement

¹⁴⁷ Cotonou Agreement

¹⁴⁸ Article 35(5) Cotonou Agreement, see also Article 85 (1)

The CPA is an international agreement that can be best explained within the context of the Vienna Convention on the Law of Treaties 1969.¹⁴⁹ According to Article 31 of the Vienna Convention, the meaning of a treaty can be obtained from its objects and purpose.¹⁵⁰ It is argued that if development as the objective and purpose was the intent of the parties (the EU and ACP groups) at the time of drafting the CPA, then the development aspect must feature in the EPA agreements not only in the negotiation process but also at every stage of implementation.¹⁵¹

Indeed the Preamble to the EAC-EU interim EPA reiterates the Cotonou development concerns. It states that the EPA shall be consistent with the objectives and principles of the Cotonou Agreement and shall also be an instrument for development.¹⁵² In its preamble, the interim EPA also reaffirms the need to provide special and differential treatment to all EAC partner states, while maintaining special treatment for the least developed states.¹⁵³

The EAC-EU agreement contains objectives which are critical to the development needs of the EAC countries such as the preservation and improvement of market access conditions.¹⁵⁴ It shows commitments on the part of the EU to address the production, supply and trading capacity of the EAC as enshrined in the Cotonou agreement.¹⁵⁵

It is thus apparent that the key objective of EPAs is to contribute to economic growth and development. The term development has been extensively defined but for the purposes of this paper the definition will be restricted to issues related to international trade.

This dissertation borrows from the statements of Federico Alberto who stated;

¹⁴⁹ Ochieng, C.M. (2009). *supra* n.54 at12

¹⁵⁰ Vienna Convention on the Law of Treaties 1969

¹⁵¹ Yenkong N. Hodu (2009) "Regionalism in the WTO and the Legal Status of a Development Agenda in the EU/ACP Economic Partnership Agreement," *Nordic Journal of International Law* 78 (2009) 225–248, at 239

¹⁵² Par 7 & 8 Preamble EAC-EU Interim EPA

¹⁵³ Par.9 Preamble EAC-EU Interim EPA

¹⁵⁴ Article 5 (c) Interim EPA

¹⁵⁵ Article 4 (e) IEAC-EU EPA

*To develop a country is to change a country. Development is triggering a self-sustaining process of increased productivity in all sectors that results in a more diversified economy. It is generating employment for most of the population of working age. It is increasing national income at a pace faster than population growth, so that real income per person increases over time. It is reducing the number of poor people so that national income is distributed more equitably over time. And all of this should result in higher living standards for a...*¹⁵⁶

A country's participation in global trade should address these development benchmarks. As Stiglitz writes, trade can be a positive force for development.¹⁵⁷ Draper identifies two interconnected development challenges in Africa; the need to overcome supply-side constraints, and addressing market access constraints.¹⁵⁸ From the African perspective, development in the context of international trade, should translate into greater market access opportunities, increased domestic productivity, improved export performance and intimately poverty reduction.¹⁵⁹ Senona rightly states that trade and development are two issues that have become synonymous with each other and any negotiated trade deal should be subjected to the development benchmark in terms of the consequences it delivers.¹⁶⁰ Thus EPAs should, in the negotiation and implementation process deliver a development package to the East African region which should trickle down to each individual member state.

Notably, global efforts through trade negotiations aimed at helping countries overcome their development challenges have been continuously disappointing. This is demonstrated by stalling

¹⁵⁶ Alberto F. (2005), "What makes a Round a 'Development Round'? The Doha Mandate and the WTO Trade Negotiations" Dialogue on Globalization Occasional Papers Geneva, No.13 January 2005 at 4 available at http://fes.dreispringer.com/dog_publications/global_economy.htm (accessed 18 January 2010)

¹⁵⁷ Stiglitz E. J & A. Charlton (2005) "Fair Trade for all- How trade can promote development" Oxford University Press

¹⁵⁸ Draper P. (2007) *supra* n.62 at 6

¹⁵⁹ Senona M. J (2009) *supra* n.142 at 72

¹⁶⁰ *Ibid*

of the WTO Doha Development Round and the controversial outcomes recent the EPA negotiations.¹⁶¹

In the interim EPA, Cotonou development commitments have only featured in the wording of the preamble and thus no have binding force on the parties. Conversely, the inclusion of certain provisions in the main body of the EPA demonstrates an utter departure and a clear betrayal of the spirit and purpose of the Cotonou Agreement.¹⁶² This is so because the MFN clause in the interim EPA poses serious challenges to development goals of the EAC region.¹⁶³

In the interim EPA text, the inclusion of the MFN clause in the content of the agreements presents enormous challenges to economic growth and development of world's poorest economies like Uganda. Under this provision member states of the EAC are required to extend to the EU the same trade concessions made under trade agreements with major trading economies. Major trading countries such as Brazil, China and India will not be willing to enter into agreements which will extend the same concessions to the EU thus inhibiting market expansion for these countries.

The MFN treatment contradicts of the development objectives that the interim agreement aims to achieve. In essence this provision prohibits the EU from providing "special treatment" to the least developed countries such as Uganda, than that granted to developing countries under the same EPAs arrangement. Previously the EU was able to discriminate in favour of LDCs under the EBA design because it was not bound to extend MFN treatment to all ACP members.¹⁶⁴ As a result LDCs countries which joined the EPA system will not be entitled to any special or different favours despite their economically disadvantaged positions.

¹⁶¹ *Ibid*

¹⁶² This opinion is shared by Senona M. J (2009) *supra* n.142 at 73

¹⁶³ Ocheing C.M (2009) *supra* n.54 at 12

¹⁶⁴ Under Lomé and Cotonou Agreements the EU was able to discriminate against developing countries in favour of LDCs

The discussion below further elaborates on how the MFN provision is a potential barrier to development.

3.3.2 The MFN Clause contradicts the *Enabling Clause*

The inclusion of the MFN clause poses a major challenge to the purpose and function of the *Enabling Clause* which governs south-south trade arrangements. Under the MFN provision EPA signatories are required to extend to the EU trade benefits granted to developing countries which are major trading economies. The term ‘South-South’ trade, as is commonly used, refers to regional trade agreements entered into among developing countries for mutual reduction or elimination of tariffs on products imported from one another.¹⁶⁵

In *EC- Tariff Preferences* it was stated that *Enabling Clause* embodies special and differential treatment for developing countries aimed at providing unequal competitive opportunities to respond to the needs of such countries.¹⁶⁶ Brazil supported by other developing countries such as South Africa, China, India, Paraguay and Argentina, has raised objections to the MFN requirement at the WTO, stating that it contradicts the WTO *Enabling Clause* which was designed to increase developing country participation in international trade.¹⁶⁷ These objections are based on the primary function of bilateral or regional trade deals which are intended to exchange better concessions than what is available to outsiders or third parties.¹⁶⁸ As a result the MFN clause would prevent EAC states from offering “secured concessions to new trade partners.”¹⁶⁹

¹⁶⁵ Par. 2(c) *Enabling clause*

¹⁶⁶ Par.30 Arguments of the European Communities in Appellate Body Report *EC-Tariff Preferences*, *supra* n.77

¹⁶⁷ Brazil’s Declaration to the WTO General Council, February 5 available at www.normangirvan.info/wat../2008/03/brazil-statement-onepa-in-wto.doc (accessed 6 February 2010)

¹⁶⁸ Braude W.(2008) *supra* n.23 at 324

¹⁶⁹ *Ibid*

The European Commission's defence of this provision has been that the *Enabling Clause* does not prohibit the extension of MFN preferences to other WTO members.¹⁷⁰ The EC also claims that there is no connection between the MFN clause which applies only to FTAs and preferences granted among developing countries under the *Enabling Clause*.¹⁷¹

Contrary to the EC position, the MFN clause can and indeed does affect south-south trade arrangements. Regional agreements among less-developed countries which are authorized under paragraph 2 (c) of the *Enabling Clause* are essentially FTAs. According to the wording used "...mutual reduction or elimination of tariffs and non tariff measures,"¹⁷² it can be deduced that agreements under the *Enabling Clause* are similar, in form and substance, to FTAs defined under Article XXIV (8) (b) of the GATT 1994. Under this provision a free trade area is defined as a group of two or more customs territories in which duties and other restrictive regulations of trade are reduced on substantially all trade between the parties.¹⁷³

In both scenarios the fundamental requirement is the reduction of tariffs and other restrictive regulations of trade (non tariff barriers) "on substantially all trade". Notably the *Enabling Clause* does not explicitly mention a reduction of tariffs "on substantially all trade"¹⁷⁴ neither does it spell out the extent of tariff reductions for 'South-South' agreements. It cannot be out rightly ruled out that in practice regional agreements among developing countries may indeed reduce or eliminate tariffs 'on substantially all trade' through deliberate or inadvertent terms and conditions. In this regard the MFN requirement extends to regional agreements covered by both the *Enabling Clause* and Article XXIV of the GATT.

¹⁷⁰ Dièye C. T. & Hanson V. (2008) *supra* n.56 at 6

¹⁷¹ *Ibid*

¹⁷² See *Enabling Clause*

¹⁷³ Article XXIV (8)(b) GATT 1994 in WTO Legal Texts

¹⁷⁴ A discussion on the aspect of 'substantially all trade is provided in the following sections

The *Enabling Clause* also gives effect to certain WTO objectives stated in the Marrakesh Agreement and in Part IV of the GATT 1994. The preamble to the Marrakesh Agreement calls for “*positive efforts to ensure that developing countries and especially the least developed among them secure a share in growth in international trade commensurate with the needs of their economic development.*”¹⁷⁵ The Appellate Body in *EC- Tariff Preferences* noted that the Enabling Clause is among the “*positive efforts*” called for in the Preamble to the WTO Agreement to be taken by developed-country members to enhance the “*economic development*” of developing-country Members.¹⁷⁶ The Appellate Body added that WTO objectives may be pursued through measures taken under provisions characterized as exceptions¹⁷⁷ which include the *Enabling Clause*.

