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**STUDENT NUMBER:**  
**29728012**

**30 May 2010**

**LLM IN INTERNATIONAL TRADE AND INVESTMENT LAW IN AFRICA**  
**CENTRE FOR HUMAN RIGHTS**  
**UNIVERSITY OF PRETORIA**  
**SOUTH AFRICA.**



HOW ECOWAS  
NEGOTIATING TEAM CAN  
STRENGTHEN THE LEGAL  
PROVISIONS OF COTE  
D'IVOIRE EPA AS TO  
BENEFIT THE WHOLE  
REGION: A LEGAL ANALYSIS  
OF THE COTE D'IVOIRE  
INTERIM EPA

THE MINI THESIS

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## Acknowledgement:

I would like to thank the Centre for Human Rights of the University of Pretoria for initiating this Programme and the Trade Moot Court Competition thanks to which I am doing the LLM.

Thank you also to the International Development Law Unit and to Professor Daniel Bradlow for the patience and constant support during lectures.

Thank also to San Bilal, Head of the Economic and trade Cooperation Programme at the European Centre for Development Policy Management (ECDPM) for being available to answer questions on EPAs negotiations when he barely knew me. Thank you very much, your intervention has been of a great help.

I would like also to express my gratitude to Marie-Laure N'cho and Emily Laubscher, two “*extraordinaires*” women without which my coming to South Africa this year for the programme would have probably not occurred.

Finally, I wish all the best to my fellow colleagues. Thank you for the amazing journey we share through out the LLM.

This study is dedicated to my family whom I love dearly and in particular to my father who never had the chance to finish his law studies. “*J’espère que je l’ai fait aussi pour toi papa*”.

## Summary

The paper examines through a legal analysis of some articles of the Cote d'Ivoire Stepping Stone Agreement, how ECOWAS can strengthened its approach in negotiating a comprehensive EPA for the region. These articles are scrutinized with a special focus on market access as to point out fields that need to be re-thought with regard objectives set out in the agreement.

It is argue that current bilateral and multilateral Trade and Investment Agreements are shrinking in their legal framework the policy space need for development in countries that need it the most. This study, underlines the fact that the legal provisions contain in the Cote d'Ivoire IEPA do reduce actually its ability to set up policies tool aim at achieving development goals. It is the sustainability of the IEPA legal provisions that is questioned under this topic with regard to sensitive issues such as the safeguard measures, the stand still clause, the MFN clause, the Rules of Origin etc.....

In so doing, the analysis reveals as well the ambiguity of the IEPA relationship with the Cotonou Agreement and the multilateral trade rules of the WTO. This ambiguity is highlighted in an attempt to drawn the attention of the region on the fact that; if there is indeed a need to update the Economic Partnership Agreement currently negotiating with the EC, this cannot be done without first of all updating the negotiating approach of the region. In fact, its weak bargaining approach coupled with that overwhelming of the EC has resulted in the agreement currently on the table.

Substantial changes can be made with this regard by acknowledging the insufficiencies in the legal framework of the IEPA but also in learning lesson from mistakes the region itself and Cote d'Ivoire have done in negotiating EPAs and its Interim version.

Thus, since EPAs often triggered the debate on liberalization and what it may carry in terms of consequences on developing countries' economies, examples of countries that took a different step toward liberalization and whose current situation may be use as a testimony by ECOWAS are quoted.

Finally, propositions are made to ECOWAS region as to enlarge current development space while battling for more flexibility under the EPA.



Acronyms:

ECOWAS	Economic Community of West African States
EC	European Community
ACP	African, Caribbean and Pacific States
IEPA	Interim Economic Partnership Agreement
EU	European Union
EPA	Economic Partnership Agreement
FTA	Free Trade Area
EEC	European Economic Community
WTO	World Trade Organisation
MFN clause	Most Favoured Nation Clause
FTAA	Free Trade Area of the America
EBA	Everything But Arms
GSP	Generalised System of Preference
GATT	General Agreement on Trade and Tariffs
RoO	Rules of Origin
PTA	Preferential Trade Agreement
CET	Common External Tariff
SADC	Southern African Development Community
CARIFORUM	Caribbean Forum
LDCs	Least Developed Countries
FDI	Foreign Direct Investment
RTA	Regional Trade Agreement
BIT	Bilateral Investment Treaty
TLs	Tariff Lines
CU	Custom Union

## CHAPTER I: INTRODUCTION

This paper aim at highlighting the Interim Partnership Agreement Cote d'Ivoire signed in late 2008 as to reveal how the legal analysis of that stepping stone agreement can help ECOWAS obtain a more advantageous legal framework for the whole region in drawing lessons from past mistakes.

The negotiations of the Economic Partnership Agreements launched in latter 2002 between the EC and the ACP countries will surely be pointed out as the most widely discussed issue in International trade from some years now.

As previous papers on the issue this study provides for a historical background however, it is the legal aspect of one IEPA<sup>1</sup> that is dealt with under this topic. Concern will be raised on the way provisions were drafted with a particular focus on their capabilities to incorporate policy space need for development. Their potential to reflect principles emphasized in the Cotonou Agreement will also be questioned bearing in mind that this agreement represent the legal basis according to which ACP states and the EU have to partnered.

Past experiences will be shed light on in an attempt to designing a new bargaining approach for the region.

As Elisabeth Tankeu<sup>2</sup> said: *"it must be realized that the Interim EPA were rushed to meet the December 31 2007 deadline and many of them are characterized by defects that need remediation"*. She went further to say that they are the products of unequal bargaining, in which the stronger party was able to use effectively its superior bargaining power and the *"carrot and the stick"* method to secure Interim Agreement in line with its negotiating objectives<sup>3</sup>.

As Joseph E. Stiglitz, Nobel Price of Economy said: *capital market liberalization sequenced wrongly, effected prematurely does not lead to faster economic growth, but does expose countries to high level of risk: it is a risk without reward*<sup>4</sup>.

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<sup>1</sup> Interim Partnership Agreement.

<sup>2</sup> African Union's Commissioner of Trade and Industry during an interview, (*Trade Negotiation Insight* Volume 7. Number 10. December 2008 /January 2009, page 2 available at [www.acp-eu-trade.org/newsletter/tni.php](http://www.acp-eu-trade.org/newsletter/tni.php)).

<sup>3</sup> Ibid page1.

<sup>4</sup> For more see Putting Development First; "Development Policies in a World of Globalization".

Of course, there are several views on the issue as others note at the outset that the rationale for the EPAs is not to forward the economic interest of the European Union, but rather to stop the economic marginalization of ACP countries noting that with EPAs, “*trade meets development*”<sup>5</sup>.

Yet, this seems unlikely since the EU has witnessed reluctance in every grouping it has tried to sign an EPA with quoting those who opted for an Interim EPA as examples to be followed. We are clearly in a situation whereby the EU seems to be the one to wish the conclusion of EPAs without further delay while ACP states are entering these agreements in order to secure the access of their commodities abroad.

Interestingly, the EC view is that contentious issues should be addressed during negotiations towards comprehensive EPAs, rather than in the context of making changes to existing interim EPAs<sup>6</sup>.

Yet, starting from the point that having secured concessions from both Ghana and Cote d’Ivoire in interim agreements it is unlikely to see the EU conceding less favourable terms in the negotiations for a full EPA, it is advice to see the contentious issues addressed in advance of interim agreements being ratified, or in the context their review<sup>7</sup>.

Furthermore, as negotiations rounds are postponed, and momentum seeps away, it seems increasingly likely for African countries to find themselves facing the status quo for many years to come, with some countries operating under interim EPAs<sup>8</sup>.

Indeed, there is a need to work on the IEPA as to anticipate the amelioration of the final version. Thus, the EU has little desire for nuance and variation as it is seeking to build a series of FTAs based on harmonized rules that work toward an eventual global compact<sup>9</sup>.

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<sup>5</sup> João Aguiar Machado: “Taking Stock of the EPA Process: Original Objectives, Past Achievements, And Future Challenges in Finalizing and Implementing EPAs”; (Updating Economic Partnership Agreement to Today’s Global Challenges, page 48; paper write on behalf of the EU commission).

<sup>6</sup> Dan Lui and Sanoussi Bilal: “Contentious issues in the Interim EPAs: potential flexibility in the negotiations” available at [www.ecdpm.org](http://www.ecdpm.org) ; Discussion Paper No. 89 March 2009.

<sup>7</sup> Ibid

<sup>8</sup> Emily Jones and Darlan F. Marti “Updating EPA: rising to the challenge” (Updating Economic Partnership Agreement to Today’s Global Challenges; Economy Policy Paper Series 09).

<sup>9</sup> Ibid



Thus, since the pending negotiations are obviously related most of the time than not to legal provisions problems parties are facing, this study aims at scrutinizing relevant articles of the Cote d'Ivoire Interim EPA in an effort to point out fields that need to be re-thought with regard to the objectives set up in the agreement.

Far from proposing to answer all the questions that may arise from the Cote d'Ivoire IEPA or to present a new theory on its understanding, this paper aims on the other at providing for a critical legal analysis of its legal provisions as to be used by ECOWAS in updating its bargaining approach.

As far as the drafting of contract is concerned, when a text is sufficiently vague; words, expressions and even a mere comma can change its meaning to the extent whereby a duty may be strengthened or an advantage completely robbed out.

Thus, as the awareness of the region on crucial issues such as Rules of Origin and Safeguard measures grows along the negotiation process, it is likely to witness a change in its bargaining position. The objective of this paper is to also contribute to that awareness in adding suggestions to the rather few legal analyses on the subject.

More at stake is that EPAs are complex agreements and the drafting is also, in parts, not as clear as it could be<sup>10</sup> which makes it necessary to bend on specific articles.

If previous papers on the issue did undertake such a study, we truly believe that there is indeed a need for specialization on the issue. The purpose is to break away from the generally broad approach that most of the authors adopt by giving an overview of all the EPAs at the same time.

This is justified by the fact that economic literature on EPAs is far more furnished than the legal one.

Before any further development, it will certainly be of interest to acknowledge a recent state of play in the IEPA of Cote d'Ivoire, the first of its kind between the EU and an African trade partner<sup>11</sup>.

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<sup>10</sup> Dan Linn and Sanoussi Bilal: "Contentious issues in the Interim EPAs: potential flexibility in the negotiations" page 37 [www.ecdpm.org](http://www.ecdpm.org); Discussion Paper No. 89 March 2009.

<sup>11</sup> Catherine Ashton, EU Trade Commissioner; (Abidjan 26 November 2008, available at [www.commerce.gouv.ci](http://www.commerce.gouv.ci)).

Cote d'Ivoire has recently unilaterally delayed the implementation of its interim agreement<sup>12</sup> which can be interpreted as pending the conclusion of a regional ECOWAS EPA. The reasons evoked for this sudden change are not clear and the situation is embarrassing to say the least since the Ivorian authorities were informed of the IEPA content when they ratify it and received the encouragement of the EU trade commissioner, Catherine Ashton<sup>13</sup>

However, this retirement confirm once again the concern on both structure and content of the EPAs as well as their ability to constitute instrument to leverage economic growth. Instead of viewing this current situation as pending the conclusion of a full regional EPA, all parties and stakeholders should cease it as an opportunity to stop and clearly re-think the IEPA as to find out where negotiations failed to come up with a sound legal framework that could take into account ECOWAS concern.

Acknowledging that these agreements if properly drafted can truly make several positive contributions<sup>14</sup>, we further advocate for their updating with regard to the special position of ACP states.

Moreover, though the ability of the EPAs to carry benefit for ACP countries has been questioned, for some authors, the presence of the stakeholders around the negotiation table confirms that they have not yet abandoned the idea of an equitable agreement<sup>15</sup>.

On the other hand, others more realistic wonder what the actual texts of the EPAs say about possibilities to opt out should the agreement failed to incorporate ACP Countries needs<sup>16</sup>.

If opting out is probably not the best option available, "no EPA" does not mean the absence of an agreement of any kind between the parties<sup>17</sup>. On the contrary, it is possible that with an effective participation from ECOWAS the current EU system could be replaced by a

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<sup>12</sup> Head of the Economic and Trade Cooperation Programme at the European Centre for Development Policy Management (ECDPM) (communication via email with the Author in earlier April 2010), see annexe.

<sup>13</sup> "I congratulate the government of the Cote d'Ivoire and especially Minister Koné for the leadership they have shown in bringing our negotiations for a stepping stone Economic Partnership Agreements to a successful conclusion", (extract from the interview, Abidjan 26 November 2008 available at [www.commerce.gouv.ci](http://www.commerce.gouv.ci)).

<sup>14</sup> Emily Jones and Darlan F. Marti: "Updating EPAs: Rising to the Challenge" (Updating Economic Partnership Agreement to Today's Global Challenges; Economy Policy Paper Series 09).

<sup>15</sup> Emily Jones and Darlan F. Marti: "Updating EPA: Rising to the challenge"; Updating EPA: rising to the challenge" (Updating Economic Partnership Agreement to Today's Global Challenges; Economy Policy Paper Series 09).

<sup>16</sup> Steven C.; Meyen M; Kennan: "comparative analysis of the EPAs content and the challenges for 2008" (Policy management report 14; J. (ODI) and Bilal. San Bilal ECDPM) [www.ecdpm.org](http://www.ecdpm.org).

<sup>17</sup> Eric Hazard: "The Complexities of Negotiating a West Africa EPA" (Oxfam International Regional Trade Campaign Manager; Trade negotiation Insight Vol.6 No.4 July - August 2007).

more balanced structure, which takes on board the legal obligations contained in the Cotonou Agreement<sup>18</sup>.

According to many ACPs states, the Cotonou agreement which constitute the context guiding the negotiations is blatantly dismissed in the IEPA articles and as a result, parties seem not to know what they are expecting from each other. Along the way, there seems to be signs of EPAs fatigue while on both side patience is exacerbating and negotiating deadlock are multiplied.

Obviously, there is a misunderstanding on what should be the priorities in order to get right the drafting of trade rules.

With this regard, the practices and dynamic that had led many countries questioned whether globalization failed them or not<sup>19</sup> is in dire in need to be refreshed.

In fact, the dismissal of relevant issues as well as the increasing of commitments in trade negotiation between states for some decades now share responsibilities in the way agenda of current trade agreements are being pushed all around the world<sup>20</sup>.

We will provide for the “*rappel*” of this dynamic after a historical overview of the relationship as it will help to understand the reluctance of ACP states in signing the EPAs.

The second chapter will be exclusively dedicated to the analysis of legal provisions that are worth being investigated with regard to the polemic they arise.

Furthermore, if one look closely at the provisions of the IEPA, the issue that keep coming is the policy space they shrink. These are the very same policies advanced countries used to get their current level of development and that are now fallen out of favor in global trade circles<sup>21</sup>.