The *Enabling Clause* is therefore regarded as more than just an exception to GATT article I.1.¹⁷⁸ It is also a legal regime whose operation excludes the application of the MFN principle in its scope of operation.¹⁷⁹ As a concrete measure the Enabling Clause provided that preferential agreement between developing countries be exempted from Article I of GATT. To ensure that the least developed countries secure a significant share in international trade, the MFN clause cannot be seen to operate in trade relations authorized under the *Enabling Clause*.

However under the interim EPA provision, MFN clause has been introduced into the scope of operation of the *Enabling Clause* (South- South trade) whereby EAC countries are required to extend any improvements in market access in their trade relations with developing countries to the EU.¹⁸⁰ For this reason some of the developing countries have clearly stated that they will not enter into any agreements with ACP countries which would extend preferences to the

¹⁷⁵ WTO Legal Texts, Marrakesh Agreement Establishing the WTO at 4, Article XXXVI. 3 Part IV of the GATT 1994

¹⁷⁶ Par. 92 Appellate Body Report *EC-Tariff Preferences*, *supra* n.77 at 37

¹⁷⁷ *Ibid* par.94

¹⁷⁸ Aniekan I. Ukpe (2009) “Legal issues on the validity of the MFN clauses in the EPAs ” at 4 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1400023

¹⁷⁹ *Ibid*

¹⁸⁰ Brazil’s statement to the WTO *supra* n.167, 4 February 2008, *supra* 167 Brazil stated that the MFN clause could also prevent third countries from entering into FTAs with the ACP group, see Lui. D. & S. Bilal. (2009) *supra* n.51, Dièye C. T. & Hanson V. (2008) *supra* n.56

EU.¹⁸¹ In this way the MFN clause defeats the objectives of the WTO with respect to developing countries and may cause a major dysfunction of the *Enabling Clause*.

Notably the MFN requirement does not apply to trade agreements between the EAC and other, or other African countries and regions or ACP members.¹⁸² Although this may enhance intra-Africa trade at the same time it does not help that the share of trade with key developing countries such as China and India will be seriously affected.

Following the recent financial and economic crisis Uganda is now looking to the ‘south’ to diversify her trade. In a recent interview by Trade Negotiations Insights, Charles Yegella, a Trade in Services Fellow with the East African Business Council, stated that although Europe is and will remain the main trading partner of the EAC, the region is also looking at other commercial partners and that an increasing number of members are now pushing for more South-South trade.¹⁸³

Uganda trades heavily with other developing countries.¹⁸⁴ In 2004 almost one-third of Uganda’s merchandise exports and imports were with neighboring countries in eastern and southern Africa.¹⁸⁵ The Common Market for East and Southern Africa (COMESA) is now the leading export destination of Uganda’s goods having overtaken the EU and according to preliminary data from the Uganda Export Promotions Board (UEPB) exports into COMESA brought in an income of over US\$506 million during 2007 compared to US\$324 million from the EU.¹⁸⁶ The

¹⁸¹ Brazil’s Declaration to the WTO General Council, *supra* n.167

¹⁸² Article 16 (4) EAC-EU Interim EPA

¹⁸³ Trade negotiations in East Africa: Insights from the East African Business Council, Trade Negotiations Insights Issue 4 Vol. 9 May 2010 (*TNI* interview with Charles Yegella, a Trade in Services Fellow with the East African Business Council and International Lawyers and Economists Against Poverty) at 11 <http://www.acp-eu-trade.org/index.php?loc=tni/> (accessed 11 May 2010)

¹⁸⁴ Kym A. *et al* (2007) “Effects of multilateral and preferential trade policy reform in Africa: The case of Uganda” *The Journal of International Trade & Economic Development*, 16: 4, 529 - 550 at 532

¹⁸⁵ Walkenhorst, 2005, in Kym A *et al* (2007) *Ibid* at 535

¹⁸⁶ “COMESA Top market for Ugandas exports?” by Nshekanabo, Aggrey, East African Business Week, Kampala posted by Tralac www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news (accessed 11th November 2009)

United Arab Emirates (UAE) topped Uganda's export destination list, bringing in over US\$109 million.¹⁸⁷ This shows that the country is involved in efforts to diversify trade outside the EU.

3.3.2.1 China's Trade relations in Africa

The MFN clause however becomes problematic where the EAC member states are engaged in economic integration agreements with major trading economies such as China or India. China is now the Africa's third biggest trading partner although the continent represents only 3 percent of Chinese global exports and 3.7 percent of its imports.¹⁸⁸

African countries are currently benefiting from the increased presence of China. Uganda has a history of established trade relations with China dating back to the 1960s.¹⁸⁹ In 2005, the trade volume between the two countries came to US\$99.37 million, among which China's export was US\$79.37 million, and import US\$20 million.¹⁹⁰ China's main exports to Uganda include mechanical and electrical appliances, textiles, garments, pharmaceuticals, porcelain and enamel products, and footwear.¹⁹¹ China's main imports from Uganda are coffee and plastics.¹⁹²

Since 2005, there has been an increase of exports from Uganda to China which has led to higher income, especially for traders involved in manufactured goods, improvement in international trade, as well as attraction of foreign investment and creation of more job opportunities.¹⁹³ Uganda was added to China's list of countries that can export duty and quota free 187 products commencing in 2005.¹⁹⁴

¹⁸⁷ *Ibid*

¹⁸⁸ Trade Negotiation Insights 2008 above

¹⁸⁹ Obwona, G. N & Kilimani (2007) "China-Africa Economic Relations: The Case of Uganda," Economic Policy Research Center September, 2007 www.aercafrica.org/documents/china_africa_relations/Uganda.pdf

¹⁹⁰ Uganda Bureau of Statistics, 2006 www.ubos.org

¹⁹¹ *Ibid*

¹⁹² *Ibid*

¹⁹³ Obwona, G. N & Kilimani (2007) *supra* n.189

¹⁹⁴ Margaret C. Lee (2007) "Uganda and China: Unleashing the Power of the Dragon". www.isn.ch/serviceengine/Files/.../03_Uganda+and+China.pdf at 30

Although trade with China presents a number of risks¹⁹⁵, the decision still remains for African governments to determine which trading partner will bring more benefit, meet their development goals and this explains why the MFN clause has been opposed in from Africa for being “both politically and strategically unacceptable”.¹⁹⁶ Therefore with the interim EPA text in its current form, China will have no incentive to join trade agreements with the East African region if it means that all the 27 developed member states of the EU will automatically get the same treatment under such agreements. This would mean that Chinese firms would have no real advantage over the EU member states in the EAC market, even though EAC states would stand to benefit from the Chinese market.¹⁹⁷

EU’s argument that the MFN provision is meant to protect the interests of ACP countries is based on the fact that any knowledge that any more favourable treatment that the “major trading economies” may obtain from ACP countries will automatically be extended to the EU might prevent economically advanced countries from taking advantage of ACP countries.¹⁹⁸ On the contrary, this has become a constraint on EAC countries’ bargaining power because they are forced to limit their requests in future trade agreements knowing that any concessions that they gain will also have to be passed onto the EU.¹⁹⁹ In this regard the EU is said to have ‘gone too far’ by demanding that the EAC to give it all benefits that it might one day grant others, regardless of what other countries might give them. Certainly this requirement is seen as a ‘pre-emptive’ injustice especially on the LDCs in the EAC.²⁰⁰

¹⁹⁵ According, Kampala City Traders’ Association (KACITA) Publicity Secretary, Issa Ssekitto, trade between China and Uganda has led to the dumping of substandard goods and merchandise, thus cheating the Ugandan traders. Interview with KACITA officials, May 16, 2006 source: Obwona, Guloba, Nabiddo and Kilimani “China-Africa Economic Relations: The Case of Uganda.” Economic Policy Research Center September, 2007 at www.aercafrica.org/documents/china_africa_relations/Uganda.pdf accessed 10 March 2010

¹⁹⁶ Trade Negotiation Insights 2008 *supra* n.

¹⁹⁷ Braude, W. (2008).*supra* n.23 at 324

¹⁹⁸ Ocheing C.M (2009), *supra* n.54 at 13

¹⁹⁹ Lui D & Bilal S (2009) *supra* n.51

²⁰⁰ Dièye C.K & Hanson V. (2008) *supra* n.56

In case of a dispute over the MFN provision, the opinion of the Appellate Body on the legal force of the Enabling Clause was clearly stated in *EC-Tariff Preferences* paragraph 101. The Appellate Body found that if there is a conflict between measures under the Enabling Clause and the MFN obligation in Article I:1; the Enabling Clause, as the more specific rule, prevails over Article I:1.²⁰¹

In effect the MFN clause does curtail negotiating rights of developing countries and consequently renders the ‘*Enabling Clause*’ inoperative. Pont-Vieira Dos Santos a former WTO official in charge of regional trade agreements pointed out that if such clauses become a practice “it could contribute to fewer South-South agreements, and more North-South agreements.”²⁰² It is important to recall that the North- South trade relations between the EU and African countries which date back to the Treaty of Rome of 1957 have not produced significant transformation of in the economies of less developing countries. According to Anjali Banthia, the EU-Africa relationship from Rome to Yaoundé to Lomé and finally Cotonou, under EU-ACP development policy has failed to deliver on the development goals leaving the ACP states ‘impoverished, uncompetitive, underdeveloped, and weak’.²⁰³ In fact majority of developing countries, especially the least-developed ones, have seen their share in world trade stagnate.²⁰⁴

²⁰¹ Appellate Body Report *EC-Tariff Preferences*, *supra* n.77 par 101

²⁰² *Ibid*

²⁰³ Banthia A. (2007) *supra* n.3

²⁰⁴ Kessie E. (2000) “Enforceability of the Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements” *The Journal of World Intellectual Property* available online: <http://Owww3.interscience.wiley.com.innopac.uatac.za/journal/119051197/issue> (accessed 31 February 2101)

3.3.3 The MFN Clause in the interim EPA contravenes Article XXIV of GATT 1994

3.3.3.1 Article XXIV compatible RTAs

Article XXIV is an exception to the MFN obligation which provides the legal framework for formation of regional trade agreements (herein RTAs). RTAs under this provision either may take the form Free Trade Areas (FTAs) or Customs Unions (CUs).²⁰⁵ FTAs essentially establish free trade among the members.²⁰⁶ Parties to such agreements agree to eliminate tariffs and other barriers to trade between one another although each party pursues its own independent trade policy with third parties.²⁰⁷ Examples of FTAs in Africa include the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA).

On the other hand, a customs union (also known as customers union) is essentially a free trade area which operates an agreed common trade policy against non-members.²⁰⁸ The common trade policy takes the form of a common external tariff (CET).²⁰⁹ A common external tariff means that parties apply the same tariff rate to imports coming into their territories. Examples of customs unions in Africa include the Southern Africa Customs Union (SACU) and the East Africa Customs Union.²¹⁰

3.3.3.2 Interim and 'Full' Free Trade Agreements

The agreement between the East African Community and the European Union is referred to as an 'interim' EPA. Legally this interim agreement is by definition a free trade agreement since its

²⁰⁵ Other RTAs which take the form of a common market area or an economic union, are not discussed under this section of the paper

²⁰⁶ Yenkong N Hodu (2009) *supra* n.151 at 229

²⁰⁷ Perdikis N.(2007) "Overview of trade agreements: regional trade agreements." in William A. Kerr & James D. Gaisford (eds) 2007. "Handbook on International Trade Policy" at 82

²⁰⁸ *Ibid* at 83

²⁰⁹ *Ibid*

²¹⁰ With the signing of the East African Common Market Protocol in November 2009, the region is set to become a common market area after ratification of the Protocol by member states.

objective is to establish free trade among the parties.²¹¹ However, Article XXIV and the Understanding on the Interpretation of Article XXIV GATT 1994 make a distinction between ‘full’ regional trade agreements and ‘interim agreements leading to the formation of a free trade area’.²¹² Article XXIV(8) (b) defines a free trade area as one in which ‘duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories in products originating in such territories’. On the other hand, Article XXIV (5) makes reference to ‘an interim agreement leading to the formation of a free-trade area’.

According to L. Bartels this implies that only those agreements which have already been implemented can be called ‘full’ regional trade agreements within the meaning of Article XXIV(8). He further argues that an agreement that has not yet met this definition but merely includes an implementation period is, formally speaking, an ‘interim agreement’ leading to the formation of a free trade area.²¹³

In practice interim agreements are treated as ‘full’ RTAs/FTAs in the WTO system. Parties intending to enter into interim or full RTAs are required to notify the Committee on Regional Trade Agreements.²¹⁴ Article XXIV 7 (a) of the GATT requires that any contracting parties (now referred to as WTO members) wishing enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate. Paragraph 8 of the Understanding on the Interpretation of Article XXIV GATT 1994 provides that upon notification the working party

²¹¹ See Articles 10 and 11 of the EAC-EU interim EPA

²¹² Article XXIV (5)(b) GATT 1994, paras’ 8 & 9 of the Understanding on the Interpretation of Article XXIV,

²¹³ Bartels L. (2009) ‘Interim agreements under Article XXIV GATT’ *World Trade Review* 2009, 8: 2, 339–350, at 340 available online <http://0-journals.cambridge.org.innopac.uatac.za/action/search> (accessed 18 December 2009)

²¹⁴ Article XXIV (7) GATT 1994,

(which was replaced by the Committee on Regional Trade Agreements)²¹⁵ may make certain recommendations which include measures required to complete the formation of the customs union or free-trade area or if necessary recommend that further review renegotiation of the agreement be made by the parties. The purpose of this requirement is to ensure compatibility with the conditions laid out in Article XXIV.

WTO Members apply the same conditions, to notified 'full' customs unions or free trade agreements as interim agreements.²¹⁶ With respect to the EAC-EU interim agreement, firstly, implementation commenced the 1 January 2008 with the EU granting duty free, quota free market access to all imports from the EAC countries with exception of rice and sugar. Secondly this agreement was referred to as 'interim' because parties failed to reach consensus on trade-related issues with respect to services, intellectual property rights, competition policy, investment and public procurement within the set deadline. It is 'branded' as an interim agreement because it only covered trade in goods as opposed to all other issues that were on the negotiation agenda.²¹⁷ It is reasonably argued interim EPAs are fully-fledged free trade agreements in the sense of Article XXIV of the GATT²¹⁸ which meet the requirements of a 'full' FTA as laid out under this provision.

3.3.3.0 Requirements for WTO-compliant Free Trade Areas

A WTO compatible RTA must meet the requirements laid down in the Article XXIV paragraphs 5 and 8 with respect to trade coverage, the length of time for internal liberalization and the level of liberalization maintained with third parties. RTAs have been criticized for introducing provisions that are WTO-plus or terms that not necessary for purposes of compliance with WTO

²¹⁵Working parties were replaced with the Committee on Regional Trade Agreements (CRTA) which was established in February 1996 by the General Council, Committee on Regional Trade Agreements, Decision of 6 February 1996, WT/L/127. Its functions include the examination of regional trade agreements.

²¹⁶ Bartels L.(2009) *supra* n.213 at 345

²¹⁷ World Bank Summary Report 2008 *supra* n.1

²¹⁸ Bilal S. (2008) *supra* n.18 at 4

rules.²¹⁹ The most-favoured-nation clause that was included in the EAC-EU interim agreement is not part of the conditions which must be fulfilled by FTAs.

Article XXIV 8 (b) requires that duties and other restrictions on trade be eliminated on “substantially all trade” on products originating from within the constituent territories. The provision does not require that all duties and other restrictions must be eliminated, but rather “substantially all.”

WTO members have not reached a consensus as to what percentage of trade should be covered by a WTO-complaint agreement nor is there a common criterion against which the exclusion of a particular sector from the liberalization could be assessed.²²⁰ In *Tukey- Textiles* case the appellate body stated;

*It is clear, though, that ‘substantially all trade’ is not the same as all the trade, and also that ‘substantially all trade’ is something considerably more than merely some of the trade. ... Thus we agree with the Panel that the terms of sub-paragraph 8(a)(i) offers ‘some flexibility’ to the constituent members of a customs union when liberalizing their internal trade in accordance with this subparagraph.*²²¹

The current interpretations of the provision seem to range from 80 to 90 percent of the volume of trade between parties.²²²

²¹⁹ Ochieng (2009) *supra* n.54 at 12, labour and environmental issues are now included in RTA; see Eugenio Diaz-Bonilla *et al* (2003) “Regional Agreements and the World Trade Organization Negotiations.” *American Journal of Agricultural Economics*, Vol.85, No. 3 (Aug 2003), pat679-683 at 628 available at <http://0-find.galegroupatcom.innopac.uatac.za/gtx/paginate.do> <http://www.jstor.org/stable/1244993> (accessed 30 November 2009)

²²⁰ Marina Foltea (2004) “The Legal Effects of Regional Trade Agreements under the GATT/WTO” MILE Thesis available at www.wti.org/mile-theses/mile-4-theses.html accessed 20th December 2009

²²¹ Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/ DS34/AB/R para. 48 www.wto.org/english/tratop_e/dispu_e/repertory_e/r1_e.htm-30k-2006-08-15

²²² In the Trade and Development Cooperation Agreement (TDCA) concluded between the EC and South Africa, ‘substantially all trade’ was interpreted to mean “an average of 90 percent of all items currently traded between the two countries. The inclusion of the word ‘average’ permits the use of an asymmetrical interpretation. The agreement seems to favour South Africa in two respects: EC markets were opened first, and approximately 94

With regard to the interim EPA, as from 1st January 2008, EU granted immediate tariff- free, quota-free access to its markets for 100 percent of imports from the EAC countries with short transitional periods for sugar and rice.²²³ In turn, the EAC market access offer to the EU consists of 82.6 percent liberalization of imports from the EU over a twenty five year transition period with an exclusion list of 18percent of sensitive products.²²⁴ In effect a 96 percent of the volume of trade between the EU and the EAC has been liberalized, which is relatively substantial.

With respect to liberalization of trade between the two parties, the EAC- EU interim agreement can be said to be WTO compliant. Paradoxically this same agreement goes against the very essence of the regional trade agreements as understood. The introduction of the MFN clause into the EU-EAC interim EPA is a contradiction to the purpose and intent of Article XXIV which is to exempt WTO members from complying with the non-discriminatory obligations. This is intended to allow countries enjoy better preferences than what is available to all WTO members. The provision does not mention anywhere that parties must give more favourable treatment to one another.