However, this situation is not the only mistakes made in the international trade arena. The weak bargaining position that result from the lack of Institutional and Administrative capacity as well as the lack of political will in most ACP states share responsibilities in the failure

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<sup>18</sup> In particular, the obligation that ACP countries should not be put in a less advantageous position than that which they enjoyed under the Cotonou Agreement (Article 37.7 of the Cotonou Agreement).

<sup>19</sup> Joseph E. Stiglitz: “Development Policies in a World of Globalization” (Putting Development First, Page 15).

<sup>20</sup> Ibid

<sup>21</sup> Kevin P. Gallagher: “Globalization and the Nation-State: Reasserting Policy Autonomy for Development” (Putting Development first: The Importance of Policy Space in the WTO and International Financial Institutions”, page1).

these countries encountered so far in negotiating international agreements. It represent with the above mentioned dynamic of policy space shrinking some of the mistakes that ECOWAS should draw lessons from as to ameliorate its bargaining approach and will constitute our 3<sup>rd</sup> chapter.

The 4<sup>th</sup> part of our study will conclude in making propositions to ECOWAS with regard to arguments that can be put forward in seeking of a development friendly EPA for the region.

## **HISTORICAL OVERVIEW OF THE RELATIONSHIP EU-AFRICA: FROM YAOUNDE TO COTONOU.**

After the decolonization process had been started, and the Organization of Africa Unity was established, some African and European states were searching for possibility of cooperation<sup>22</sup>. The European Economic Community which intended under the Association of the overseas countries and territories to maintain the relationship between certain European states and their formers colonies, created the Yaoundé convention in 1963.

Later on, as Great Britain joined the EEC<sup>23</sup> in 1973, the Yaoundé convention was replaced by the Lomé Treaty and some new states were added to the previous list to form the African Caribbean Pacific countries.

These countries benefited under that treaty of a duty free quota free access to the EU market until 2000. During that period, all products from these regions apart some sensitive products had entered the EU market exempted from tariffs in the basis of a favourable law regime.

With the creation of the WTO in 1995 as the principal organization dealing with trade at an international level and the ratification of many countries as states members, countries have to comply with the WTO. More at stake is the fact that most of the world developing countries are aware that they will be better off in terms of trade partnership if they do not comply with the new WTO rules.

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<sup>22</sup> Norbert Toth: "Historical Duty or Pragmatic Interest?" (Notes on EU and AU security issues; African security review 16.3 Institute for security studies).

<sup>23</sup> European economic community

The most renowned of these rules, the MFN clause means broadly that, each time a member grants a favour to another member, it has to do the same for the others in the same condition<sup>24</sup>.

Yet, the Cotonou agreement provided unilateral preferences to ACP countries with respect of accessing the markets of the EU. Such agreement is now unlikely to pass as well the muster of a compliance examination against Article XXIV of the GATT 1994 that requires reciprocity under such preferences to substantially cover all trade between the parties.

In fact, if ECOWAS states wish to continue to benefiting from the market access of the past it will have to negotiate an EPA as it is unlikely that WTO members' especially developing Asian countries will consent the granting of preferences to ACP states in violation of their rights. According to the WTO Law, they are also eligible to benefit from these preferences since they are also developing countries.

Obviously, the parties have been invited to decide whether to terminate their trade cooperation or not and that should they decide to continue under an EPA, that they will have to grant each other the same preferences.

Parties agreed on the second options and in order to set up the new relationship, the European commission undertook to negotiate EPAs with Africa.

EPAs are essentially free trade agreements that will overhaul the entire way in which African countries' trade relations are structured with their largest trading partner, the EU<sup>25</sup>. However, assuming that an implementation of such an agreement needed time with regard to the consequences it may have on Africa, the WTO granted a derogation to both parties until 2008.

This explains why in 2000, the Lomé Treaty has been replaced by the Cotonou agreement with the aim at adjusting the trade regime of the EU and Africa with WTO rules by the end of 2007.

Yet, apart from the WTO compatible aspect, one of the main reasons for the Lomé Treaty to be replaced by the Cotonou agreement is the failure of the later regime to produce any remarkable progress in the economies of West African states. The fact of the matter is that

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<sup>24</sup> See Article 1 of the GATT 1994 available at [www.wto.org/wto](http://www.wto.org/wto) legal texts.

<sup>25</sup> Mayur Patel: report on "EPAs Between EU and African Countries" available at [www.realizingrights.org](http://www.realizingrights.org).

the regime failed to produce the desired results in terms of a market share increase and development product diversification while the Cotonou Agreement aim at placing in its centre the pursuit of development and poverty eradication<sup>26</sup>.

The new arrangement (EPA) is supposed to be built on the Cotonou Agreement and was set to come into force in January 2008.

Until that date, the parties had been allowed to deal among themselves under the basis of their previous relationship.

Yet, new concepts have been added to their cooperation. One of the finding of the Cotonou agreement is that Africa's states will negotiate the EPA under regional groupings. The new concepts of the Cotonou agreement have notably modified the relationship EU-Africa since it is much broader in scope than any previous arrangement has ever been between the parties.

The arrangement is designed to last for a period of 20 years and is based on four main principles:

- Equality of partners and ownership of development strategies which means that the African states will determine how their societies and their economies should develop.
- Participation of the civil society: the private sector is an actor in addition to the central government or local government.
- Dialogue and mutual obligation with the obligation for the parties to respect Human Rights.
- Differentiation and regionalization: cooperation agreement will vary according to each partner's level of development, needs, performance and long-term development Strategies.

In West Africa, ECOWAS and UEMOA are the Treaties under which negotiations are taking place. Each regional grouping negotiation is expected to give birth to a final EPA for its region.

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<sup>26</sup> Ibid.

However, late development in the negotiations reveals parallel EPAs that are negotiated by the EC with isolated countries namely interim EPA or stepping stone economic partnership agreement. One of these agreements is the current IEPA signed by Cote d'Ivoire with the EC.

Thus, until that day, no final EPA has been reached between the EU and ECOWAS as parties are still negotiating what will be under that EPA.

In fact, there are conflicting signals about whether west African countries will sign an economic partnership agreement as negotiations have persistently dragged with several postponement, compelling Ghana and cote d'Ivoire, the world leading cocoa producers to sign interim agreement with the EU to enable them continue shipment of their commodities abroad<sup>27</sup>.

## **RAPPEL OF THE CURRENT DYNAMIC IN INTERNATIONAL TRADE.**

A consensus among authors is that existing and proposed rules for the global economy are restricting policy spaces for development in the nations that need them the most<sup>28</sup>. Many developed country free trade proponents argue that increasing trade and investment through WTO and free trade arrangements will automatically lead to growth and development<sup>29</sup> when they actually used a different approach in trade policy to reach their current level of development.

More strangely, the very same policies used once by them are now scorned under their initiative to secure the entering of their value added goods on the market of developing and less developed countries<sup>30</sup> which in return will only be able to propose basic commodities.

There seems to be a real intention to maintain developing countries in their current situation of consumers of goods coming from abroad as they are trapped into the now famous “there

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<sup>27</sup> International trade news, “EPA negotiates between west Africa and EU in limbo” available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org).

<sup>28</sup> Kevin P. Gallagher: “Globalization and the Nation-State: Reasserting Policy Autonomy for Development” (Putting Development First, page2).

<sup>29</sup> Ibid page 3.

<sup>30</sup> Ibid, page

is no alternative to globalization” with its proposed rules of “liberalization at all cost” that tied their arms and which one may find the expression in the provisions of the EPAs.

While the DOHA negotiation round is still underway, a proper process is launched for what cannot be obtain in term of market liberalization under the WTO to be fully realized under bilateral and regional deals where developing countries have less bargaining power and where many countries end up agreeing to such measures<sup>31</sup>. Under these agreements, more commitments are required from countries and governments are merely given the space they need to implement policies aim at encouraging production for instance.

One could even affirm without fear of failure that the EPAs are among these legal texts.

The result of this dynamic of “liberalization” is everywhere in the main trade agreements developed countries are concluding with their trade partners such as the FTAA<sup>32</sup> with Latin America, the United State and Canada that are a real expression of the interference in the sovereignty of states through the legal frameworks of current trade agreements.

Interestingly, despite the fact that they often cover different matters the “*a la mode*” trade arrangements are very similar in their results which are the constant erosion of policy space need for development. This explains why some of the concept in international trade such as preferential and differential treatment are misunderstood or deal with improperly.

In fact, while their objective is to establish equilibrium between parties with regard to their different level of development, we are witnessing instead the setting up of legal frameworks as if they were economically equal.

Therefore, it is only when this way of thinking economic and trade policies will be revisited by parties that EPAs will be realistic enough to build a true partnership.

After this brief rappel of the dynamic under which current trade agreements are being negotiated, we will now step into the analysis of the IEPA legal provisions after an overview of the content its content.

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<sup>31</sup> Putting Development First; Page 11.



## STEPPING STONE AGREEMENT SIGNED BY COTE D'IVOIRE.

The 31 of October 2008 in Banjul, Côte d'Ivoire had announced officially its willingness to conclude an interim EPA and signed it in the few next weeks. This information was not new. In July of the same year, Cote d'Ivoire through its regional integration Minister already confirmed to the EU commission that in case the region failed to reach an agreement, it was going to sign an interim EPA.

Cote d'Ivoire is one of the developing countries of ECOWAS and as such, cannot benefit from the “*Everything But Arms*” but instead is eligible for the GSP scheme in the absence of an EPA<sup>33</sup>.

### 1) Overview of the Structure and content of Ivory Coast EPA.

The emphasis in the interim EPAs has been mainly on policy reforms, opening markets, and granting reciprocal preferences<sup>34</sup>.

#### a) The Market Schedule

The coverage of liberalization of Ivory Coast offer is 83% of the EC imports in value and 88.7% in tariff lines over 15 years, and over 10 years is 69.8% of the EC imports in value and 83.9% in tariff lines. All sectors are covered.

#### b) What does the IEPA covers.

The Agreement covers all major provisions of the trade in goods agreements such as provisions on custom duties, export taxes, a standstill clause, a non discrimination clause, trade defense instruments (anti-dumping and countervailing measures, multilateral and bilateral safeguards), special provisions on administrative cooperation in custom matters, a chapter on custom and trade facilitation, a chapter on technical barriers to trade and sanitary and phytosanitary measures as well as exception clauses. The respective offers of the parties are set out in annexes attached to the agreement. The agreement also contains an annex on mutual administrative assistance in custom matters.

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<sup>33</sup> Only the least Developed Countries are eligible for the Everything But Arms (EBA).

<sup>34</sup> Elisabeth Tankeu, African Union's Commissioner of Trade and Industry during an interview (Trade Negotiation Insight Volume 7. Number 10. December 2008/ January 2009 available at [www.acp-eu-trade.org/newsletter/tni.php](http://www.acp-eu-trade.org/newsletter/tni.php)).

The Agreement provides that each party will apply its rules of origin in force on 01/01/08 and, in parallel, will negotiate rules of origin to be annexed to the Agreement by 01/07/2008 at the latest. (See the Cote d'Ivoire IEPA).

### C) Others Component of the Agreement.

This Agreement focuses on safeguarding the market access of Ivory Coast to the EC on 01/01/2008 and avoids trade disruption which could have an important negative economic impact for this country. It hence focuses on trade in goods aspects.

The Agreement is accompanied by a political declaration and contains a preamble reaffirming the objective of concluding a global EPA with all West African countries and regional organizations. Commitment to regional integration is also reasserted. A specific Title in the Agreement identifies broad areas on which negotiations will continue in perspective of concluding a global EPA with the whole region (services, investment, competition, intellectual property, public procurement, sustainable development).

The Agreement contains a Title on Development Cooperation covering priority areas of development cooperation for accompanying the implementation of this Agreement. The main areas identified are the reinforcement and upgrading of productive sectors, the cooperation in respect to fiscal adjustment, to foster the improvement of business climate, and the implementation of trade rules contained in the Agreement. The parties agree to cooperate in these areas notably in the context of the Cotonou Agreement. Finally, the agreement contains a detailed dispute settlement mechanism, as well as general, final and institutional provisions." *(Summary provided by the European Commission)*

Thus, if the EU retains the right to designate certain products as 'sensitive' the gains of an EPA will be worth even less for Cote d'Ivoire which agreed a 83 % liberalisation as it already is for banana in late December 2009 as a result of an agreement that provides for lower European tariffs on bananas from Latin America<sup>35</sup>.

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<sup>35</sup> An Agreement finalised in mid-December aims to comply with regulations governing non-discrimination between member states of the World Trade Organisation available at [www.acp-eu-trade.org/newsletter/epa](http://www.acp-eu-trade.org/newsletter/epa).

Concerning the rules of origin, the agreement in its title III article 12 and 13 only talk about the custom duties on product originating in both region but did not clearly set up the condition under which for example a good processed in Cote d'Ivoire with external raw material should enter the EU market under the same preference. It is only said that the parties will decide on the rules of origin before the end of 2008 which they obviously did without any significant changes instead, Cote d'Ivoire delayed the implementation of the agreement<sup>36</sup>.

Thus, a quite important part of the agreement is dedicated to the settlement of disputes that may arise from the interpretation and implementation of the agreement. The provisions related to this subject are more furnished than the "*development cooperation*", one of the main targets of the agreement.

While some issues are being deal with under the dispute settlement provisions of the IEPA such as default in administration cooperation, others are just left out to be considered under WTO provisions or the Cotonou agreement.

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<sup>36</sup> See annex 2.

## CHAPTER II: THE LEGAL ANALYSIS OF THE COTE D'IVOIRE IEPA.

Many have been said concerning the EPAs in general and little when it comes to one in particular. In fact, most of the studies are related to comparison between regional blocks and how well they have done so far.

Several issues according to ACP negotiators were not taken into account in the drafting of the IEPAs while they are pointed out as priorities by the Cotonou Agreement.

This is currently the case for the mid-term review, adopted by the EC and ECOWAS in Brussels on February 2007 which signaled a “difference of opinion on whether or not to include a development chapter in the EPA.

It has also questioned the “state of readiness of ECOWAS” and the “effectiveness and efficiency of the structures of negotiation.” However, despite the findings of the mid-term review, the lack of qualified manpower and capacity is not considered a major structural constraint in the negotiations, and as such, the original cutoff date for a deal has not been revised<sup>37</sup>. At the same time, little attention has been paid to the raft of reforms that must be carried out before an EPA can even be implemented. Both of these issues were identified as major stumbling blocks in an independent mid-term review conducted by the West African Farmers’ and Agricultural Producers’ Organization (known as ROPPA)<sup>38</sup>.

Moreover, regional integration, an essential goal of the road-map agreed at Accra in 2004, was barely mentioned in the European Commission’s review. This can explain why the Cote d’Ivoire IEPA contains only a one sentence article dedicated to the issue<sup>39</sup>.