In the multilateral arrangement the MFN clause is necessary to ensure that there is equal treatment to all WTO member states.²²⁵ However in a regional arrangement, the MFN provision is not required since parties are essentially allowed to discriminate against the rest of the WTO members. Countries enter into regional trade arrangements to obtain better concessions than those available under a multilateral arrangement. Recourse to FTAs is said to privileged because the country at a hand lacks the productivity rate that would allow it to compete on the

percent of South African exports were covered versus 86 percent of EC exports.” Source: Paul Kruger, 2009 “Contentious issues in Article XXIV” posted by TRALAC at <http://www.tralac.org/cgi-bin/giga.cgi?cat=/>

²²³ Article 10 and par. 1 of Annex EAC-EU Interim EPA

²²⁴ Annex II of the Interim Agreement - Customs Duties on Products Originating in the EC Party

²²⁵ Trost. F (2008). “Reconciling Regional Trade Agreements with the MFN Principle in the WTO- GATT” *MqBJL* 2008 vol.5 at46 http://www.buslaw.mq.edu.au/docs/publications/past_editions/volume_5/02Trost.pdf

international scene.²²⁶ The MFN requirement would defeat countries' reasons for entering into regional agreements.

Ukpe clearly points out that because FTAs between WTO members specifically derive their legitimacy from Article XXIV which is an integral part to the WTO law, the interim EPA agreements can be construed as subsidiary to the principle WTO Agreement (GATT 1994).²²⁷ This argument is based on the common law principle of statutory interpretation which is to the effect that subsidiary legislation cannot override principle legislation.²²⁸ To this end, EPAs must be in conformity with Article XXIV as the principle legislation. It therefore ensues that the MFN clause in the interim EPA which requires the parties to extend to each other favourable treatment derived from different other FTAs contravenes Article XXIV and has no legal basis.²²⁹

This has raised questions as to the validity and enforceability of the MFN provision in EPAs. FTAs under Article XXIV are accepted as derogation from GATT Article I.1, whose provisions are negotiated as between the specific parties. It follows therefore that rights and obligations negotiated under this kind of arrangement are only acquired by parties which are privy to such FTAs. The MFN provision in Article 16 of the interim EPA technically imports rights or benefits from other FTAs between the EAC and third parties on to the EU. To give the EU benefits from FTAs to which it is neither a party nor took part in the negotiation would, according to some analysts, amount to 'legal aberration'.²³⁰ In contrast WTO members are entitled to MFN treatment that any of them may accord to the other by virtue of their membership. The EU is neither a signatory nor a member of the other 'economic integration agreements' from which it demands equal treatment.

In this respect the MFN clause does not give a legal basis to the EU to claim any increased market access which for instance may be granted to India in an EAC-India FTA. It therefore

²²⁶ Mavroids C. P. (2005) at 226

²²⁷ Aniekan I. Ukpe (2009) *supra* n. 178 at 11

²²⁸ *Ibid*

²²⁹ *Ibid*

²³⁰ *Ibid* at 12

remains to be seen how the EU intends to enforce 'its' rights under agreements to which it is not a party.

Ultimately MFN introduces free-rider problems since concessions negotiated by EPA signatories and third parties (developed countries or major trading economies) must be transferred to the EU.²³¹

The MFN requirement is contrary to Article XXIV and in effect poses a major barrier to the formation of FTAs among developing countries on one hand and between less developed countries and developed countries on the other hand. The definition of 'major trading economies' also includes developed countries.²³² It was not the purpose of Article XXIV to give all WTO members better concessions negotiated under FTAs to which they are not privy. To this end, the use of MFN in the interim EPA may in future become a subject of dispute settlement among WTO members. It has been argued that this provision can in future suffice to constitute '*specific measures*' at issue necessary for the request for the establishment of a WTO dispute settlement Panel."²³³

Related to the above, although the EC insisted on the conclusion of interim EPAs by the end of 2007 in order to comply with WTO requirements, it has not met other related WTO obligations under Article XXIV. By unilaterally starting to implement these agreements without prior notification to the WTO, the EU may be directly violating GATT Article XXIV and the related WTO decision on Transparency Mechanisms for Regional Trade Agreements of December 2006.²³⁴ Under these provisions, WTO members who intend to form RTAs must give notification of such agreements before they are implemented or are in operation.

²³¹Michanne H Prempeh (2008) "The MFN Clause in the EPA: Supporting multilateralism of making foes of Nations" Paper presented at the 6th Garnet PhD School: "Global Governance & Regionalism: The Institutional Dimension" 12th June 2008 at 17 www.garnet-eu.org/fileadmin/.../phd.../Haynes_Prempeh.pdf

²³² Article 16 (6) Interim EPA

²³³ Aniekan I. Ukpe (2009) *supra* n.178 at13

²³⁴ Braude W. (2008) *supra* n. 23 at 325

3.4 The MFN clause is a disregard of EAC interest

The MFN provision has been used as a tool for the protection of mercantilist interests of the EU rather than enhancing welfare objectives of the poor countries.²³⁵ Even before the conclusion of the agreements EPAs were viewed as an arena where the EU would display mercantilism, economic and political power at the cost of the ACP countries.²³⁶ In South Africa, the EPAs have also been criticized for being too focused on mercantilist interests and therefore undermining efforts to reach fairer trade terms. According the Trade and Industry Minister Rob Davies, the commercial ambitions of the EU which have been depicted in the EPA negotiations are partly in relation to competition with China and India for markets in Africa.²³⁷ It was therefore not very surprising that the outcome of the negotiations were compromised policies such as MFN requirement that does little in terms of realizing development needs of poor countries.

On her part, EU has argued that the provision serves to protect it from “potentially less favourable treatment by the ACP countries” in future regional trade arrangements with any major trading economies and on the other hand, it is also intended to protect the interests of the ACP countries from aggressive market access demands of the developed and economically advanced developing countries.²³⁸ EU needs the markets of the ACP and the EAC in this context and cannot claim to protect development and trade in these countries without ‘jeopardizing’ its interest. The EAC’s call to the European Commission to raise the threshold for the definition of a ‘major trading economy’ under the MFN provision has fallen on ‘deaf ears’ with the EC maintaining that that increasing the percentage would allow European Commission competitors to benefit from better trading conditions than the EU in the region.²³⁹ Considering

²³⁵ Ochieng C.M (2009) *supra* n.54 13

²³⁶ Senona M. J (2009) *supra* n. 142 at 62

²³⁷ “South Africa weary of EU trade Pacts”, Reuters Creamer Media’s Engineering News Online, Johannesburg posted by Trade Law Centre for Sothern Africa- TRALAC at <http://www.tralac.org/cgi-bin/giga.cgi?cat=1052&limit=10&> (accessed 20 November 2009)

²³⁸ Ochieng C.M (2009) *supra* n.54

²³⁹ EPA negotiations update Melissa Julian, ECDPM, Trade Negotiation Insights Volume 7 No. 10, December/January 2009 available at Available online at: www.ictsd.net/tni www.acp-eu-trade.org/tni accessed 20 January 2010 , at 18

the EU's level of development in contrast to some members of the ACP group such as Uganda, for the EU to demand of these countries to give it the same treatment as other potential partners cannot be interpreted as protecting their interests. It appears the EU is advancing a market access programme for its own companies.²⁴⁰

3.5 The MFN Clause; a constraint on Policy space

The MFN Clause has further been criticized as a constraint on trade policy options of EAC countries. Governments play a vital role in formulation of national policy which is designed to build human, technological and infrastructural capacities that are required to increase and diversify production. The primary function of government is to identify, develop, implement and assess national policies that will advance its development objectives.²⁴¹ A Country's obligations under international agreements can become constraint on the national policymaking process.²⁴²

While countries engage in international interactions it is important for them to retain some room for national policy formulation that is independent of the international commitments for their own specific development needs. This is important because countries are at different levels of development. This 'room' for governments to develop their own policies is referred to as "policy space". In international trade relations, the term "policy space" was defined by the United Nations Conference on Trade and Development (UNCTAD) as "*the scope for domestic*

²⁴⁰ Markov H. (2008) "Checking the system: a review of trade preferences." Trade Negotiations Insights Volume 7 Number 6 July/ August 2008 Available online at: www.ictsd.org/tniwww.acp-eu-trade.org/tni (accessed 21 November 2009)

²⁴¹ M. Hamwey M.H (2005) "Expanding national policy space for development: Why the Multilateral Trading System Must Change." Trade-Related Agenda, Development and Equity (T.R.A.D.E.) Working Papers No. 25 September 2005 South Centre, at 1available at www.gina.gov.gy/.../TRADE-RELATED%20AGENDA%2025.pdf (accessed 30th January 2010)

²⁴² *Ibid*

policies, especially in the areas of trade, investment and industrial development which might be framed by international disciplines, commitments and global market considerations."²⁴³

The concern among international observers is that developing countries are losing their policy space because of constraints caused by international rules which prevents these countries from pursuing their developmental policies.²⁴⁴

According to the UNCTAD decision,

*The increasing interdependence of national economies in a globalizing world and the emergence of rule-based regimes for international economic relations have meant that the space for national economic policy, is now often framed by international disciplines, commitments and global market considerations. It is for each Government to evaluate the trade-off between the benefits of accepting international rules and commitments and the constraints posed by the loss of policy space. It is particularly important for developing countries, bearing in mind development goals and objectives, that all countries take into account the need for appropriate balance between national policy space and international disciplines and commitments.*²⁴⁵

Countries obviously lose policy space when they join the WTO. Milner argues that WTO rules that require transparency and predictability, the use of tariffs instead of non-tariff measures are by their nature a restriction on policy space.²⁴⁶ Some of these restrictive rules include the prohibition on the use of quantitative restrictions (quotas) as a barrier to trade under Article XI, the rules on non-discrimination; the most favoured nation treatment in Article I.1 and national treatment provision in Article III of the GATT 1994. The results of 1986-94 Uruguay Round negotiations of WTO negotiations marked the shrinking of policy space especially for

²⁴³ Sao Paulo Consensus adopted at UNCTAD XI held in Sao Paulo 13-18 June 2004. UNCTAD (2004) *São Paulo Consensus*, UNCTAD TD/410 available www.unctad.org/en/docs/ite20042_en.pdf http://www.unctad.org/en/docs/td410_en.pdf accessed on 28 January 2010

²⁴⁴ Page S. (2007) "Policy space: "Are WTO rules preventing development?" Overseas Development Institute (ODI) Briefing Paper January 2007, www.odi.org.uk/resources/download/82.pdf

²⁴⁵ Par. 8 of the Sao Paulo Consensus adopted at UNCTAD XI held in Sao Paulo 13-18 June 2004,

²⁴⁶ Milner C. (2009). "Constraining and Enhancing Policy space: the WTO and adjusting to globalization." *The Journal of International Trade and Diplomacy* 3(1) Spring 2009, 127-154, at135

developing countries which made huge concessions with respect to tariff bindings. Nevertheless WTO constraints on policy space are important for countries to access foreign markets.

Infringements on developing countries' national policy space must be considered within the context of the development process itself.²⁴⁷ Discussions on policy space have raised concern that developed countries are imposing policies on developing countries which limits choices of the later.²⁴⁸ Besides the disciplines and commitments provided made in the WTO, policy space of WTO members is further constrained or modified through other unilateral actions such as conditionalities attached to World Bank²⁴⁹ loans and also through bilateral and regional trade arrangements such as EPAs.²⁵⁰

RTAs have been criticized as one avenue through which developed countries impose certain restrictions on developing countries that impact on development targets.²⁵¹ In the EPAs, the MFN clause is seen as a major threat to policy space of ACP/EAC countries' policy space. The policy making process in the EAC will be partly framed by the MFN obligations to the EU. Consequently member states in the region will be forced to steer clear of any efforts to diversify trade which are contrary to this provision. The conclusion reached among analysts is that EAC countries will be tied or locked into trade with EU²⁵² rather than exploring better options with developing countries.

²⁴⁷ Robert M. Hamwey 2005. *Supra* n.163 at 8

²⁴⁸ Page S. 2007 *supra* n.244 at 2

²⁴⁹ The World Bank structural adjustment programs

²⁵⁰ Milner C. (2009) *supra* n.248 at 138

²⁵¹ *Ibid*

²⁵² Ochieng C.M (2009) *supra* n.54 at 13

3.6 The Standstill Clause

Related to policy space the standstill clause in the interim EPA which prohibits parties from increasing their applied tariffs is also a limitation on policy space of the EAC countries. Article 13 provides, “*Except for the measures adopted according to Articles 19 and 21, the Parties agree not to increase their applied customs duties in their mutual trade.*”²⁵³ Articles 19 and 21 refer to anti-dumping and countervailing measures, and bi-lateral safeguards respectively which are not analyzed in this paper.

One of the impacts of WTO membership on policy space is the border-import measures under which members are required to bind their tariff lines at a level above which they cannot raise them again. This is done through ‘binding’ of commitments; for goods, these bindings amount to ceilings on customs tariff rates.²⁵⁴ Each country’s bound rates can be found in its schedule of commitments. Countries may however impose tax imports at lower rates than the bound tariffs. These are known as applied tariffs. Developing countries frequently use applied tariffs instead of their bound rate to tax imports while in developed countries the tariff rates actually charged are usually the same.²⁵⁵

Majority of WTO members in sub-Saharan Africa have bound their tariff rates at 50 percent or above while their average applied tariff rate is below 20 percent.²⁵⁶ In the Uruguay Round of WTO negotiations, Uganda bound tariffs on all agricultural products, photographic goods, rubber and some categories of machinery at ceiling rates of 40 percent and 80 percent.²⁵⁷ Rwanda on the other hand, has an average bound rate for its imports above 60 percent and an average applied tariff which is below 30 percent in every product group except dairy products.²⁵⁸

²⁵³ Article 13 EAC- EU Interim EPA

²⁵⁴ Understanding the WTO 2008, by the WTO, Fourth Edition, at 12

²⁵⁵ *Ibid*

²⁵⁶ Milner C. (2009) *supra* n.248 at 133

²⁵⁷ Kasekende L. *et al* (2007) “Trade Policy, Manufacturing Efficiency and Exports in Uganda” in Oyojide A. & Njikeu D. (Eds.) (2007) Africa and the World Trading System Vol.2 Country Case Studies at 373

²⁵⁸ www.wto.org

Import tariffs are used as a policy instrument for industrial development.²⁵⁹ The difference between the bound and applied tariffs provides the policy space needed for industrial development. Countries are free to raise their applied rates to protect domestic industries and thus the standstill provision which prohibits the EAC countries from increasing their applied tariffs poses a major restriction on these countries from using tariffs as an instrument of development policy specifically for industrial development. WTO law does not require members to freeze their applied tariffs as long as they do not exceed the bound rates.

One might argue as some scholars have, that because developing and least developing countries have not taken advantage of the flexibility created by the space between their bound and applied rates then it would suggest that these countries do not want to use tariffs for development policy.²⁶⁰ Thus the major 'loss' of potential policy space has already occurred and there would be no actual constraint on policy space.²⁶¹

However, recent events such as the global financial and economic crisis have shown that African countries need to retain their policy space for industrial growth and development as well as food security. When countries are at the beginning of industrialization, their applied tariffs should not be permanently bound in order to give room for tariff adjustments which are proportional to the level of agricultural and industrial development.²⁶² Ugandan trade policy objectives emphasize the centrality of export promotion in the medium-term adjustment and growth programme.²⁶³ The goal is to increase export diversification (particularly non-traditional

²⁵⁹ Sheila Page (2007) *supra* n. 244 at 2-3

²⁶⁰ Milner C. (2009) *supra* 248, Sarah Page (2007) *supra* n.244 at 2

²⁶¹ *Ibid*

²⁶² "Trade negotiations in East Africa; Insights from the East African Business Council." Trade Negotiations Insights Issue 4 Vol 9 May 2010 at 11, available online www.ictsd.net/news/tn

²⁶³ Kasekende L. et al (2007) *supra* n. 257 at 370

exports) through encouraging the establishment of processing of industries in order to reduce the country's over reliance on agricultural commodity exports.²⁶⁴

The standstill clause essentially freezes tariffs on all trade between the parties including sensitive products that have been excluded from liberalization. The EAC exclusion list mainly comprises of agricultural products, wines and spirits, chemicals, plastics, wood based paper, textiles and clothing, footwear, ceramic products, glassware, articles of base metal and vehicles.²⁶⁵ EAC member states are predominantly agricultural economies, with agriculture providing the bulk of employment in each country; about 80 percent of the population depends directly or indirectly on agriculture.²⁶⁶

Agriculture is a backbone of Uganda's economy accounting for approximately 40 percent of GDP and 85 percent of export earnings.²⁶⁷ To freeze the tariffs on agriculture imports can be disastrous to the economies of the five countries. It undermines the ability of EAC countries to adjust to changing economic conditions, especially fluctuations in world markets and would in essence displace local food production in the region, making the region more vulnerable to food insecurity.²⁶⁸ A strict application of the standstill provision which fixes applied duties at the levels in force upon entry into force of the agreement could result in freezing exceptionally low import duties. According to a study on the implications of the EPAs on Africa, it is estimated that European exports could grow by more than four billion USD in Africa, inducing USD 0.8 billion of trade displacement.²⁶⁹

²⁶⁴ WTO Trade Policy Review- Uganda, 21 November 2001 WT/TPR/G/93
www.wto.org/english/tratop_e/tpr_e/tp182_e.htm (accessed 20 January 2010)

²⁶⁵ As shown in preceding chapters

²⁶⁶ Braude, W (2008) *supra* n.23 at 54

²⁶⁷ WTO Trade Policy Review- Uganda *supra* n. 284

²⁶⁸ Cosmos O 2009 *supra* n.54 at70

²⁶⁹ UNECA (2004), 'Economic and Welfare Impacts of the EU-Africa Economic Partnership Agreements', ATPC work in progress no. 10 (Addis Ababa, Ethiopia), in Romain R. & Njuguna Karingi, S.N (2007). "How to Balance the outcomes of Economic Partnership Agreements for sub-Saharan African Economies?" United Nations Economic Commission for Africa *The World Economy (2007)*, at 1880 www.ssrn.com/sol3/papers.cfm?abstract_id=1029817

3.7 Advantages of MFN clause

Despite the potential problems associated with the MFN clause, the EAC stands to benefit from this provision although the realization of such benefits may be diminished by other longstanding issues.

The argument raised by the EC for including the MFN clause is that “they guarantee that all ACP regions will be treated equally, so that any region or country signing an agreement now will not be relatively worse off if another region manages later to negotiate extra concessions.”²⁷⁰

However, Bilal is quick to point out that the MFN provision would make it impossible for the EU to discriminate in favour of more economically disadvantaged ACP regions than the more advanced ones under the EPAs system.²⁷¹ In this regard Uganda which was entitled to preferences under the EBA, would not be receive better treatment or flexibility upon signing the EPA arrangement.