Concerning the European commission’s review, the section devoted to regional integration concludes rather tersely that “various fields of regional integration have been looked at in-depth during the first phase of the negotiations,” and that “the EPA is therefore an important contribution to the dynamics of regional integration,” but fails to explain either the ways or the means of how integration can be put into practice<sup>40</sup>.

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<sup>37</sup> Negotiations of the Economic Partnership Agreement of West Africa- European Community, Report on the revision of the negotiations of the economic partnership agreement (EPA) EU-West Africa according to article 37.4 of the Cotonou Agreement, Brussels, 28 February 2007.

<sup>38</sup> Eric Hazard: “The Complexities of negotiating a west Africa EPA” (Trade Negotiations Insights; from Doha to Cotonou Vol. 6 No. 4 July-August 2007 [www.acp-eu-trade.org/newsletter](http://www.acp-eu-trade.org/newsletter)).

<sup>39</sup> Article 32 of the Cote d’Ivoire IEPA on Regional Integration: “The Parties agree to push forward customs reforms aimed at facilitating trade in the region of West Africa”.

<sup>40</sup> Eric Hazard: The Complexities of negotiating a west Africa EPA (Trade Negotiations Insights from Doha to Cotonou Vol. 6 No. 4 July-August 2007 [www.acp-eu-trade.org/newsletter](http://www.acp-eu-trade.org/newsletter)).

This raised concern about the ability of this agreement to embodied provisions that enable economic development of Cote d'Ivoire. The following legal analysis starts from the preamble of the Cote d'Ivoire IEPA to some of the main articles that often triggered the debate on IEPA.

The interim agreement of Cote d'Ivoire contains the following main part: the preamble, Title 1: the objectives; title 2: the partnership for development; Title 3 Trade regime for goods; the fourth Title concern the services and Trade Investment rules. Title five focused on the prevention and settlement of the disputes arising from the Agreement. The general exceptions are deal with under Title 6 while the Institutional general and final provisions constitute the emphasis of the last title.

#### 1) The preamble.

##### a) Overview

It is important first of all to acknowledge that all the EPAs and IEPAs texts share the same preamble.

A preamble is an introductory and explanatory statement in a document that explains the document's purpose and underlying philosophy<sup>41</sup>. While preambles may be regarded as unimportant introductory matter, their words may have effects that may not have been foreseen by their drafters.

For instance, it is on the basis of the preamble to the French Constitution, mentioning the solemn regard of the French Republic towards the principles set forth in the 1789 Declaration of the Rights of Man and of the Citizen that the Constitutional Council has declared certain laws to be unconstitutional<sup>42</sup>. In Canada, the preamble to the Constitution Act, 1867 was cited by the Supreme Court of Canada in the Provincial Judges Reference, to increase guarantees to judicial independence<sup>43</sup>.

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<sup>41</sup> René Degni Ségui: Introduction to Public International Law, Université de Bouaké Abidjan Cote d'Ivoire.

<sup>42</sup> Goldworthy Jeffrey: "The Preamble, Judicial Independence and Judicial Integrity". *FORUM Constitutionnel* (2000).

<sup>43</sup> Ibid.

Thus, Article 31(2) of the 1969 Vienna Convention on the Law of Treaties indicates that the preamble to a treaty can be relevant to the interpretation of a treaty.

As all preambles generally do, the preamble Cote d'Ivoire IEPA states the background according to which the agreement is set up. This is because the preamble shed light on the main reasons and purposes as well as the objectives and intentions lying beneath the legal text it aim at introducing and does have in some system a "*force probante*" (a binding force) almost equal if not superior to this of the rest of the text<sup>44</sup> in the achieving of the Agreement purposes. With this regard, Enderlein\* & Maskow\* point out that different jurisdictions regard preambles differently. They state: "Opinions differ in the legal systems as to the legal importance of preambles.

Logically, a legal text must be reflecting in an unambiguous way and in its relevant Chapters the objectives stated in the preamble which inspires the whole document.

Furthermore, the expectations of the Preamble should be the likely result of the implementation of rules contain in an agreement because it shows the reasons and philosophy of an Agreement.

The Ivory Coast IEPA preamble expresses its profound attachment to the Cotonou Agreement signed between the EU and the ACP states the 23<sup>rd</sup> June 2000<sup>45</sup> and presents it as the main source of inspiration of the EPAs in stating that "the parties reaffirm their commitment to working towards the achievement of the Cotonou Agreement objectives in particular the eradication of poverty, sustainable development and the progressive integration of the African, Caribbean and Pacific (ACP) States into the world economy"<sup>46</sup>.

With this regard, the Cotonou Agreement incorporate as one of its fundamental principles equalities of the partnership of the development strategies with the ACP states determining the development strategies for their economies and societies in all sovereignty.

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<sup>44</sup> Paul Yao N'dré: *La force Probante du Préambule en Droit International Public*, (the Binding force of the Preamble in Public International Law); *Professeur Agrégé de Droit Public Université D'Abidjan Cocody, Cote d'Ivoire*.

\* Pace Law School Institute of International Commercial Law.

<sup>45</sup> Stepping Stone Partnership Agreement between Cote d'Ivoire and the European community sign in 2007; Preamble, page 5 paragraph 1. [www.acp-eu-trade.org](http://www.acp-eu-trade.org).

<sup>46</sup> See Paragraph 10 of the Cote d'Ivoire IEPA. 9Legal Text available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org)).

An important place is also given to the General Agreement in Trade and Tariffs (GATT)<sup>47</sup> and the others World Trade Organization Agreements as International Trade principles and rules to which both parties committed themselves<sup>48</sup>. Particular acknowledgements have been made such as: the difference in the level of economic and social development, the importance of cooperation on development for the implementation of the Agreement, the need of signing a comprehensive EPA and finally the commitment to support the regional integration process in West Africa in promoting regional economic integration as an essential instrument for its integration in the World economy “ which helps it to meet the challenges of globalization and achieve its economic and social development objectives”<sup>49</sup>.

#### b) Legal Analysis

Looking at the content of the preamble, the signing of an EPA and its implementation by the ACP states and the EU should not have arisen any problem. The main concerns of West Africa and broadly of ACP states which are sustainable development and regional economic integration are stated as priorities through out the text since those issues represent not only the basis on which the arrangement is agreed but seems to be ; from an ACP states perspective at least; the condition “*sine qua non*” under the deal.

They are presented in the preamble as priorities that cannot be avoid but rather that should lead the whole process of negotiations and implementation of the agreement.

The parties to the Agreement have made clear for all to see that the principles contain in the preamble were not to be ignored. There is then no doubt about their intention to give a binding force to this text with regard to what was expecting from the IEPA. This current situation serves the interest of the ACP states to say the least and one may say that the region succeeded in reflecting its priorities in the preamble of the EPAs.

Interestingly, these Agreements have attracted so many attentions and raised many fears that it becomes difficult to identify areas of the debate where commentators seem to

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<sup>47</sup> General Agreement on Trade and Tariffs.

<sup>48</sup> Stepping Stone Partnership Agreement between Cote d’Ivoire and the European community; Preamble, page 5 paragraph 6.

<sup>49</sup> See paragraph 13 and 17 of the Cote d’Ivoire IEPA.

agree<sup>50</sup>. More at stake is that from an African perspective, the outcome of the EPA negotiations so far, “falls short of expectations” with their Interim versions incapable of achieving the objectives stated in the preamble<sup>51</sup>.

How did they get there considering that this agreement was drafted with regard to ACP priorities is a question that authors and stakeholders are still trying to answer.

As far as we are concerned, the acknowledgement of the need for flexibility by both parties highlights the fact that the preamble objectives’ were ignored in the very articles of the EPAs. This is because from a legal point of view, there is no doubt that the preamble did reflect ACP states concern showing the way that should have been followed by the parties without any real problem. One can even argue that the accusation by the EU of ACP regions being difficult and vice versa is not justified.

However, there seems to be some imperfections in spite of the good figure of the preamble. In fact, considering that the EU committed itself in the Cotonou Agreement to ensure an alternative situation whereby non LDCs with no EPA will still benefiting from advantages granted under the previous arrangement<sup>52</sup>, the preamble should have provided for a precision in case the agreement failed to meet ACP states development objectives.

Thus, as stated by the final provision of the Cotonou agreement in its article 91: “*no treaty, convention, agreement or arrangement of any kind between one or more member states of the Community and one or more ACP states may impede the implementation of this agreement*”. As a result, even the EPAs must not jeopardize the Cotonou Agreement which is the corner stone of any future relationship between the parties.

This specific point should have been mentioned in the preamble just as a reminder instead of only acknowledging the parties deep attachment to the Cotonou agreement.

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<sup>50</sup> Emily Jones and Darlan F. Marti “Updating EPAs: Rising to the Challenges” (Updating Economic Partnership Agreement to Today’s Global Challenges: Essays on the Future of EPAs; Economy Policy Paper Series 09).

<sup>51</sup> Elisabeth Tankeu, African Union’s Commissioner of Trade and Industry during an interview, *Trade Negotiation Insight* December 2008 /January 2009, Volume 7 Number 10 page 2 [www.acp-eu-trade.org/newsletter](http://www.acp-eu-trade.org/newsletter).

<sup>52</sup> We are here referring to the duty free quota free market access provided under the Lomé Treaty.



The fact of the matter is that if both parties are indeed ownership of development strategies<sup>53</sup>, then this precision shouldn't be a problem and that it could have committed the EU to provide for this alternative.

Furthermore, the Paragraph 11 of the preamble seems to concede to the EPAs, the capabilities "to attract investment and to create new opportunities for employment". However this is not always the case as many authors indicate that such treaties act more as complement than as substitutes for good institutional quality and local property rights, the rationale often cited by developing countries for ratifying international bilateral or multilateral Agreements<sup>54</sup>.

Thus, indication of the difference in the level of economic development stated in paragraph 13 of the preamble seems to refer to the concept of special and differential treatment without clearly saying it. In fact, the legal language must be clearly specified to avoid misinterpretation. Because, where the text is vague or lacks consistency, there is always a possibility to understand the matter differently.

Finally the last paragraph which states that: "reaffirming their commitment to supporting the regional integration process in West Africa, and in particular to promote regional economic integration as an essential instrument for its integration in the world economy....." could have been stated the following way: "reaffirming their commitment not to impeding the regional integration process but rather to supporting and promoting it as an essential instrument for its integration in the world...." these are small details which implication may turn out to be very important.

Yet, if these propositions are to bear fruit, the preamble itself should reflect in the rest of the agreement and in its interpretation. The articles must have the blueprint left by the main focus which is *sustainable development* through economic growth and regional economic integration.

However, we are witnessing a situation whereby the ACP states claim that the legal framework of the EPAs currently on the table is far from embodying the above objectives<sup>55</sup>.

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<sup>53</sup> The Cotonou Agreement first fundamental principle; Article 2 available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org).

<sup>54</sup> Mary Hallward-Driemeier: "Do Bilateral Investment Treaties Attract FDI? Only a bit....and they could bite" World Bank, DECRG.

<sup>55</sup> African Union's trade commissioner Elisabeth Tankeu; surveying progress: African perspectives on EPAs negotiations.

Our next path will consist in the analysis of some articles of the IEPA, especially those that rise concerns on their content as to reveal where ECOWAS should bargain for more flexibility. This task aim at looking at the intention of the articles trough out the language used by the drafters as to find the possible outcome or consequences they may have on the objectives the agreement is saddled with the responsibility to carry out.

2) Legal analysis of some relevant articles of the Cote d'Ivoire IEPA.

Article 2 of the Agreement first Title concern its objectives<sup>56</sup> and start with a special recognition of the principles of the Cotonou Agreement contain as well in the preamble in stating that the agreement is to allow the Ivorian Party to benefit from the enhanced market access to the EU; to negotiate an EPA which will help to reduce poverty, promote regional integration and the harmonious and progressive integration of ECOWAS into the World economy. The article goes further and states that this will be done in accordance with Cote d'Ivoire political choices and development priorities. Our next task will consist in finding if these priorities are truly taking into account.

a) The market access.

- The Liberalization level and schedule.

The level of liberalization can be defined as the level of market openness or the extent to which a market should be open between the parties of an agreement which in the current case refers to *substantially all the trade* between the parties as states in article XXIV of the GATT.

The liberalization schedule is related to the stages of the liberalization, the period and deadline provide for to reach the liberalization expected under the agreement.

As mention above, EPAs are complex agreements and its language is not clear in part to the extent that many of the procedures and requirements debating in the EPA are not directly stated in the agreement but can find their origin in the Cotonou Agreement or the WTO General Agreement on Tariff and Trade.

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<sup>56</sup> Article 2 of the Cote d'Ivoire Interim Agreement with the EU, [www.acp-eu-trade.org](http://www.acp-eu-trade.org) or [www.europa.eu/index\\_fr.htm](http://www.europa.eu/index_fr.htm).

This is the case for issues such as market liberalization and schedule which rest directly with article XXIV of the GATT. However, if one looks once again at the first title of the EPA the concern of Cote d'Ivoire seems to have been integrated in the objectives of the IEPA<sup>57</sup>. The language of the first title is clear in showing that the decision and choices made by Cote d'Ivoire will be taking into account in framing the EPA. Yet, whether the access to the EU market has been really enhanced or not is debatable.

The fact that Cote d'Ivoire which already had had significant access to the European market will have now to open its own market to the EU products make ACP countries doubt in the capacities of the EPAs to enhanced their access to the EU market.

This is exacerbating by the fact that the EU is also allowed to exclude some sensitive products \_even a few\_ from the EPA. It is then unclear if an EPA would cover all imports into the EU or replicate Cotonou-type coverage<sup>58</sup>.

Moreover, although the Cotonou Agreement states that market access – with a review of rules of origin must be improved as part of the EPA negotiations, there is no such provision to discuss broader changes to rules of origin<sup>59</sup>. In fact The Cotonou Agreement emphases that trade liberalization in the context of an EPA shall build on the “*acquis*”.

In others words, advantages already made before the EPA have to be secured not deteriorated.

With regard to all these requirements a question should be asked as whether the level of liberalization of Cote d'Ivoire market has to be 83% over a 15 year period for it to meet the requirements of article XXIV of the GATT.

Comforted by this current situation, analyses point to the fact that Europe will win more from such an Agreement since the guiding strategy for formulating these agreements according

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<sup>57</sup> See article 2 of the Cote d'Ivoire IEPA.

<sup>58</sup> Mombert Hoppe: “Economic Partnership Agreements: Does Preferential Access of Non-LDC African countries increase?” (World Bank Group Trade note July 12, 2007/ International Trade Department).

<sup>59</sup> Mark Pearson “Agreeing the EPA: A Strategy Unfolds” (Trade Negotiation Insights, from Doha to Cotonou Vol.6 No.4 July - August 2007; available at [www.acp-eu-trade.org/newsletter](http://www.acp-eu-trade.org/newsletter)).

to Ablassé Ouedraogo<sup>60</sup> was maximizing the competitiveness of European firms abroad while many ACP countries will face a deterioration of their economic situation.

This may be justify by the fact that the EU is the one who had to face tariff to ACP states prior to the negotiation of the EPA and will face no more tariff after the conclusion of EPAs. Meaning while, it is the ACP that will now have to deal with lost of fiscal revenue due to market liberalization and elimination of tariffs.

After what have been said, it is welcome to ask according to which party market access have been enhanced in the EPA.

The current confusion can be explain by the fact that Europe unfortunately conceive the EPA as a classical free trade agreement, similar to those it signed for instance with Chile and Mexico<sup>61</sup> as the language use in both agreements are very similar.

The reasons put forward to justify such arguments are reinforce by the liberalization rate on 80% over a 15 year period expecting from ACP states in the EPA when they stressed not to be ready economically for such an opening.

It is obvious that neither their development priorities are taking into consideration nor their political choices give a voice.

Both parties acknowledge that the level of the liberalization as well as the schedule of tariff dismantlement provide for in the Cote d'Ivoire IEPA will seriously impede on the country ability to use fiscal revenue to finance development.

This is because while the share of import duties in fiscal revenues has declined over time for most countries, poorer countries continue to depend more heavily on trade taxes as a source of revenue<sup>62</sup>. This current situation exacerbates the feeling that EPAs are not development friendly as their preamble and objectives claim them to be<sup>63</sup>.

Furthermore, Article 35.2 of the Cotonou Agreement states: *“Economic and trade cooperation shall build on regional integration initiatives of ACP States, bearing in mind that*

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<sup>60</sup>Ablassé Ouedraogo was deputy director general of the World Trade Organization and is special advisor to the president of the WAEMU Commission for the EPA negotiations Updating Economic Partnership Agreement to Today's Global Challenges.

<sup>61</sup> Ablassé Ouedraogo: “Why are the Economic Partnership agreement Detrimental for Africa’s Future?” (Updating EPAs to today’s Global challenge: Essays on the Future of the EPAs Page 66 Economy Policy Paper Series 09).

<sup>62</sup> San Bilal and Vincent Roza: “Addressing the fiscal effect of an EPA” available at [www.ecdpm.org](http://www.ecdpm.org).

<sup>63</sup> Realizing rights, The Ethical Globalization Initiative “Economic Partnership Agreements between the EU and African Countries, potential development implications for Ghana”, page 23.

*regional integration is a key instrument for the integration of ACP countries into the world economy.”*

The West African group approach in negotiating an EPA is obviously inspired by this requirement which explain why ECOWAS proposed 60% liberalization of its market at the meeting of its leaders in Abuja, Nigeria in June 2009 while the EU wants 80 % of market liberalization.

To this ambiguous approach of the EU commission which can be regarded as a pushing and that does not comply with the above article, the ECOWAS commissioner for trade and Industry, Mohamed Daramy answered: *“they just want us to give 80% market opening, but based on our technical analysis, we don’t believe we are ready to go 80% right now”*.

Thus this position is reinforce by the fact that West Africa lags behind in areas such as Productivity, competitiveness and the achievement of food security and will most likely not be able to catch up and authorize an opening up of 80% of its market to the European exports by 2020<sup>64</sup>.

As far as we are concern, the language use in the EPA is not the one use on the ground and the result expected is far from the objectives stated in the agreement.

We believe that the legal language of the EPA lack of honesty if one may call it that way. The sustainable development objectives is thus deny when considering the period set up for the tariff dismantlement under both EPA and IEPA. The argument put forward by the EU to justify the level of the opening as well as the schedule for the opening is the *substantially all trade* that has to cover the Free Trade area between parties within *no more than a 10 year period expects in exceptional circumstances* stated in article XXIV of the GATT.

The ACP states seem to have their hands tied up by this provision which according to the EU has to be respected at all cost. Yet, if it is true that these requirements are provided for by the WTO and that their application by the parties is WTO complainant\_ the rational cited for the EPA\_ it will be of interest to acknowledge that all that are under the EPAs are not WTO compliant.

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<sup>64</sup> Eric Hazard (OXFAM International Regional Trade Campaign Manager): “The Complexities of negotiating a West Africa EPA” (Trade Negotiation Insights vol. 6 N° 4 August July 2007 available at [www.acp-eu-trade.org/newsletter](http://www.acp-eu-trade.org/newsletter)).

In fact, saying that the article itself does take into account the kind of regional trade agreements the EU is currently negotiating with ACP states is far from true.

The explanation is simple: they just do not exist at the time when this article has been drafted.

We are talking of a mixed regional trade agreement between countries with a different level of economic and social development that is only taken into account under the WTO Law by default<sup>65</sup>. The scope of article XXIV was extended to the mixed RTAs by default because they were not covered by the Enabling Clause<sup>66</sup> and that no other specific legislation was introduced since.

The RTAs are organized by three GATT/WTO provisions: Article XXIV of GATT which concern Customs Union and Free Trade areas; the Enabling Clause that allowed countries sharing the same geographical region to derogate from the Most Favoured Nation principle of the GATT in order to grant each other trade preferences and finally Article V of GATS which is the only provision to take into account differences in economic level in the RTAs<sup>67</sup>.

Even in so doing, the General Agreement in Trade in Services (GATS) states that: “*where developing countries are parties to such agreement, flexibility shall be provided for regarding the substantial sectoral coverage and the elimination of substantially all discrimination in accordance with the level of development of the countries concerned*”.

The article targets an obligation for a special and differential treatment that is to be granted to developing states in the implementation of such an agreement.

This progressive position of GATS is to be sought in its posteriority to the other GATT provisions as it was negotiated and signed more recently than the others.

The point is that if the EPA were to follow the letter and the spirit of article XXIV, then it will not even come to exist or at least will have to embody with regard to the GATS a special and differential treatment. This can explain why the arguments of the 15 year period for

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<sup>65</sup> Dr El Hadji A. DIOUF: “Article XXIV of GATT and the EPA: Legal Arguments to support West Africa’s Market Access Offer” (Analytical document of Enda Third World, prepared on behalf of the West African Platform of Civil Society Organizations on the Cotonou Agreement POSCAO- AC)

<sup>66</sup> Background on EPA Negotiations: “where do we stand?” [www.acp-eu-trade.org](http://www.acp-eu-trade.org) (Preferences to ACP countries were also not in conformity with the *enabling clause* (GATT decision, 1979).

<sup>67</sup> See Article V paragraph 3 (a) of the General Agreement on Trade in Services available at [www.wto.org](http://www.wto.org).

tariff dismantlement and the level of openness expected from ACP states are viewed as not well founded by them.

Since the EPA is not the typical agreement falling within the gap of article XXIV the EC should admit in the language of these agreements that the real issue here is not to strictly respect WTO provisions since many aspects of the EPAs are not WTO compliant but rather to make it sounds compatible and less opposed to WTO requirements.

The approach adopted by the EU with regard to these issues make us doubt of the intention that lied behind well elaborate sentences of EPA's legal Jargon such as *sustainable development, political priorities and regional economic integration*.

It is advisable, that is in defining the rules of the EPAs, the parties get flexibilities for everyone where feasible for the interest of both parties.

The fact is that if EPAs are not really the kind of agreements stated under article XXIV which despite this situation rules any of its aspects, there is a possibility to allow some flexibility with regard to the particular situation of the ACP states as provided for under article V Paragraph 3 (a) of the General Agreement on trade in Services.

Thus, the Cotonou Partnership Agreement (CPA) contains a number of provisions giving guidance on the WTO compatibility of EPAs<sup>68</sup>.

Article 37.7 states that EPA negotiations would be *as flexible as possible in establishing the duration of a sufficient transitional period, the final product coverage, taking into account sensitive sectors, and the degree of asymmetry in the timetable for dismantling tariffs*.

By providing for a 15 or 10 year period for the dismantlement of tariff as required by article XXIV of the WTO, the EU misinterprets this article.

The words "*as flexible as possible*" while not providing for a specific period for tariff dismantling does help in the finding of that period which is certainly not 10 years as professionals in the field confirm that an opening of 83% of its market by 2020 is not advisable to ECOWAS<sup>69</sup>.

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<sup>68</sup> Dan Lui and San Bilal "Contentious issues in the interim EPAs: Potential flexibility in the negotiations", (Discussion paper N° 89 March 2009). [www.ecdpm.org](http://www.ecdpm.org).

<sup>69</sup> Eric Hazard (OXFAM International Regional Trade Campaign Manager): "The Complexities of negotiating a West Africa EPA" (Trade Negotiation Insights vol. 6 N° 4 August July 2007; [www.acp-eu-trade.org](http://www.acp-eu-trade.org)).



A 10 year period is in fact as argued by ACP negotiators and stakeholders a very short period for dismantling tariffs between the EU and ACP states<sup>70</sup> and as such cannot be viewed as flexible enough to meet the requirement of article 37 of the Cotonou Agreement.

The negotiations were intended to be as *flexible as possible* in establishing the degree of asymmetry in the timetable for tariffs dismantling which means that the agreed period of time should meet ACP states development objectives or at least be close to it.

Another interpretation of this article is that the time table in dismantling tariffs should be as flexible as possible in order to allow the gradual and smooth entering of these states in the reciprocal framework of the EPAs as to not impede on their ability to recover from market liberalization.

As a result, the period set up for tariff dismantling is probably longer than 10 or 15 years provided for under most of the EPAs. Thus, as mentioned above, these 10 years were required at a time when the kind of mixed trade agreements such as the EPAs were not even launched in order to be referred to by article XXIV of GATT 1994.

Furthermore, in article 37.8 both sides committed to working together in the WTO to defend the arrangements reached, in particular with regard to the degree of flexibility available, whilst later agreeing in article 39.3 on the importance of flexibility in WTO rules to take into account the ACP's level of development which clearly mean that both sides agreed for the need of flexibility under the EPAs in spite of what article XXIV currently provides for.

According to what have been mentioned above, the situation is not really an enhancement of market to the EU as expected under the Cotonou Agreement but rather an erosion of preferences compared to the previous situation.

However there is no question about the alternative to an EPA proposed by the EU being less advantageous than the EPA itself as the ACP would have to face tariff to the EU under the generalized system of preferences; one of the schemes left available for non LDC's with

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<sup>70</sup> The period for tariffs dismantling is one of the main issues at the origin of the riot of Accra (Ghana) in June 2009 as emphasised by Francis Kokutse in "ECOWAS Delay on EPA allows Ghana to Re-Think". Available at [www.acp-eu-trade.org/newsletter](http://www.acp-eu-trade.org/newsletter).



no EPA and more accessible than the Generalized System of Preferences Plus called also GSP +.

Thus, one may ask if the market access enhancement which is the emphasis of article 2(a) of the Cote d'Ivoire IEPA is said to be enhanced with regard to the previous arrangement between parties or with regard to an alternative to an EPA. This article visibly meant an enhancement with regard to the previous situation, as the EU claim to open itself to the ACP more than before as products that were excluded by it will now be subject to a free access to the EU<sup>71</sup>.

Yet the current situation is not what can be called an enhancement of market to the EU as pointed out by ACPs negotiators.

Thus, there is also the issue of the rules of origin that can impede on Market Access and that is worth being investigated.

- The issue of the rules of origin

The RoO stipulate how much local processing must be performed on materials and intermediate goods in order for a product to be considered to be of local origin, and thus qualify for more favorable market access treatment in a trade agreement<sup>72</sup>.

Where a product contains no materials or processing from outside a PTA area it is deemed as originating from the preference receiving trade area the only difficulty resting where a product contains material or processing from countries not party to the PTA<sup>73</sup>. However, a good is likely to be granted the origin status once sufficient working or processing of that good has taken place within the preferential trade area.

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<sup>71</sup> Dr El Hadji A. DIOUF: "Article XXIV of GATT and the EPA: Legal Arguments to support West Africa's Market Access Offer" (Analytical document of Enda Third World, prepared on behalf of the West African Platform of Civil Society Organizations on the Cotonou Agreement POSCAO- AC).

<sup>72</sup> Eckart Naumann: "Economic Partnership Agreements and Rules of Origin: Outcome and Challenges" (Updating Economic Partnership Agreement to Today's Global Challenges: Essays on the Future of EPAs; Economy policy Paper Series 09).

<sup>73</sup> Patricia Augier: "The Impact of Rules of Origin on Trade Flows", (CEFI UMR 6126, CNRS – *Université de la Méditerranée & IM*) Michael Gasiorek (Sussex University & GREQAM); Charles Lai-Tong (CEFI UMR 6126, *Centre National de Recherche Scientifique CNRS*).

It is then necessary to set limits within which inputs from area outside the PTA are allowed. It is with this regard that preferential Rules of Origin such as those contain in the EPA, set administrative and local processing requirements that enable goods and materials to obtain preferential access to the market of a given trade partner<sup>74</sup>. The objectives are to reduce trade diversion and trade deflection to a minimum, which can be achieved by having Rules of Origin which are simple and transparent.

According to the EU system, there are 2 ways of determining the local origin of a good. It has to be *wholly obtained* or substantially transformed to be granted the origin status. The definition of wholly obtain refers to raw material extracted, agricultural products grown and harvested and livestock born and raised in the exporting country, fish caught within the country territorial waters as well as any fish products made exclusively from local materials.

The *substantially transformed* requirement is of a necessary importance when imported materials such as materials coming from outside the PTA are used.

Determined through compliance with product- specific rules, it uses 3 different methodologies on a stand-alone or combination basis:

1. The so-called value-added test normally expressed as a limitation on the value of imported materials;
2. The tariff heading jump where the pre and post- processed products or materials can be classified within a different tariff heading; and
3. The specific technical requirement.

Acknowledging the complexities of these RoO as well as the shortcoming of the current regime, the EU commission proposed a change based on the value addition principle.

In the Cote d'Ivoire Interim EPA, the Rules of Origin are deal with under article 14 which states that: "*the Parties shall establish a reciprocal common regime governing the rules of origin by 31 July 2008 at the latest, based on the rules of origin set out in the Cotonou Agreement and providing for their simplification, in view of the Ivorian Party's development objectives*".

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<sup>74</sup> Ibid page 4

Moreover, according to this article, should the parties failed to reach an agreement on a regime governing RoO that the applicable regime shall be the most favourable regime to Cote d'Ivoire of either the current regime adopted by the EC Party or the improved rules established under the Cotonou Agreement.

The Cote d'Ivoire is thus given the latitude to operate a choice concerning the rules of origin that will be applicable to it.

In 2008, the parties hopefully reach an agreement on this matter<sup>75</sup>.