To this extent the MFN provision is criticized on grounds that it does not take into account the trade and development needs of the least developing countries.²⁷² In addition to this, the non-reciprocal preferential market access to EU markets which most Africa countries enjoyed since the signing of the 1975 Lomé Agreement did not bear significant results. Exporters to EU markets still encounter the same challenges posed by trade distorting subsidies granted to EU producers and stringent food and health safety standards.

Another possible benefit is that the EAC party is not required to extend any favourable treatment resulting for regional economic agreements entered into with countries of the ACP group, or any African countries and regions.²⁷³ The exclusion of the MFN requirement from regional trade agreements with African countries or region is important to promote intra- Africa trade especially with the recent plans to form a “Cape to Cairo” FTA. The political leadership of

²⁷⁰ D. Lui & Bilal.S (2009) *supra* n.51

²⁷¹ *Ibid*

²⁷² Lehaghan P.M. *supra* n.40

²⁷³ Article 12 (4) EAC-EU interim EPA

COMESA, EAC and SADC are currently involved talks to pave way for the integration of the three regional blocs to form one unified free trade area.²⁷⁴

Conclusion

The MFN provision introduced by the interim EPA is not a requirement of the enabling Article XXIV for WTO compatible RTAs and as a result it poses serious threat to South-south trade between the EAC member states and major trading economies. Secondly the MFN clause is a constraint on policy space which is necessary to promote export diversification, industrial growth and ensure food security in the region. Potential limitations on policy space are compounded by the standstill clause which practically freezes the tariffs at applied rates. This can be disastrous to the region especially with the recent economic down turn. In effect the interim EPA has introduced more onerous trade obligations and rules on a reciprocal basis which protect EU interest while limiting the scope for developmental policies in EAC. Indeed the MFN clause poses major threat the EAC's future trade expansion. Although EAC countries have been granted preferential market access for their exports, they have in turn paid a price on important development policy issues.

²⁷⁴ Lisa Yarmoshuk (2009) "Amid global uncertainty, high hopes for regional integration and the African Economic Unity" Southern African Global Competitiveness Hub *Inside Southern African Trade* Issue 15 January 2009

CHAPTER 4

4.1 Recommendations and Conclusions

This chapter will attempt to mark out ways in which the challenges posed by the controversial the MFN provision may be addressed. Analyses of the MFN clause implication demonstrate that EPA signatories especially the LDCs may lose their small share in international trade. Recommendations ranging from amending EPA provisions to a complete overhaul of the approach used by the EU in the negotiation have been suggested.²⁷⁵ Since each region or country may be affected in different ways, it is important for EPA signatories to devise concrete and clear solutions that are suitable to their particular development needs and objectives. This a task ought to be undertaken bearing in mind that the EPAs once in force will become a permanent trade regime between the EU and the EAC countries. For Uganda, it is important to assess impacts on country bases while taking account of regional policies. The EAC should be given enough time to reconsider the implications of these on each member state and the region as a whole.

A discussion of some recommendations necessitates an inquiry into the legal status of the EAC-EU interim Agreement. The practicality of the recommendations depends on the agreements banding nature.

4.2 Legal status of the EAC/EU interim EPA

The EAC-EU interim EPA is still in its initialled state implying that parties have not signed the agreement. The interim EPA is a treaty which by definition means an international agreement concluded between states.²⁷⁶ As such it is governed by the Vienna Convention on the Law of Treaties 1969 (hereafter referred to as the Vienna Convention). Article 1 of the Vienna Convention provides that the convention applies to treaties between states.

²⁷⁵ The 2008 Report by Christiane Taubira, a left-wing member of the French National Assembly <http://agritrade.cta.int/en/content/view/full/4107>

²⁷⁶ Article 2 (a) Vienna Convention on the Law of Treaties 1969 reproduced in D.J Harris (2004). "Cases and Materials- International Law", at 789

With respect to initialled agreements, Article 10 (b) of the Vienna Convention states that initialling an agreement signifies that the text is authentic and definitive, ready for signature or provisional application.²⁷⁷ Provisional application means that parties may commence with the implementation of a treaty pending signature or ratification. An initialled text does not create any obligations on the parties.²⁷⁸ A treaty becomes binding on a party upon signature or ratification. According to Article 11 of the Vienna Convention, consent of a state to be bound by a treaty may be expressed by signature or ratification or by any other means agreed to by the parties.²⁷⁹ In the interim EPA, it was agreed that the agreement shall be signed, ratified or approved in accordance with the domestic rules of the respective parties.²⁸⁰ Since the interim agreement was only initialled it does not create binding obligations on the parties.²⁸¹ Notably, MFN requirement can only come into operation after the parties have signed and ratified the agreement.²⁸²

The EAC-EU interim EPA was scheduled to be signed by July 2009.²⁸³ EAC states have stalled in the signing of these agreements citing a number of reasons which include the need for financial resources.²⁸⁴ The EU has warned that if the EAC countries do not sign the agreement the deal will be cancelled.²⁸⁵

²⁷⁷ Bartels .L (2008) "The legal status of the initialled EPAs and legal constraints on renegotiation." April 2008. available at www.thecommonwealth.org/files/177361/FileName/EPAsin2008.pdf at 1.

²⁷⁸ Batels. L (2008) *Ibid*

²⁷⁹ Vienna Convention in D.J Harris (2004) *supra* at n.275 at 804

²⁸⁰ Article 45 (1) EAC/EU Interim EPA

²⁸¹ Emily Jones and Javier Perez (2008) "Partnership or power play? EPAs fail the development tests Trade Negotiations Insights", Volume 7. 2 Number 4 / May 2008 at 3 Available online at: www.ictsd.org/tni www.acp-eu-trade.org/tni

²⁸² see Article 16 EAC-EU Interim EPA

²⁸³ EDCPM Briefing Note "State of EPA Negotiations in May 2009"

²⁸⁴ Kiguta P. (2008) *supra* n.27

²⁸⁵ Ng'wanakilala, Fumbuka, "EU wants time table for East Africa Trade deal". Reuters, 2010-02-17 Dar es Salaam posted on Tralac website at www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir

Clearly the EAC is under pressure to sign this trade agreement and according to the EU main explanation behind this is the need for a signed agreement to be notified to the WTO.²⁸⁶ As discussed above the GATT 1994 requires that RTAs must be notified to the WTO.

4.3 Notification of the interim EPA

The position under international law is that an initialled agreement can be notified to the WTO. The WTO Transparency Decision which contains the procedure for notification of RTAs requires that members participating in negotiations aimed at the conclusion of RTAs shall endeavor to inform the WTO.²⁸⁷ Paragraph B.3 of the Transparency Decision further states that 'the required notification of an RTA ... 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.'²⁸⁸

From this provision, notification can even take place upon provisional application and it is not a requirement that the parties must have signed the agreement prior to notification.²⁸⁹ Although the EAC-EU EPA has only been initialled, the parties already commenced with provisional application. In Article 45 (4) of the interim agreement parties agreed to apply the provisions of the agreement which fall in their respective competence. From 1 January 2008 the EU granted quota free, duty free market access to imports from the EAC region with transitional periods for rice and sugar.²⁹⁰ The interim EPA can therefore be notified to the WTO in its current state. The claim by European Commission that the interim agreement can only be notified to the WTO once it has been signed is therefore not persuasive and lacks justification.

²⁸⁶ Karin Ulmer EPA stocktaking: urgency for a development contest Volume 7. 2 Number 4 / May 2008 Available online at: www.ictsd.org/tni www.acp-eu-trade.org/tni at 8, see L.Bartels 2008 at 340

²⁸⁷ Par. A. 1 (a) of the WTO General Council, Transparency Mechanism for Regional Trade Agreements, Decision of December 14 2006, WT/L/671 available at www.wto.org

²⁸⁸ *Ibid*

²⁸⁹ Bartels .L (2008) *supra* n.276 at 2

²⁹⁰ Paragraphs 1 and 2 of Annex 1 to the EAC/EU EPA titled, 'Customs Duties on Products Originating in the EAC Party'

The time element should not be used to pressure the EAC into signing agreements which are intended to be permanent. The agreement can still be notified in its current to give room for renegotiating aspects of the agreements which are not required for WTO-legality such as the MFN and standstill clauses. The only requirement is that the renegotiated agreement must be re-notified to the WTO and that it remains WTO-legal.²⁹¹ The EU has imposed a higher standard with regard to signing of EPAs than it applies in its own treaty practice. For example, the free trade agreement between the EU and South Africa (the TDCA) was signed on October 1, 1999 and ratified by South Africa in November 1999. However it took EU's own member states such as Luxembourg, France, Austria, Italy and Greece until April 27 2004 to ratify the very same TDCA.²⁹² Arguably, it would be unreasonable to hold the EAC to a standard higher than that which the EU member states apply in their own treaty practice. EAC states should thus be given reasonable time to look into controversial provisions before signing.

In this regard this paper recommends that parties should consider the possibility of re-negotiation of the contentious issues in particular, the MFN provision.

4.4 Re-negotiation

Countries are not precluded by WTO law from renegotiating initialed agreements, so long as the renegotiated agreement is still WTO-legal. The EU has indicated that it is willing to consider the revision of EPAs only in the context of final agreements.²⁹³ The Understanding on the Interpretation of Article XXIV provides for the possibility of renegotiation of notified agreements.