However as pointed out by some authors, only a few changes have been introduced to the RoO compared with the previous Cotonou preferences that are relating mainly to the treatment of textiles and clothing, fish and fish products, and certain agricultural products<sup>76</sup>. These changes are of questionable benefit for the countries of the African, Caribbean, and Pacific Group of States (ACP)<sup>77</sup>.

According to the changes introduced in the textile and clothing, a sector deemed as sensitive to both parties, RoO is granted only where exporters could demonstrate that a substantial portion of production along the value chain was undertaken locally. Under the IEPA however, there has been a shift to "one step transformation" for both textiles and clothing and this probably represents the single most important improvement of the EU-ACP RoO. Yet, this positive outcome is accompanied by two others changes that are more restrictive<sup>78</sup>:

- ✓ textiles and clothing are now *excluded* from the value-tolerance (or *de minimis*) provisions which grant producers a 15 percent exemption by value from the normal RoO requirements; and, (the 15% were not taking into account in the calculation of the external input that takes place in the processing of a good) it is worth mentioning that this current situation was quite advantageous in region with high potential of cumulation.
- ✓ The sector has also been excluded from the outward processing arrangements otherwise provided in the provisions on territoriality.

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<sup>75</sup> See annex 2.

<sup>76</sup> Eckart Naumann: "Economic Partnership Agreements and Rules of Origin: Outcome and Challenges" (updating EPAs to Today's Global Challenges, page 111; also available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org)).

<sup>77</sup> Ibid page 1

<sup>78</sup> Ibid page 2

These changes undermine the possible benefit that the “one step transformation” could have allowed.

The fish and fish product requirement has been slightly relaxed in comparison with those under Cotonou Agreement though, they remain mostly complicated and restrictive<sup>79</sup>.

Thus, a notable absence as many authors agree is the *tuna derogation* which under Cotonou exempted a specific annual quantity of tuna loins and canned tuna from the strict origin requirement otherwise applicable to export from the ACP.

Furthermore, the changes in the RoO in no way compensate for this loss in ACP privilege<sup>80</sup> which makes it worst with Cote d’Ivoire’s position as the first producer of tuna loins and canned tuna of West Africa.

It is important to remind that when the political situation of 2002 occurred in Cote d’Ivoire, it is the benefit made by the port zone (mostly specialized in tuna production and exportation) that has sustained the government in helping to keep up fiscal revenue for budget financing over several years and hopefully till now and without which the republic would have faced serious difficulties<sup>81</sup>.

This shows how important flexibilities in the RoO could be meaningful for ACP states if only the language in the EPAs was follow by deeds. If the new RoO were to help the Cote d’Ivoire reduces poverty in being the most favourable regime to this country *in view of its development objectives* as states in article 14 of the IEPA then this exemption shouldn’t have been removed but rather ameliorate to foster the country ability to take advantage from the simplified RoO as it aims to be called.

As far as concerned Agriculture, there are some RoO changes for certain processed Agricultural products in the IEPA, implemented by means of a derogation annexure. These changes permit either a slightly higher imported material allowance or provide a different methodology: the tariff jump instead of a value-based test and whether these changes in

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<sup>79</sup> Ibid page 2

<sup>80</sup> Ibid Page 3

<sup>81</sup> Laurent Gbagbo, President of the Republic of Cote d’Ivoire; (froma speech at the opening ceremony of the restructuring of the Port September 2008); available at [www.portautonomedabidjan.com](http://www.portautonomedabidjan.com).

the Rules of Origin are more favourable for ACP exporters is not quite clear<sup>82</sup>. Thus, the new rules on cumulation under the IEPA are of considerable concern to ACP countries for several reasons. First of all, under Cotonou, ACP states were considered a single territory for RoO purposes and were eligible for full cumulation.

As a result, an ACP country could use inputs produced in any other ACP country and it would still be considered originating while under the IEPA, the new market access regulations permit cumulation only between countries that initialed the agreement<sup>83</sup>.

This current situation will keep countries that initialed an EPA isolated from the others ACP countries with which there are greater opportunities for cumulation let alone with countries from the same regional grouping that is in dire in need to foster their economic integration.

In fact, the division of the ACP into regions, and then into those that signed EPAs and those that did not, means that – at least in terms of cumulation – ACP signatories are worse off than before, particularly those in Africa<sup>84</sup>.

This is because only once an ACP states has signed and implemented the IEPA on its part may it cumulate production with all other ACP states that did the same. Thus, article 14 while stating that the rules of origin under the EPA has to take due account of the development objective of the Ivorian party does not provide for a clear understanding of what should be understood by *development objectives*.

It can certainly be objected that the Cotonou Agreement will provide for a background however, the Cotonou Agreement RoO are not going to constitute the rules of origin in the IEPA but will merely inspired these one.

Furthermore, from a legal point of view, it is not really clear how can the rules of origin reflect development concern of the smallest economy in the EPA when they have to be *reciprocal and common* which imply that what is expected from one party will be strictly expected from the other.

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<sup>82</sup> Eckart Naumann: “Economic Partnership Agreements and Rules of Origin: Outcome and Challenges” (updating EPAs to Today’s Global Challenges, page 111; also available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org)).

<sup>82</sup> Ibid page 1.

<sup>83</sup> Ibid page 4

<sup>84</sup> Sanoussi Bilal and Dan Lui: “Contentious Issues in the IEPA: Potential Flexibility in The Negotiations” (Discussion Paper No. 89 March 2009 [www.ecdpm.org](http://www.ecdpm.org)).

It will then be wise for ECOWAS to obtain a better provision with regard to this issue under the final EPA as to ensure what the region will commit itself to.

In fact, in the case of Cote d'Ivoire where clothing and textile production rely on the purchasing of Burkina-Faso cotton, questions such as what will be the implication of a reciprocal common rules of origin if this is understood "70% of raw material originating from the territory of a party to the agreement" or if parties can only cumulate with states that also initialed an EPA knowing that Burkina-Faso did not initialed one are welcome to be asked.

Moreover, whether individual or groups of ACP countries will be able to obtain significant concessions beyond the limited changes that had taken place thus far remains questionable, as the European Union through the commission has often expressed its desire \_and demonstrated this in practice\_ to maintain a level of overall harmony across its preferential RoO regime and will thus likely continue to be guided by this objective<sup>85</sup>.

Thus, few RoO changes that have been undertaken so far do little to encourage greater regional economic integration, which after all remains a stated policy objective of these agreements<sup>86</sup>.

Fortunately, in the new regime EPA RoO, there seems to be a clause which allows ACP countries to treat materials sourced from other developing countries as "their own" which could potentially be a major source of flexibility depending on the countries involved<sup>87</sup>. We only hope that this current situation will make a great difference and will truly serve the interest of ECOWAS.

However, there are still some issues that need to be addressed with regard to the RoO.

The concept of special and differential treatment that seems to be absent in most of the provisions concerning RoO in the Cote d'Ivoire IEPA is one of these issues.

Article 19 (3) "*forbid parties to use trade policies relating to the mixing, the processing according to specified quantities which would require directly or indirectly that any specified*

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<sup>85</sup> Eckart Naumann: "Rules of Origin and EPAs: the devil lies in the details", (updating EPAs to Today's Global Challenges, page 111; also available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org)).

<sup>86</sup> Ibid page 7

<sup>87</sup> Sanoussi Bilal and Dan Lui: "Contentious Issues In The IEPA: Potential Flexibility in The Negotiations" (Discussion Paper N° 89 March 2009 available at [www.eccdpm.org](http://www.eccdpm.org)).

*amount or proportion of the product subject to the regulation in question be supplied from internal sources”.*

The national treatment principle intervenes once again in the RoO aspect of the IEPA without any real consideration for the level of development of Cote d’Ivoire. It is welcome to have provisions on RoO that provide for more flexibility in the processing of products in order to allow the less stronger party use policy tool to encourage national production and the use of internal sources.

In fact, introducing a more liberal set of rules in the EPAs could act as a critical tool to stimulate growth in many of the world poorest nation<sup>88</sup>

- Stand still clause, taxes and other fees and charges on exports.

The “*statu quo*” or stand still clause<sup>89</sup> is dealing with under article 15 of the Cote d’Ivoire IEPA, and expresses simply that no new customs duties should be introduced in trade between parties while the increasing of those already applicable will not be allow.

In the Cote d’Ivoire IEPA, that clause still applies even if a product is excluded from liberalization.

One of the arguments of the EC to justify the introduction of this clause in the EPAs is that the stand still clause should be used as a base line for tariff liberalization<sup>90</sup>.

The Paragraph 1 of this article in the two EPAs texts of Ghana and Cote d’Ivoire states the same rule.

It is tragic that the EPAs concern only the reduction of applied tariffs<sup>91</sup> because even though paragraph 2 admits that these tariffs would nevertheless be modified when ECOWAS CET will be finalized provided this occurs before the end of 2011 and that higher tariffs could concern only some tariff lines; the overall TLs concerning imports from EU could not exceed those already agreed in annex 2 of the EPAs.

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<sup>88 88</sup> Marc Pearson: “Rules of Origin: Development Friendly Threshold?” (Programme Director for the Regional Trade Facilitation Programme, <http://rtfp.org>; (Trade Negotiation Insights: From Doha to Cotonou Vol.6 No.4 July-August 2007 available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org)).

<sup>89</sup> These are appellations commonly given to this clause in articles and review of authors.

<sup>90</sup> San Bilal and Dan Lui: “Contentious Issues in the Interim EPAs: Potential flexibility in the Negotiation” (Discussion Paper N° 89 March 2009 available at [www.ecdpm.org](http://www.ecdpm.org)).

<sup>91</sup> ROPPA, Meeting to ponder the protection measures required for West Africa’s agricultural development, Ouagadougou, Burkina Faso, 8-9 February 2009 (Reflexions on the safeguard measures that ECOWAS could adopt Jacques Berthelot, Solidarité, February 7, 2009).

In other words these EPAs do not let any possibility to increase the applied tariffs up to the bound tariffs of these countries, a fortiori taking into account the "other duties and charges" (ODCs). This is in total contradiction with WTO rules as the bound tariff under the multilateral trading system is the only one that commit a party.

In fact this article implies that ECOWAS could not bind its CET and change its applied tariffs within the limits of its bound tariffs; which is intolerable politically and also legally as contrary to the basic WTO rule that Members' commitments concern their bound tariffs and not their applied tariffs<sup>92</sup>.

Thus the Cotonou Agreement is quite clear in stating that: "*Negotiations of the economic partnership agreements shall aim notably at establishing the timetable for the progressive removal of barriers to trade between the Parties, in accordance with the relevant WTO rules*"<sup>93</sup>."

The rationale is that, if for instance a party announces a tariff of 35% at the WTO for a product A, it can actually applied on the same product a tariff of 20% and is allowed to increase it provided that the limit bound at the WTO is not exceeded.

This is because the water between the applied tariff and the bound tariff can play an important role in setting up policy tools to imbalance the lost in fiscal revenue or to react in front of situations that need the state intervention.

Thus, many studies have shown that the more the water between an applied tariff and a bound tariff is considerable, the less parties are responding to dumping or subsidies situations by using safeguard measures<sup>94</sup> as they will be first of all increasing their applied tariff in the limit settle by the bound tariff before initialing safeguards measure. This can truly served the purpose of reducing trade barriers between parties.

A further consideration in the amendment of the standstill clause is to ensure that the trade defence provisions are effective since bilateral safeguard duty rates, for example, should be able to go beyond the rate that tariffs are bound at under the EPA<sup>95</sup>.

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<sup>92</sup> Ibid page 4

<sup>93</sup> See article 37 of the Cotonou Agreement; available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org) or [www.europa.eu/index\\_fr.htm](http://www.europa.eu/index_fr.htm).

<sup>94</sup> Edwinie Kessie, Legal Officer at the World Trade Organisation during a lecture given at the University of Pretoria from 31<sup>st</sup> August to 4<sup>th</sup> September 2009 (Regulation of International trade, information obtain from class notes); [edwinie.kessie@wto.org](mailto:edwinie.kessie@wto.org).

<sup>95</sup> ActionAid, Christian Aid, and Oxfam, "Market access for goods", Briefing 3: The EU Free Trade Agreements Manual, March 2008. [www.oxfam.org.uk/resources/policy/trade/euftamanuals.html](http://www.oxfam.org.uk/resources/policy/trade/euftamanuals.html)



Recently some commentators have also highlighted how this provision could have some unforeseen consequences. In fact, a number of governments, in response to very high food prices, reduced import duties and in some instances even set them at zero<sup>96</sup>.

At this moment in time therefore, the strict application of this 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<sup>97</sup>.

Furthermore, by expecting Cote d'Ivoire to stick to its applied tariff while there are still spaces in between the bound and the applied tariff that could be use any time this country needs it, the EU is denying to Cote d'Ivoire the use of a policy space and the right to benefit from an arrangement already made under the WTO which it although stressed to complying with under the EPAs.

This is all the more bizarre knowing that the reasons for the EPAs being negotiated is the compliance with the very same WTO rules that are now infringed under the stand still clause and many others provisions of the EPAs.

Interestingly, according to article 80 (3) of the IEPA on the final provisions: *the Parties agree that this Agreement does not require them to act in a manner inconsistent with their WTO obligations*. Even tough one may argue otherwise, this provision can be interpreted as forbidding the EPAs to jeopardize what have already been achieve under the multilateral trading system; the “*acquis*” that shouldn’t be changed.

This provision makes it worst since as a result; the IEPA is contradicting itself in expecting something and its opposite at the same time. And even if as proposed by some authors<sup>98</sup> the standstill clauses could be re-drafted to exclude food and other products where tariffs have been temporarily reduced in an attempt to obtain more flexibility, ECOWAS will better battled for the removal of this clause from the EPA given its obvious opposition to current WTO rules.

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<sup>96</sup> For specific examples see CTA (2008) “Contentious issues in IEPA negotiations: implications and questions in the agricultural sector” Special Report, Agritrade, October 2008, <http://agritrade.cta.int/en/content/view/full/4272>

<sup>97</sup> Remarks by Paul Goodison at the ACP-EU Joint Parliamentary Assembly, Committee on Economic Development, Finance and Trade Meeting, Brussels, 10 September 2008.

<sup>98</sup> Dan Lui and San Bilal: “Contentious Issues in the IEPA: Potential Flexibility in the Negotiations” (Discussion Paper N°89, March 2009 available at [www.ecdpm.org](http://www.ecdpm.org)).

It is as though most of what is currently required under the IEPA is not only incompatible with the Cotonou Agreement but also with the WTO provisions, which may explain why the negotiations of EPAs in general are controversial and probably why they are stuck at the moment.

Thus, WTO-compatibility does not require the inclusion of a standstill clause in the EPA<sup>99</sup>. Furthermore, the limited flexibility shown in the CARIFORUM, SADC and Pacific interim EPAs standstill clauses – to products not subject to tariff liberalisation commitments – is not easily explained in objective terms, with distinctions between ACP regions that raises questions about the consistency and coherence of EU policy<sup>100</sup>.

It is also important to point out the ambiguity of article 16 duties, taxes and other fees and charges on export. The first paragraph states that: *No new customs duties on exports or charges with equivalent effect shall be introduced, nor shall those currently applied in trade between the Parties be increased from the date of entry into force of this Agreement.* going further the second paragraph stresses that: *In exceptional circumstances, “if the Ivorian Party can justify specific needs for income, protection for infant industry or environmental protection, it may, on a temporary basis and after consulting the EC Party, introduce customs duties on exports or charges with equivalent effect on a limited number of traditional goods or increase the incidence of those which already exist”.*

However, article 11 of the IEPA aim at reaffirming the parties’ commitment to complying with the provisions of article VIII of GATT 1994 which in its paragraph (a) says that *“all fees and charges of whatever character imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered”.*

This obviously doesn’t suggest that charges on exportation should not exist or that new charges should not be introduced but rather if introduced be limited to the services rendered.

These charges in terms of article VIII of GATT are justified by the existence of a service rendered. So, as long as there is a *service rendered*, there should be a charge connected

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<sup>99</sup> Bartels L.: “The legal status of the initialed EPAs and legal constraints on renegotiation”, (April 2008. [www.thecommonwealth.org/files/177361/FileName/EPAsin2008.pdf](http://www.thecommonwealth.org/files/177361/FileName/EPAsin2008.pdf)).

<sup>100</sup> Dan Lui and San Bilal; “Contentious Issues in IEPA: Potential flexibility in the Negotiations” (Discussion N° 89, March 2009).

to it no matter a charge on export or import. This even imply that should exportation be shifted from one specific raw material to another, there is the possibility of introducing new charges on exportation; and in the context of the service rendered this has nothing to do with the environment and an Infant industry protection even if export charges are often than not use toward these purposes.

Although article VIII of the GATT states further that they should not be use for fiscal purposes, this doesn't mean that they should not exist or be introduced or even be increased. As long as they comply with the requirement of the approximate cost of services rendered nothing should be opposed to their introduction or increasing.

When allowing the introduction of new charges on export only under exceptional circumstances and on condition that Cote d'Ivoire justify for the need to protect its environment or its infant industry while proclaiming to comply with article VIII of GATT, the IEPA obviously lack of logic. The fact is that, introducing new charges on exportation or increasing those currently applied exist solely from the requirements state under article 16 of the IEPA.

The existence of export or import taxes at the border is further justified by the fact that they may be easier to administer by border authorities than other forms of taxation. In fact while many countries have in the past suffered from an inadequate framework for managing wealth from minerals, forestry or other resources, it has been argued that export taxes may be more *transparent* than alternatives since the existence of export taxes, by providing legal powers and incentives for authorities to control exports, may also assist in the *management* of those resources<sup>101</sup>. This is why export taxes can legitimately constitute a tool in the development priorities of ACP countries. And if they were truly asked to give their opinion as provided by the concept of equal partnership then the use of export taxes should be allowed under the IEPA.

Then, it is not only confusing but rather unacceptable to require from Cote d'Ivoire to justify to the EC the introduction of new charges on export as well as the increasing of those that already exist when the Cotonou agreement states the *equality of partnership* of parties which imply that, it is in principle up to ACP states to determine how their economies should

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<sup>101</sup> San Bilal and Dan Lui: "Contentious issues in the IEPA: Potential Flexibility in the Negotiations" (Discussion Paper N° 89, March 2009 available at [www.ecdpm.org](http://www.ecdpm.org)).

develop. This as a result makes parties equal actors in setting up the rules of their relationship.

Consequently, the terms of many of the exceptions to the general rule prohibiting export taxes may make the exceptions difficult to apply in practice, particularly where clauses give an effective veto to the EC party.

Leaving aside the arguments for and against their existence, there are some questions as to whether provisions on export taxes are necessary for completion of a WTO-compatible free trade agreement<sup>102</sup>. The WTO does not prohibit their use, although Article XI: 1 of the GATT contains a general ban on the use of other forms of export restriction or prohibition<sup>103</sup>.

Though ACP negotiators argue that the use of export taxes that facilitate economic development should not be prohibited as flexibilities contained in the EPAs do not go far enough in providing the policy space they seek, a general ban on export taxes may also lead to an ACP State being in breach of its obligations under another international agreement, in particular an international commodity agreement<sup>104</sup>.

The bound and applied tariffs and charges connected to export are organized by the WTO. Though propositions were made on their possible modification prior to the EPAs, developing countries have always been opposed to it.

Interestingly, many of the controversial issues in the trading system that were the subject of opposition by developing countries ended up on the negotiation table of bilateral and regional deals where the very same countries with less bargaining power this time agree to such measures<sup>105</sup>.

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<sup>102</sup> Ibid Page 15

<sup>103</sup>The general rule in GATT Article XI: 1 is subject to a number of exceptions to the prohibition in Article XI:1, such as Articles XI:2(a) (shortages of foodstuffs and other essential products) and XX (general exceptions). The CARIFORUM EPA and the interim EPAs have provisions that are equivalent to GATT Article XI:1, but not exceptions in Article XI:2 nor the full range of general exceptions that are contained in Article XX. (Comment made by the ECDPM Trade Director).

<sup>104</sup> San Bilal and Dan Lui: "Contentious issues in the IEPA: Potential Flexibility in the Negotiations" (Discussion Paper N° 89, March 2009 available at [www.ecdpm.org](http://www.ecdpm.org)).

<sup>105</sup> Kevin P. Gallagher: "Globalization and the Nation-State: Reasserting Policy Autonomy for Development", (Putting Development First).

b) Dispute Settlement Mechanism of the Cote d'Ivoire IEPA.

Our analysis under this chapeau aim at analysing the sustainability of the Dispute Settlement Mechanism of the Cote d'Ivoire IEPA with regard to diverse issues contain in the agreement. Its consistency and its ability to solve problems that may arise from relevant matters such as Development Cooperation, Trade Defence Mechanism and others less obvious but equally important issues will be questioned.

- Development Cooperation and Dispute settlement Mechanism.

Recognizing the consequences of the implementation of an EPA for ACP states, the parties agreed in the objectives of Part 4 of the Cotonou agreement, (*Development Finance Cooperation*) that financial resources and appropriate technical assistance will be provide to ACP states as to support their effort toward the achieving of the EPA objectives<sup>106</sup>.

This is because the lost of fiscal revenue by ACP states need an imbalance to help these countries adjust to the new regime.

Article 46(1) the IEPA on the prevention and settlement of disputes (Title V) states that: *"This Title shall apply to all disputes concerning the interpretation or application of this Agreement, with the exception of the provisions of Title II of the Agreement and except where specifically provided otherwise"*. Its also states that, notwithstanding paragraph1 of article 46 stated above, the procedure set out in Article 98 of the Cotonou Agreement shall apply in the event of disputes concerning the financing of cooperation on development, as specified in the Cotonou Agreement.

It becomes important to remind the issues deal with under Title II of the IEPA and article 98 of the Cotonou Agreement.

The former is about the partnership for development which refers to cooperation needs to implement the IEPA and that can take a financial and a non financial form<sup>107</sup>.

The latter contains rules governing the settlement of disputes that may arise from the Cotonou agreement.

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<sup>106</sup> Mayur Patel: report on EPAs Negotiation; available at [www.realisingrights.org](http://www.realisingrights.org).

<sup>107</sup> Article 4, paragraph 6 of Cote d'Ivoire IEPA. (Legal text available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org) or [www.europa.eu/index\\_fr.htm](http://www.europa.eu/index_fr.htm)).

If development cooperation of the IEPA is regulated by the Cotonou agreement as to maximizing the benefits of the IEPA – which is understandable since this agreement contains provisions on economic and regional cooperation and integration that are advantageous to ACP states<sup>108</sup> – what is not clear in return is that the settlement of disputes arising from such an important issue is expected to be ruled by the dispute settlement provisions of the Cotonou agreement which in return contains only few options than the one under the IEPA.

It is then at stake to ask the purpose of a dispute settlement mechanism incorporated in a FTA.

Generally, the objective in setting up a dispute settlement mechanism in an agreement is to strengthen the agreement as to make it more sustainable by providing it with dispute settlement rules that are appropriate to its context and specific needs.

In fact, settlement rules contained in a contract if not for all the disputes that may arise from it provide for the resolution of disputes related to principal matters of the contract and without which the contract could possibly be terminated<sup>109</sup>.

Under the IEPA, the development finance cooperation is considered as a prerequisite for the full implementation of the agreement.

As such, Title V of the IEPA should include the disputes that may arise from this matter in the IEPA dispute settlement mechanism.

Furthermore, issues such as the nature of financing, which bring the question of what cooperation should take a financial or a non-financial form; The scope of financing, related for instance to what is financed by ACP states and what is left to be financed by the EU have to be clarified since the IEPA and even the Cotonou agreement is not quite clear in defining them<sup>110</sup>.

Article 60 of the Cotonou agreement uses language such as: “*the scope of financing may include measures that contribute to attenuate the debt burden and balance of payment*”

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<sup>108</sup> For more see section 3 of part 3 “cooperation strategies” of the Cotonou Agreement. (Document available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org)).

<sup>109</sup> Ehui Félix : “Droit des Contrats Spéciaux”, (Professeur de Droit des Contrats ; Faculté de Droit d’Abidjan Cocody et de Bouaké).

<sup>110</sup> For more see Article 60 of the Cotonou Agreement (Chapter 2, scope and nature of Financing); [www.acp-eu-trade.org](http://www.acp-eu-trade.org).

*problems of the ACP countries depending on the needs and types of operation considered most appropriate”.*

What *measures* may be deemed important enough as to be financed? And according to which standards operation may be considered *most appropriate*?

Article 63 of the Cotonou Agreement on the method of financing states in its paragraph (b) that “*parties shall determine the method of financing by referring to the nature of the project or programme, its economic and financial return*”.

Moving further, paragraph (c) says that “*the financing may take the form of loans. In the case of loans, the method of financing shall be determined by reference to factors guaranteeing their servicing*”.

In the former case, there is a question on what should constitute a project or programme with an economic and financial return.

In fact, both parties are invited to determine the method of financing on the basis of this criterion when they may not view *a project carrying a financial return* the same way.

Thus, a project with a financial and economic return is not always a project with development emphases.

Many development projects require at the beginning high financial investment before they produce any economic return as an outcome<sup>111</sup>; while some projects with high financial return are not always development friendly.

In fact, the long or short term of the financial return as well as its link with sustainable development expected under this article should be mentioned in the EPA at least.

In the latter case, there is indeed a problem on how can ACP countries with their very low capital income truly guarantee a servicing to justify a financing they may truly need and it is unclear whether or not they will still benefit from it.

There is indeed a need to emphasize in a more binding language what the Cotonou agreement had left vague or unresolved instead of referring to it on matters that need proper explanation.

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<sup>111</sup> Rosalinda Thomas: “The Law of Foreign Direct Investment”, (lecture of the author, LLM Trade and Investment Law, University of Pretoria, Centre for Human Rights [www.chr.up.ac.za](http://www.chr.up.ac.za); Information obtained from class notes).

In fact, nowhere in the EPA the development financing and financial aid to the ACP states is expressed in a language that commits the EC as far as concerned the installments and the possibility to increase the financing<sup>112</sup>.

This is all the more important since the Dispute Settlement Mechanism contained in the EPA provides for 3 possibilities of settlement of the disputes. The consultations (article 47); the mediation (article 48) and the arbitration procedure, dealt with under Chapter III (*Procedure for and Settlement of Dispute*).

According to Title V of the IEPA that organized these procedures, the consultations are the first step toward the resolution of disputes and parties only refer to the mediation and arbitration successively when the next option available failed to solve the problem<sup>113</sup>.

Under the Cotonou Agreement in the other hand, the procedure is short and lacks consistency. Article 98 states that: *“any dispute arising from the interpretation or the application of this agreement (.....) shall be submitted to the council of ministers or to the committee of ambassadors between meetings of the council of ministers”*<sup>114</sup>.

Thus, if the said Council of Ministers or Committee of Ambassadors does not succeed in settling the dispute either party may request settlement of the dispute through means of arbitration<sup>115</sup>. If the arbitration failed, there is no other alternative as the next article is on the denunciation clause.

Though the mechanism of the IEPA is probably not the best option, it is obvious that this of the Cotonou Agreement is far more inappropriate to regulate the chapter on development cooperation given its importance.

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<sup>112</sup> Source: The New EPAs, ODI-ECDPM, 31 March 2008. [www.acp-eu-trade.org](http://www.acp-eu-trade.org).

<sup>113</sup> See the Title V of the Cote d'Ivoire IEPA on Prevention and settlement of Disputes. (Legal text available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org) or [www.eiropa.eu/index\\_fr.htm](http://www.eiropa.eu/index_fr.htm)).

<sup>114</sup> Article 98. 1 of the Cotonou agreement on Dispute Settlement.

<sup>115</sup> Article 98. 2 (a) of the Cotonou Agreement.



- Administrative Cooperation and the Dispute Settlement Mechanism.

It is first of all important to underline that this section has not been excluded from the IEPA Dispute Settlement Mechanism. Under this section, the parties express their commitment to combating irregularities and fraud as regards customs and related fields<sup>116</sup>.

Administrative cooperation in the IEPA is broadly about communication of information and its fluent transfer from both sides in order to facilitate control of preferential treatment granted in the agreement<sup>117</sup>.

The implication of such provision for ECOWAS member states is important especially given their low level of technology to comply with for instance, obligation to verify originating status or to prove that the required threshold of the value added criteria has been fulfilled as a failure to comply with those rules is understood as a default in complying with Administrative cooperation and expose them to severe sanctions<sup>118</sup>.

Interestingly, it is as though the Dispute settlement Mechanism of the IEPA is related only to violation of Administrative Cooperation requirements as only sanctions on irregularities and fraud as regards customs and related field are provided for.

In fact, the IEPA does not provide for sanctions or compensations regarding infringement of Development Cooperation provisions that are however considered as priorities.

Article 21 (2) states to this effect: *“When a Party obtains proof from objective information of a lack of administrative cooperation and/or irregularities or fraud, this Party may temporarily suspend the preferential treatment granted to the product(s) concerned in accordance with this Article”*.

Of course, some conditions are required in order to perform a suspension of preferences however; there is an issue that seems confusing.

Paragraph 4 of the article states that: *“Temporary suspensions under this Article shall be limited to those necessary to protect the financial interests of the Party concerned. They shall not exceed a renewable period of six months”*.

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<sup>116</sup> Article 21 (1) of Cote d’Ivoire IEPA. (Legal document available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org)).

<sup>117</sup> For more see also article 21(3) of Cote d’Ivoire IEPA.