Upon notification of the agreement, recommendations made by the working party (which was replaced by the Committee on Regional Trade Agreements (CRTA)) may include, if necessary,

²⁹¹ Par. D.1 of the WTO Transparency Decision, *supra*

²⁹² Bartels .L (2008) n.276

²⁹³ Bilal (2009) *supra* n.18 at 3

further review of the agreement to be made by the parties.²⁹⁴ A review would essentially involve renegotiation. This would be in line with some of the recommendations that have come from members of the EU itself. The Taubira Report of 2008 by Christiane Taubira, a left-wing member of the French National Assembly recommended a complete overhaul of the approach used by the EU in the negotiation of EPAs.²⁹⁵ This Report calls for the adoption of a completely new approach to EPAs and renegotiation so as to reach agreements which would be more conducive to development.²⁹⁶ Although the general view is that it is unlikely that this report's recommendations will be adopted by the current Presidency of the Council of the EU, it does at least contribute to the debate over how to develop economic cooperation with Africa.²⁹⁷ The extent to which these interim agreements can be revised is however not certain.

Renegotiation of EPAs could take the form of amendments or a total rescission of the MFN clause. The decision to re-open or renegotiate the texts may be up to each EAC member state to decide since this involves financial implications on individual countries. Renegotiation also needs to be weighed against an assessment of the gains to be made vis-à-vis the resources which would be diverted away from pursuing other regional or national policies.²⁹⁸

The question of renegotiation requires extreme caution. ACP/EAC countries may prejudice tariff preferences granted under the EPA in trying to push for renegotiation.²⁹⁹ Also, if the countries withdrawal provisional application of the agreement, it could be seen as an indication of the EAC countries' intention not to ratify the agreement.³⁰⁰ On the other hand, Braude writes, the

²⁹⁴ Par. 8 of Understanding on the Interpretation of Article XXIV

²⁹⁵ On April 9 2008 Christiane Taubira, a left-wing member of the French National Assembly, was asked by French President Nicolas Sarkozy to examine ways of relaunching the Economic Partnership Agreements (EPAs) between the European Union and the African, Caribbean and Pacific (ACP) countries and to help clarify the French position during its Presidency of the Council of the European Union (FPEU).

²⁹⁶ Mombrial N. (2009). "What if politics finally got involved with world affairs? The Taubira Report on EPA" Trade Negotiations Insights Volume 7 Number 6 July/ August 2008 at2 available online at: www.ictsd.org/tni/www.acp-eu-trade.org/tni accessed 21 November 2009

²⁹⁷ *Ibid*

²⁹⁸ Haywood K. (2008) *supra* n.29 at 7

²⁹⁹ Bartels L (2008) *supra* n.213 at 2

³⁰⁰ *Ibid*, see Braude. W (2008) *supra* n.23 at 325, Article 45 (4) EAC/EU Interim EPA For the East African countries which have not even signed the agreement, withdrawal of ratification could be interpreted as the regions intention not to sign, leave alone ratification.

act of seeking to renegotiate the agreement in itself should not be taken as a signal of intent to circumvent ratification.³⁰¹

Another danger in re-opening the interim agreements is that this could also lead to new demands from the EU itself, which may increase the risks associated with EPAs.³⁰² It may further compromise the EAC regional integration process with Kenya as the only developing country in the region which stands to lose much without the EPA preferences. The rest of the counties would be entitled to import to the EU under the EBA scheme while Kenya would fall under the Generalized System of Preferences where it would be competing for the EU market with other highly competitive developing countries such as Brazil.

4.5 Amendment

In some parts of Africa, EPA texts have been renegotiated and revised. EPA provisions of Côte d'Ivoire and Ghana were amended to allow changes to accommodate a regional tariff while the Ghana interim EPA now includes a new Annex (II) allowing the country to introduce an additional levy on imports of 0.5 percent of the cost, insurance and freight (c.i.f.) value until the end of 2017.³⁰³ The EU should not be seen to apply a flexible approach with some countries and a strict one on others. Similarly, the EAC states should be allowed to revise the MFN and Stand still provisions.

4.5.1 Amendment of the MFN Clause

Remarkably, in some other EPAs the requirement to extend benefits to the EU is not automatic. In the EPAs initialled by Ghana and Côte d'Ivoire, consultations have to be made jointly by the parties to determine whether and how any more favourable treatment should be provided to the EU.³⁰⁴

³⁰¹ *Ibid*

³⁰² *Ibid*

³⁰³ D. Lui & S. Bilal (2009) *supra* n. 51 at 10

³⁰⁴ D. Lui & S. Bilal (2009) *supra* n. 51 at 12, In Article 17 (3) of the Ivory Coast EPA, parties shall consult each other and decide together on the implementation of the MFN clause requirement. Stepping Stone Economic Partnership

The parties need to renegotiate the terms on which more favourable treatment should be granted to the EU because conditions that lead to the grant of such treatment to a third party may not be the same. For instance, the EAC countries may derive greater benefit from FTAs with third parties than that granted by the EU under the interim agreement. In the case of the CARIFORUM text,³⁰⁵ for example, a decision must be taken jointly about whether to deny the EU any benefits to which it was entitled in specified FTAs with other countries.³⁰⁶

On the other hand the EAC has requested for more flexibility under the MFN Clause, particularly that the one percent, threshold used to categorize countries as ‘major trading economies’ should be raised to exclude certain countries.³⁰⁷ In this regard this threshold can be raised to exclude some of the developing countries which are potential trade partners with the East African countries.

Bilal further suggests that in order to dispel any confusion with regard to ‘South-South’ trade, the wording in the MFN text should clarify that agreements notified to the WTO under the *Enabling Clause* will not be affected by the clause.³⁰⁸ It is equally important to agree on a language that would clear up the ambiguity over the definition of ‘more favourable treatment’ for tariff concessions.

A better alternative for the EAC would be to renegotiate for a total removal of the provision. Arguments in favour of this alternative can be based on the fact that some FTAs between the EU and other parties do not contain the MFN obligations. The TDCA and EU–Mexico FTA are less restrictive in certain respects.³⁰⁹ They contain no MFN or standstill clause provisions. South

Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part, *Official Journal of the European Union* L 59/3 3.3.2009

³⁰⁵ The EPA signed between the EU and the Caribbean group of countries

³⁰⁶ Bilal S. 2009 *supra* n.18 at 28

³⁰⁷ Trade negotiations in East Africa: Insights from the East African Business Council, Trade Negotiations Insights Issue 4 Volume 9, May 2010 (*TNI* interview with Charles Yegella, a Trade in Services Fellow with the East African Business Council and International Lawyers and Economists Against Poverty) at 11. www.ictsd.net/tn

³⁰⁸ D. Lui & S. Bilal (2009) *supra* n.51 at 31

³⁰⁹ TDCA Agreement *supra*

Africa trades more with ‘major trading economies’ such as China than the EAC.³¹⁰ It is unreasonable for the EU to apply different trade policy to EAC region which poses less threat to its market share in the region.

4.5.2 Amendment of the Standstill clause

Potential challenges arising from the standstill provision are compounded by a lack of clarity in drafting. Currently the standstill clause as provided in Article 13 of the interim EPA is ambiguous. It does not clearly specify whether freezing of tariffs at applied rates applies to products which have been liberalized or those on the exclusion list. During the December 2007 EU-Africa summit the EC president Jose Manuel Barroso stated that contentious clauses in EPAs could be opened for further discussion at a later stage.³¹¹ More recently the EC has indicated that it is ‘open to discussions’ on the EAC’s standstill clause in the process of working towards a full EPA. Both sides have therefore agreed to formulate new standstill articles in the comprehensive EPA.³¹² Apparently these efforts have not produced results hence this study highlights ways in which this provision can be modified.

Although the EAC members may have agreed to formulate new standstill provisions, it is recommended that they consider the option of eliminating the provision from the agreement. Failure to achieve this, the region should consider its revision. The stand still provision essentially freezes tariffs of all products traded between the EU and the EAC whether or not they have been excluded from liberalization. This means that even tariffs on products on the ‘exclusion list’, cannot be raised after the entry into force of the agreement. First, renegotiation should aim at achieving a clear distinction as to which products the provision applies to. In this regard, there is need for some flexibility which allows for application of the standstill provision to liberalized products only and not products on the exclusion list, such as agricultural products. In other EPAs, the standstill clause only applies to products committed for liberalization.³¹³ The

³¹⁰ Other countries may include Brazil and India

³¹¹ Braude W.2008 *supra* n.23 at 319

³¹² D.Lui & S. Bilal (2009) *supra* n. 51 at11,

³¹³ CARIFORUM, 2008; SADC, 2008 in Obote C 2009 above

same flexibility that the EU has permitted in some regions should be extended to the EAC. The Taubira Report of 2008 recommended that EPAs should aim at ensuring recognition of the right to food, food security and the special status of agriculture.³¹⁴ This can be done by elimination of the standstill clause from the agreement.

Secondly, on the side of the EAC, the standstill clause should be amended to apply asymmetrically. This implies that freezing of tariffs should only take place in accordance with the liberalization schedule agreed to by the parties. According to agreed schedule, liberalization is to take place over the next 25 years the EAC will liberalize 82.6 percent of imports from the EU by value (65percent by 2010, 80percent by 2023 and the remainder by 2033. Similarly the standstill clause can be made to apply first to the 65percent to be liberalized by 2010, to 80percent by 2023 and the remainder of goods to be liberalized by 2033. It is of course debatable as to whether such a revision would entirely rid the EAC members of the dilemma presented by such a provision. In the long run EAC countries may still be faced with complexities of having their tariffs frozen at applied rates, which makes modification of the provision only a temporary solution. EAC countries should thus be more concerned with the long term benefits of the interim Agreement. African countries and the ACP group generally, are looking at EPAs for developmental trade especially now that the WTO Doha Round has failed to come to a conclusion. Consequently this makes a case for a complete removal of the standstill clause in the EPA.

4.6 Extension of the Cotonou waiver

It has been suggested that to avoid the impasse involved in achieving development-friendly EPAs which are also WTO compatible, the European Commission may jointly with the ACP countries request the extension of the Cotonou waiver from WTO members or even for a new one.³¹⁵ Taking into consideration that the EAC region has not reached a final EPA,³¹⁶ extension

³¹⁴ Taubira Report, 2008,

³¹⁵ Yenkong N. Hodu (2009) *supra* 151at 236-237

³¹⁶ Apart from EAC countries which have so far failed to sign the instrument, EPAs have also met stiff resistance with only Caribbean countries under the Caribbean Forum Configuration which signed and notified to the WTO a

of the waiver would be another alternative which would permit the EU to continue granting of preferences while negotiating final EPAs. Request for a waiver is provided under Article IX of the Marrakesh Agreement Establishing the WTO while the Understanding in Respect of Waivers of Obligations under the GATT 1994 makes provision for extension of an existing waiver.³¹⁷

It is contrary to the Cotonou Agreement and unreasonable to rush the EAC countries into signing agreements when they are not ready to do so. Clearly most Africa countries are not ready to sign the EPAs since negotiations have now stretched into 2010 past the July 2009 deadline. Analysts have commented that the EU has exaggerated the risk of legal challenges to a further Cotonou Agreement waiver because WTO cases can take years to be resolved.³¹⁸ It should be recalled that EPAs were meant to be concluded at the pace of ACP countries. Article 37 (5) of the Cotonou Partnership Agreement provides that negotiations of the economic partnership agreements will be undertaken with ACP countries at the level they consider appropriate and in accordance with the procedures agreed by the ACP Group. A waiver would be compatible with the spirit of the Cotonou provisions. The risk in obtaining a new waiver is that the EU may be required to make costly trade concessions to non-ACP countries³¹⁹ thus this paper proposes other alternatives.

4.7 Alternatives to EPAs: The Generalized System of Preferences (GSP) and Everything But Arms (EBA) schemes

After the expiry of the WTO waiver for Lomé and Cotonou non-reciprocal preferences, the EU had two alternatives. One was to extend the preferences to all developing countries (including least developing countries) to make it non-discriminatory. Another option was to change the non-reciprocal system into a reciprocal preferential trade regime which is now the EPAs that

full EPA, the CARIFORUM in October 2008. Briefing Note on State of EPA Negotiations, May 2009. Prepared by the ECDPM available online www.ecdpm.org

³¹⁷ WTO Legal Texts, Results of the Uruguay Round of Multilateral Trade, at 9 & 29

³¹⁸ Trade Negotiations Insights vol. 7, No. 2 March 2008

³¹⁹ Hinkle E. L and Maurice Schiff M. (2004) "Economic Partnership Agreements between Sub-Saharan Africa and the EU: A Development Perspective on their Trade Components" Africa Region Working Paper World Bank February 2004 at 17 http://www.unige.ch/ses/ecopo/demelo/Cdrom/RIA/Readings/EU_SSA_EPA.pdf

was chosen by the EU. However due to the skepticism surrounding EPAs, based on legitimate and justifiable reasons, it has been suggested that ACP countries should consider the EU market access alternatives to EPA regime.³²⁰ These are the Generalized System of Preferences (GSP) for developing and the Everything But Arms (EBA) scheme for least developing countries. Under these options EAC countries would have to forfeit the quota free duty free market access that has accorded to them under the EPAs.

GSP is the system under which the EU (and other developed countries) grants preferential market access to imports from all developing countries. With the EBA scheme which was introduced in 2001, all imports from least developing countries were granted duty free, quota free market access for all products except arms and ammunition. All East African member states with the exception of Kenya qualify for the EBA scheme.

The GSP which grants same preferences to all developing countries is easiest way to comply with WTO regulations that require non-discriminatory preferential regimes among WTO members.³²¹ On the other hand, it also follows a non-reciprocal approach instead of the mutual liberalization required by EPAs and because of this it does not entail conditions requiring MFN treatment for the EU.

Some analysts are of the view that switching from the EPA system to the GSP and EBA initiatives would be less costly for most countries than adopting the EPAs.³²² The GSP option may lead to growth in industrial output as EAC economies adjust to increased EU tariffs on agriculture exports by channeling their resources from agro-processing industries to other

³²⁰ Romain Perez (2006) "Are Economic Partnership Agreements a First-best optimum for African Caribbean and Pacific Countries?" *The Journal of World Trade*, 40(6) 999-1019, at 1000, Helmuth Markov (2008) "Checking the system: a review of trade preferences Trade Negotiations Insights Volume 7 Number 6 July/ August 2008 available online at: www.ictsd.org/tniwww.acp-eu-trade.org/tni accessed 21 November 2009

³²¹ Romain Perez & Karingi .S (2007) "How to Balance the Outcomes of the Economic Partnership Agreements for sub-Saharan African Economies?" United Nations Economic Commission for Africa, *The World Economy* (2007) 1877-1899, at 1882 (accessed 21 December 2009)

³²² Romain Perez (2006)*supra* n.321 at 1000

industries.³²³ In Uganda, it is hoped that the oil discovered in 2006 in the Albertine Graben region (Lake Albert basin) will augment industrial growth of other sectors. Under the GSP scheme local industries are more protected than the EPA regime. The GSP and EBA initiatives will also help these countries to preserve their revenues unlike the case under the EPA arrangement.

However it is important to note that the two trade regimes are highly unpredictable since they rely on the goodwill of EU and can therefore be withdrawn at anytime. Industrialized economies are free to determine the magnitude and scope of their own GSP schemes and modify them arbitrarily without fear of sanction by the GATT in event of import surges or other threats to sensitive domestic sectors.³²⁴ In addition the GSP initiatives capture all developing countries implying that countries with unequal production capacities and resources will be competing for the European markets on equal terms. In East Africa Kenya would be competing with countries such as Brazil, Argentina or India.

It is therefore imperative for individual countries to further investigate the alternatives to the EPAs but at the same time weigh the costs abandoning the EPAs.³²⁵ Given the potential cost of the EPAs, they may find it preferable, especially for the LDCs, to rely on the EBAs preferences if they can be formalized.³²⁶ For the developing countries, the cost of losing part of their preferences by resorting to the GSP scheme only, *vis-à-vis* opening up their markets for the EU under the EPA should be weighed carefully. For regional groups which constitute both developing and least developing countries such as the EAC, the decision to choose these alternatives is not entirely up to individual countries. Regional integration initiatives would render the GSP or EBA systems almost impossible and risky to apply.

³²³ *Ibid* at1013

³²⁴ Robert Read (2007) "The generalized system of preferences and special and differential treatment for developing countries in the GATT and WTO." in Kerr W. A. & James D. Gaisford (eds) (2007) *supra* at465

³²⁵ Romain Perez *et al* (2007) *supra* 1889

³²⁶ *Ibid*

These alternatives are also based on the presumption that the EU is willing to replace them in place of the EPAs.³²⁷ If the EU were to retaliate against ACP countries which do not sign the EPA by withdrawing preferences under the Cotonou Agreement there would be, there would be dire consequences for these countries.

4.8 Conclusion

This study sets out a case against the inclusion of the MFN provision in the interim Economic Partnership Agreement between the East African Community and the European Union.

The study analyzed the MFN clause with a view to draw some attention to the possible implications of this clause on the EAC particularly Uganda as one of the least developed countries in the region. It shows that the MFN provision is more restrictive than the WTO requirements for RTAs and is potentially detrimental to the country's trade and developmental policies. Specifically the MFN requirement as underscored by this study, demonstrates an outright departure from the development imperatives of the Cotonou agreement which provided the framework for EPA negotiations.

It has been argued that the MFN clause in its current form is rather contrary to the Article XXIV GATT which governs the FTAs. The study attempted to show that this provision is more restrictive than what is necessary for WTO compliant FTAs. This dissertation has also shown that this provision affects South-South trade agreements consequently rendering the Enabling Clause which governs South-South trade dysfunctional. The challenges of the MFN provision with respect to policy space of least developing countries are compounded by the standstill clause which freezes tariff rates of both liberalized and sensitive products of EAC member states. This paper has illustrated that this would restrain Uganda's ability to adjust to volatile global food prices and thus intensifying food security problems in the region.

The recommendations made in this paper would go a long way in resolving the contention surrounding the MFN provision however this paper reiterates that extreme caution is needed with respect to the alternatives to the EPAs. Regional integration efforts cannot be compromised for the sake of trading with the EU especially now that Kenya is emerging as a regional manufacturing hub for East Africa.

Economic partnership agreements are on the whole important to Uganda however for all the reasons illustrated above, the MFN provision in the interim EPA would patently be to the country's own detriment and the region generally. The likelihood that the MFN clause will diminish potential benefits of these agreements cannot be downplayed.

Although this study draws attention to the MFN clause as one of the contentious provisions in the interim agreement, it should be noted that resolving the arising implications will not by itself solve the challenges encountered by African exporters to EU markets. In order to harness benefits of the Economic Partnership Agreements, both the EU the EAC parties need to address other related issues such as supply-side constraints, trade-facilitation as well as technical regulations and standards to trade imposed by the EU countries.

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