<sup>118</sup> The sanctions in the IEPA are only the suspension of trade preferences in the event of non compliance with rules on customs duties and administrative cooperation (see article 28 of the Cote d’Ivoire IEPA).

Indeed, it is unclear what period according to each party is deemed necessary to protect its financial interest as their perception of the matter may be different.

There is also article 65(1) of the IEPA that states that: “*The arbitration authorities set up under this Agreement shall not deal with disputes relating to the rights and obligations of each Party pursuant to the Agreement establishing the WTO*”.

Since most of the issues dealt with under the IEPA are relating to the rights and obligations of parties pursuant to the WTO \_because EPAs are first of all trade agreements\_ it is almost the whole issues brought under the IEPA that are not going to benefit from the procedure of arbitration which left only the consultation and mediation procedure available.

### c) Trade Defence Instruments in the Cote d'Ivoire IEPA.

In the interim and EPA texts, the issues of safeguards and infant industry protection are treated together in the chapter on “*trade defence instruments*”. This is despite, arguably, some major differences between traditional safeguards – which are usually associated with temporary import surges occurring as a result of liberalisation of some other area – and the principle of infant industry protection, which relates more to a policy choice by a government to protect a certain industry for a limited period of time to help it achieve a degree of competitiveness<sup>119</sup>.

The IEPA contain provisions dealing with multilateral and bilateral safeguards.

With regard to the former, the agreement preserves the right for the parties to apply multilateral safeguard measures (and antidumping and countervailing duties) in accordance with the requirements of the WTO<sup>120</sup>.

In the IEPA, the EC has stated that it *may* not apply multilateral safeguards to products originating in Cote d'Ivoire. This advantage intends to last only during the first five years of the IEPA<sup>121</sup>.

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<sup>119</sup> Dan Lui and San Bilal: “Contentious Issues in the Interim EPAs: Potential Flexibility in the Negotiations”, (Discussion Paper N°89, March 2009, [www.ecdpm.org](http://www.ecdpm.org)).

<sup>120</sup> See article 23 (1) of the Cote d'Ivoire IEPA : “*the Agreement does not prevent the EC Party or Côte d'Ivoire from adopting antidumping or countervailing measures in accordance with the relevant WTO agreements*” , (Legal text available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org)).

<sup>121</sup> See also article 24 (2) and 24 (3) of the Cote d'Ivoire IEPA.

The latter which also include the infant industry safeguards, set out a framework under which either party may suspend its tariff liberalisation obligations<sup>122</sup>.

Both safeguard measures are basically intended to protect a country Industry from being overwhelmed by import surges from others countries through a framework set up temporarily until the threat is gone or the purpose for which it has been set up is achieve.

Article 24 of the IEPA that provide parties with the right to take a measure in conformity with GATT article XIX (which is related to emergency action on import of particular products) also states in its paragraph (2) that: *“Notwithstanding paragraph 1, in the light of the general development objectives of this Agreement and the small scale of the Cote d’Ivoire economy, the EC Party shall exclude imports from Côte d’Ivoire from all measures taken pursuant to Article XIX of GATT 1994”*.

According to this article, imports from Cote d’Ivoire are exonerated from all measures taken on the basis of Article XIX of GATT. If so, then it is difficult to understand why the provision of article 25 on bilateral safeguards is repeating almost totally the words of article XIX of GATT.

Obviously, the flexibility that has been obtained under article 24 is taken back by article 25 as far as concerned Infant Industry at least.

This is because in both articles<sup>123</sup> the circumstances under which the safeguard measures applied are very similar to the extent that import from Cote d’Ivoire will still be facing the requirement under article XIX of GATT 1994.

This situation is important to highlight since the possibility that exports from an ACP State could cause injury to an industry in the EC is very remote, while the contrary is rather likely. Yet, despite the unequal risk of injury, the EC insisted that EC antidumping and countervailing measures had to apply to the ACP States in the same way as all other countries, such as China, India and the United States<sup>124</sup>.

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<sup>122</sup> Article 25 of the Cote d’Ivoire IEPA.

<sup>123</sup> For more detailed see Article 25 of Cote d’Ivoire IEPA and Article XIX of GATT 1994. (Legal documents can be access at the following web site: [www.acp-eu-trade.org/](http://www.acp-eu-trade.org/) [www.wto.org](http://www.wto.org)).

<sup>124</sup> Dan Lui and San Bilal: “Contentious Issues in the Interim EPAs: Potential flexibility in the Negotiation”, (Discussion Paper 89, March 2009 available at [www.edpm.org](http://www.edpm.org)).

For example, the fact that tariffs may only be increased according to the IEPA in response to a significant surge in EU imports means that infant industry protection cannot be provided in situations where trade flows remain constant which is not true because as said above, the idea of an infant industry protection is relates more to a policy choice than to face import surges<sup>125</sup>. As it stands, the clause may not allow for new industries to be established using protective tariffs, since an industry which did not yet exist could not be threatened with serious injury by an import surge.

Thus, tariffs may be increased only in response to an increase in the volume of imports, not also because to a fall in import prices as provided under the WTO<sup>126</sup>.

Equally worrying for the ACP is that the provisions on infant industry inexplicably expire after 15 or 20 years<sup>127</sup>. In principle, there is no reason to assume that increases in demand for new products – one of the main reasons for setting up infant industries – will only occur in the next twenty years, after which innovation will cease. Therefore, it is questionable whether provisions made available under current multilateral and bilateral trade agreements are taken into consideration the principle of special and differential treatment governing the relationship between countries with different levels of development<sup>128</sup>.

Moreover, article 23 on antidumping and countervailing measures shall not be subject to the IEPA dispute settlement provisions<sup>129</sup> while article 19 (6) stressed that: “*For matters relating to the payment of subsidies to national producers, the Parties shall refer to the WTO*”.

This current situation is very ambiguous since the problem under trade defense instruments is related most of the time than not to payment of subsidies that has not yet been resolved under the WTO.

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<sup>125</sup> ROPPA, Reflexion on the safeguard measures that ECOWAS could adopt, Jacques Berthelot, Solidarité February 7, 2009.

<sup>126</sup> Ibid page 8

<sup>127</sup> For more see the Chapter on trade defence Instrument of the Cote d’Ivoire. ([www.acp-eu-trade.org](http://www.acp-eu-trade.org)).

<sup>128</sup> Ajit Singh: “Special and Differential Treatment: The Multilateral Trading System and Economic Development in the Twenty-First Century”, (Putting Development First, article n° 12 page 233).

<sup>129</sup> Article 23 (5) of the Cot d’Ivoire IEPA.

It is worth noting that the WTO had acknowledge its incapacity to currently solve the problem of subsidies and products dumping given the number of frameworks under which governments in a subtle manner hide these practices<sup>130</sup>.

In fact there seems to be no logical answer to the question why the parties to an agreement that bother to incorporate a dispute settlement mechanism in its framework, have to refer to another framework while they are well aware of its incapacity to solve their problem.

It is as though knowing that the WTO cannot provide for a solution, the EU is avoiding the question under the EPAs on purpose.

Preliminary conclusion:

The issues analyzed under this chapter do not emphasize all the relevant questions contain in the Cote d'Ivoire IEPA but only some of them.

As many before us, we believe according to what have been said above that it is unclear whether EPAs legal Provisions embodied provisions that could lead to sustainable development.

The Cotonou Agreement which aims at securing most of the advantages granted to ACP states prior to the EPAs has probably failed to reach this objective.

The binding force of the EPAs seems to this regard more important than this of the Cotonou Agreement. And it is probably the reason for the IEPA to remind that in the event of any inconsistency between the two agreements on specific matters, the provisions of the IEPA shall prevail<sup>131</sup>.

The Cotonou Agreement is not the only legal text that shares an unclear relationship with the EPAs and IEPAs. The arguments of the EC are also not easy to comprehend when it comes to explain its understanding in the IEPA of the notion of "*WTO compatible*".

In fact when it argues that parties have to open their market to the same level in order to be WTO compliant \_which is understandable since parties have to grant each other the same preferences according to the WTO\_it doesn't use the argument of WTO compatibility with regard to the stand still clause.

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<sup>130</sup> Edwini Kessie, Legal Officer at the World trade Organisation during a lecture given at the University of Pretoria on the Doha Development Agenda Negotiations. (LLM in Trade 2010, Centre for Human Right University of Pretoria, information obtains from class notes).

<sup>131</sup> See Article 80 of the Cote d'Ivoire IEPA. (legal text available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org)).

The argument of the EC is that the stand still clause can be use as a tariff base line to obtain a homogeneous and predictable framework that will serve one of the WTO main objectives namely: trade liberalisation<sup>132</sup>.

However, it is not the function of the EC to anticipate or to set up a policy aim at reaching trade liberalisation on behalf of the WTO.

Thus, the IEPAs of Ghana and Cote d'Ivoire while more advantageous than the GSP scheme, contain however less advantageous provisions than the WTO<sup>133</sup>. The stand still clause and the MFN clause contain in the IEPA are some of these less advantageous provisions.

It is thus interesting that while some authors stressed that current WTO rules restrict countries ability to set up policy tool for development<sup>134</sup> EPAs however appear to be more stringent.

If anything, the Cote d'Ivoire IEPA has to be re-thought in order for the region to benefit from more advantageous terms under the full EPA. Yet, this cannot be done without acknowledging the mistakes this country and the whole region could have done so far in negotiating the EPA. Even the Cotonou Agreement does not always contain favourable rules for ACP states<sup>135</sup>.

These issues will be more discussed in the next chapter.

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<sup>132</sup> Dan Lui and San Bilal: "Contentious Issues in the Interim EPAs: Potential Flexibility in the negotiations", (discussion Paper N° 89, March 2009 available at [www.ecdpm.org](http://www.ecdpm.org)).

<sup>133</sup> with this regard it is important to point out the WTO safeguard measures are more *development friendly* than the IEPA (the safeguard measures under the WTO can be apply in the case of import surges or fall in import prices (article 5 of the AoA, GATT 1994); while the IEPA provide for the application of such measures only in the event of a surge in import volume (article 25.2 of the IEPA).

<sup>134</sup> Robert Hunter Wade: "What Strategies are viable for Developing Countries today?" (The World Trade Organisation and the Shrinking of "Development Space" (Putting Development First, Article n° 5).

<sup>135</sup> See article 37.5 of the Cotonou Agreement. (Available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org)).

### CHAPTER III: LESSONS DRAW FROM PAST MISTAKES: TOWARD A STRONG BARGAINING POSITION.

The bargaining position of ECOWAS has long been considered as weak by stakeholders and authors given to several reasons such as the limited administrative and institutional capacity<sup>136</sup>. The reasons of this state of fact may also be found in the lack of political will of some of its members during the EPAs negotiation. This situation has weakened the ability of ECOWAS to negotiate a sound legal framework under the EPA to the extent that the grouping fell apart<sup>137</sup>.

In fact, several mistakes were made that could however be avoided under a comprehensive EPA.

Thus, apart from the mistakes made by ECOWAS and already acknowledged by stakeholders<sup>138</sup>, the well established International trade practices<sup>139</sup> that may be imputed to developed countries<sup>140</sup> would have made it difficult for ECOWAS to reach an Agreement that fully encompasses the development objectives of its countries.

These issues will constitute the focus under this chapter as we will also point out examples of countries that took a different step or that like ECOWAS followed a reform that is not likely to carry development.

#### 1. Updating ECOWAS negotiating approach in EPAs.

With this regard, two points should be underline which are the mistakes due to an unforeseen consequence of a provision contain in the Cotonou agreement and those related to the lack of organization of ECOWAS.

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<sup>136</sup> Emily Jones and Darlan F. Marti: "Updating EPAs: Rising to the Challenge" (Economy Policy Paper Series N° 09).

<sup>137</sup> Cote d'Ivoire, Ghana, Nigeria and Cape Verde are the only countries of the region that cannot benefit from the EBA (Everything But Arms is the scheme made available for least Developed Countries) and while Nigeria still resist an EPA, Ghana and Cote d'Ivoire initialled an IEPA on their own. (Information available at [www.ecowas.org](http://www.ecowas.org) or at [www.acp-eu-trade.org](http://www.acp-eu-trade.org)).

<sup>138</sup> Tetteh Hormeku, Africa's head of Programmes TWN (an International non-governmental Organisation doing research and promoting equitable distribution of World resources and Ecologically sustainable development), Interview by Francis Kokutse, "ECOWAS Delay Allows Ghana to Re-Think". [www.acp-eu-trade.org](http://www.acp-eu-trade.org).

<sup>139</sup> See page 15 on the rappel of the current dynamic in International Trade.

<sup>140</sup> Kevin P. Gallagher: "Globalisation and the nation-states: Reasserting Policy Autonomy for Development". (Putting development First, page 2).

a) Mistakes due to a provision of the Cotonou Agreement.

After the Cotonou Agreement was set up, ACP regions undertook to negotiate EPAs in regional grouping with the purpose to assist regional economic integration. All members of the regional EPA grouping would remove tariff barriers with each other, thereby encouraging intra-African and intra-ACP trade<sup>141</sup>.

Though article 37.7 emphasized regional economic integration as a priority on which partnership between parties should be built, it is not compulsory to negotiate an EPA with regional groupings since article 37.5 express the possibility of initialing an EPA with a country once it consider itself ready to do so.

Even if such negotiation has to be done in accordance with the procedures agreed by the ACP group, this provision is rather prejudicial for ACP states as it has caused isolated countries to negotiate separately from the bloc. And the fact that regional integration could have been undermined as a result should have been anticipated by ECOWAS.

In practice, so far only the Caribbean countries have signed an agreement as a bloc. The majority has negotiated with the EU as regional EPA groupings, but they have initialed agreement as individual countries or sub-regions (Cote d'Ivoire and Ghana initialed an IEPA in West Africa so did Cameroun in Central Africa while the East African Community splitted up with its regional grouping)<sup>142</sup>.

If concluding EPAs with Cote d'Ivoire is likely to have serious implications on regional integration in the region, it is however the weak approach of these countries that have caused most of the damages.

b) The weak bargaining position of ECOWAS

It is worth mentioning to that a strong bargaining position is the result of an integrated region cannot be built without trust and confidence among countries.

Cote d'Ivoire that initialed an IEPA and signed it has only weakened the already fragile confidence in the region but shall also expose itself to several problems as opening up to EU products would be in breach of UEMOA Treaty, and would most likely be condemn by

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<sup>141</sup> Source: ECDPM Paper, EPA Negotiation and Regional Integration in Africa, November 2008.

<sup>142</sup> Peter Draper SAIIA quoted by Gumisai Mutume, 13 November 2008. [www.saiia.org.za](http://www.saiia.org.za).



UEMOA Court of Justice<sup>143</sup>. The fact is that the conclusion of an EPA does split in principle UEMOA, a custom union which must have a CET.

Fortunately, as already mention; Cote d'Ivoire does not implement the IEPA probably so as to continue to respect its CU obligations under UEMOA Treaty. Yet, this is fortunate depending on where one stand to look at it. The delaying of the IEPA can constitute in the long run an impediment on the conclusion of the full EPA but is actually welcome to preserve cohesion under UEMOA and ECOWAS which rather help the current regional integration process in the EPA negotiation.

However, the "*faux pas*" made by Cote d'Ivoire do not represent the only mistakes at the origin of the splitting of the region. It is interesting with this regard to point out that apart from the Ivory Coast; none of the ministers in charge of regional integration at the local level were involved in the EPA negotiations<sup>144</sup>.

This begs the question of whether or not regional integration will play a role in a final agreement at all.

Furthermore, at the meeting for the mid term review of the region on the RoO and the EPA project held in Cotonou from 8<sup>th</sup> to 11<sup>th</sup> July 2008, where absent Cap Verde, Liberia and Niger and this was not the first time countries did not show up at important meetings.

Of course, this situation was reflected in their ability to put forward a text proposal to the extent that in 2007, when Peter Thompson, a Director of the European Commission's department for trade in Brussels called upon the representatives of ECOWAS and UEMOA to put forward proposal texts on market access and services, West Africa has been incapable of drafting any proposal<sup>145</sup>.

This is the probably why the EU cannot be held responsible for all the mistakes done by ECOWAS in failing to incorporate its needs in the EPAs.

In fact, the main concern seemed to securing the market access to the EU in order to avoid erosion of trade preferences which is a very compromising situation as in focusing only on

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<sup>143</sup> see annexe 2.

<sup>144</sup> Eric Hazard: "The Complexities in Negotiating a West Africa EPA". (Oxfam International Regional Trade Campaign Manager; Trade Negotiation Insight "from Doha to Cotonou"; vol.6 n°4 July-August 2007 available at [acp-eu-trade.org](http://acp-eu-trade.org)).

<sup>145</sup> Ibid page 11.

market access; ACP states repeated the pitfall of the past<sup>146</sup> given that there are equally important issues that need also a particular attention.

The same problem occurred during the negotiation for the reciprocal common regime governing Rules of Origin (RoO).

Despite their criticism of the existing RoO regime, ACP countries were equally unable to articulate a unified position on the reform of RoO during the EPA negotiations and instead focused only on negotiating specific changes in certain sectors<sup>147</sup>.

This may be explain by the perception that RoO are an issue of technical detail, coupled with and perhaps driven by their technical opaqueness that result unfortunately in less attention focused on their use as protectionist tools<sup>148</sup>. However, this approach should be abandoned because RoO are a key determinant of market access and as such shouldn't be overlooked in negotiations for preferential market access<sup>149</sup>.

It is obvious that apart from the capacity and administrative constraint authors stressed to be at the centre of difficulties facing by the region in EPAs negotiations, there is also an unwillingness to participate to the process and a lack of commitment from certain countries.

This is exacerbating by the present pace of the negotiations that does not encourage wider participation. Large numbers of participants, whether they be negotiators, civil society or the private sector, are often limited to observer status or providing access to information, rather than being able to make constructive and significant contributions to the debate<sup>150</sup>.

The manner in which the negotiations have been conducted would seem to contradict the goals of the Cotonou Agreement then<sup>151</sup>.

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<sup>146</sup> Patrick Messerlin: "Economic Partnership Agreements: How to Rebound?" (Professor of economics and Director of *Groupe d'Economie Mondiale* at Sciences Po (GEM).

<sup>147</sup> Eckart Naumann: "Economic Partnership Agreements and Rules of Origin: Outcomes and Challenges" (Updating EPAs to today's Global Challenges, Economy Policy Paper Series 09 Page 111).

<sup>148</sup> Patricia Augier : "The Impact of Rules of Origin on Trade Flow", (CEFI CNRS-*Université de la Méditerranée*; (CEFI UMR 6126, CNRS)

<sup>149</sup> Ibid page 2

<sup>150</sup> Eric Hazard: "The complexities of Negotiating a West Africa EPA" (Oxfam International Regional Trade Campaign Manager, Trade Negotiation Insight, From Doha to Cotonou vol 6 n°4 July-August 2007 available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org)).

<sup>151</sup> See Cotonou agreement principles. (The participation of the Civil Society and the private sector to the negotiation process is one of the main principles of the Cotonou Agreement available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org) or [www.eu.org](http://www.eu.org)).

However, ECOWAS should bear in mind that if finalized, EPAs intend to be permanent<sup>152</sup> and as such, its countries ought to work together in coalition at all levels and toward every possible aspect and field that might be of an interest for them in order to strengthen their position and obtain a better legal framework as a result.

Moreover, countries such as Cote d'Ivoire that initialled an IEPA have faced difficulties regarding the insertion of a development chapter in the agreement as all the Interim EPAs do not contain a development chapter<sup>153</sup>. Even the EPA initialled by ECOWAS do not contain one either.

Despite the controversial nature of a development chapter in the EPAs, the agreement should include one since according to a recent study; this kind of agreement is only possible if it is accompanied by a section on development<sup>154</sup>. The said section have to take into account the main preoccupations of the region, as well as by a more in-depth study of regional integration, and by improving productivity and competitiveness and the achievement of food security. West Africa lags behind in all these areas and without a development chapter will not be able to catch up and authorise an opening up of 80 percent of its markets to European exports by 2020 as required by the EPAs.

If the region updates its bargaining position in ameliorating its interventions in the EPAs negotiations, then ECOWAS would move towards meeting the expectations of its leaders.

## 2. The need for policy space in the EPA context.

In spite of the current globalization dynamic, some countries opted for a more protectionist approach as to preserve their development space while others fully embraced the liberalisation process. Under this chapeau, these examples will be highlight after showing the function of development space in developing economies.

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<sup>152</sup> Source: Speaking Notes Dr. Paul Goodison for ACP-EU Joint Parliamentary Assembly, 10 September 2008.

<sup>153</sup> Source : The New EPAs, ODI-ECDPM, 31 March 2008.

<sup>154</sup> Obtain From "*Etude des Alternatives aux APE*". This study was commissioned by Roppa, Oxfam International and the Rural Hub, December 2006.

a) The function of development space in developing economies.

In the field of economics and related areas such as law and sustainable development, Authors have long agreed on the key role governments have to play in the development of their countries<sup>155</sup>. This role is related often to the space available to them in designing national policies aim at ensuring social and economic development through framework that target national products or services as priorities.

These policies generally discriminate against others countries by granting favourable treatment to national trade sectors or at behaving in a way as to limit the openness of a country to foreign competitors or to foreign investment<sup>156</sup>.

While it is believe that the rationale behind these policies is to ensure that a state is sufficiently equipped to face competition, Joseph Stiglitz (Nobel Price of Economy) mention however their increasing importance in the seeking of development by developing countries.

According to him, the space available to governments authorities in setting up trade policies is vital to develop sectors of the economy that need the state intervention such as Infant Industry, Banking sector regulation and Greenfield projects. Its objective as he put it, is not only to strengthen an economy to a point whereby it could face liberalization but rather to ensure in the long term its seeking of other frontiers for investment.

Powerful economies such as the United States and Europe undertook the very same policies to reach their current level of development before being majors foreign direct investors and services providers all around the world<sup>157</sup>.

Yet, in the context of current multilateral and bilateral trade agreements, this space once available to countries as to carry on development framework is being gradually restricted<sup>158</sup>. As a result, today's countries that are seeking development are better off in benefiting from the same space in setting tools that meet their development ambition.

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<sup>155</sup> Amit Bhaduri: "Toward the Optimum Degree of Openness" (Putting development first Page 69).

<sup>156</sup> Mary Hallward-Driemeier: "Do Bilateral Investment Treaties Attract FDI? Only a bit...and they could bite". (World Bank, DECRG June 2003).

<sup>157</sup> Kevin P. Gallagher: "Globalisation and the Nation-State: Reasserting Policy Autonomy for Development", (Putting Development First, Page 1).

<sup>158</sup> Ibid

This is probably why there is a growing consensus in International trade literature that existing and proposed rules for the global economy are restricting policy space for development in the nation that need development the most.

The economist William Cline has shown that “three-fourth of the world’s poor live in countries that are considered too developed to qualify for any of the special regimes oriented toward benefiting countries in these grouping” (Cline 2004: 10).

A current example is the EBA regime that secured market access for LDCs to the EU and which Cote d’Ivoire though a heavily indebted poor country is not eligible for.

Even the GSP+ a second sub-regime of the GSP system and which is more advantageous than the EPAs is not easily granted though the EU stressed of its availability for developing countries with no EPA and that have applied for it<sup>159</sup>.

In fact, it is difficult to understand why an alternative regime to the EPAs exists without being accessible while current EPAs on the table are said to be more stringent than the WTO rules.

Thus, it is interesting what these countries are required to be granting the GSP + when for a very long time they have benefited from a more advantageous regime without complying with any of the International conventions they are now required to comply with in order to be granted the scheme.

The rationale behind this attitude as expressed by many ACP negotiators is to force ACP countries to converge toward an EPA as to meet the EU schedule since their priorities are barely taken into account.

The Millennium Development Goals forged in 2001 by the United Nation General Assembly recognized that trade policies can play a role in achieving development goals, but only if done properly and with recognition of special and differentiated treatment for developing countries.

Yet as emphasized in chapter II of this study, many provisions contained in the Cote d’Ivoire IEPA do not really consider special and differentiated treatment.

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<sup>159</sup> Nigeria and Gabon, two non-LDC countries that have concluded no EPA have seen their application rejected on the basis that participation in the scheme requires the ratification and implementation of a number of International conventions related to Human Rights, labour Law and Democracy; (Source: “Alternatives Trade Regimes” in the New EPAs, ODI-ECDPM, 31 March 2008).

The most obvious one with this regard is certainly the Most Favoured Nation clause or MFN clause present in article 17 of the Cote d'Ivoire IEPA and article 19 of the CARIFORUM EPA.

The principle of the MFN clause is simple: following the EPA, should any ACP country or grouping conclude a free trade agreement with any developed country or any other (i.e. non- EU) country or grouping which is a *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 and vice versa<sup>160</sup>.

The MFN clause is a symmetrical restriction of policy space in the sense that both parties are obliged to extend to the other improvements in treatment which is unacceptable with regard to the difference in their level of development.

The fact that the EU compel through this article Cote d'Ivoire to pass on to it advantages obtain in third agreement knowing that it has to catch up a retard on development confirm the total dismissal of the principle of special and differential treatment.

And as Brazil put it in its concern to the WTO on this clause: "if confirmed, the MFN clause will discourage or prevent third countries from negotiating FTAs with EPA parties and will create major constraint to south-south trade when we are witnessing a major extension of that trade".

This is anything but welcome within the context of a Development Round given that the MFN clause essentially ensures that the ACP countries cannot discriminate against the EU in future agreements.

The term "*major trading economy*" is defined in most texts as either countries having a percentage share of world trade greater than 1 per cent, or regions with a share of greater than 1.5 per cent and such a distinction would include agreements with the three powerhouse developing economies of India, Brazil and China<sup>161</sup>.

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<sup>160</sup> Dan Lui and San Bilal: "Contentious Issues in the Interim EPAs: Potential Flexibility in the Negotiations"; (Discussion Paper N° 89 March 2009). [www.ecdpm.org](http://www.ecdpm.org)

<sup>161</sup> Ibid Page 27.

Though the absence of any definition of “*FTA with third parties*” has led some to point out that the MFN clause might not apply fortunately in the case of agreements that were notified to the WTO under the Enabling Clause \_which will have the merit to exclude from the MFN clause FTA with India, Brazil and China\_ Brazil still object to the MFN clause and express its wish to hear from the EC the rational for devising these agreements in this format.

We completely share this point of view because no matter what a notification of a FTA under the enabling clause might add as advantages regarding the MFN clause for ACP countries that signed an EPA, the MFN clause still stands in stark contrast with every single path undertook to provide developing countries with special and differential treatment.

It is even opposed to the principles of the Cotonou agreement, the basis under EPAs negotiations.

Moreover, it is disappointing that, notwithstanding all the pious references to the special and differential treatment in the Doha Declaration, the on- the ground reality is that any such considerations are being blatantly ignored in the negotiations on services and current bilateral trade agreements<sup>162</sup>

However, in case ECOWAS is given the latitude to set up policy tools, the effective use of that space requires policymakers to have a vision of where they want to take an economy. This, in turn, necessitates the formulation of a national development strategy that has a clear understanding of local capabilities, constraints and opportunities.

They will have to identify clear objectives; spells out how policy instruments will be deployed to attain them, and establishes effective monitoring mechanisms to determine whether policy targets are being met<sup>163</sup>.

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<sup>162</sup> Ajit Singh: “Special and Differential Treatment: The Multilateral Trading System and Economic Development in the Twenty-first Century” (Putting Development First page 233).

<sup>163</sup> United Nation Conference on Trade and Development: “Policy Space: What, For What and where?” Discussion Paper N°.191 October 2008.

b) The example of Latin America and South Korea.

It is important for ECOWAS to be reminded with this regard that perhaps no region of the world has experimented with global economic integration than Latin America. In recent years, a growing range of trade agreements that seek more rapid global economic integration and a deeper liberalisation process have been promoted. After following this dynamic by introducing a package of deep reforms, including reducing tariffs and barriers to FDI during the last twenty years, this region has yet not experienced the promise economic growth<sup>164</sup>.

The point is that the above mentioned trade agreements that seek deeper liberalisation and EPAs are lookalike agreements and though this region followed that rational, the economic development it was seeking did not happened.

In signing an IEPA with its current provisions, Cote d'Ivoire made probably the same mistakes as Latin America years ago which makes it important for ECOWAS to be reminded.

Of course, no country has developed successfully by turning away from global trade. However, what the vast array of studies show is that the positive relationship between trade and investment and growth is contingent upon numerous other institutional factors such as key roles governments play in economic development<sup>165</sup>.

In designing an EPA for the region, ECOWAS should ensure that its countries still benefit from the space need for development.

For instance, as putted in 1999 by the Economists Rodriguez and Rodrik: in contrast to Latin America countries that where flexible in terms of restrictions on Trade and FDI, south Korea encouraged exports and borrowed funds from abroad while being very restrictive on trade liberalisation and FDI. Nevertheless, it was treated with Latin America the same in many models as open economies and did achieve the economic development it was seeking. This is because in partnering with others countries, South Korea managed not to tie its hands up to the extent of being incapable to setting up policies with regard to its own

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<sup>164</sup> Kevin P. Gallagher: "Globalisation and the Nation-State: Reasserting Policy Autonomy for Development" (Putting Development First).

<sup>165</sup> Ibid Page 5.



choices and that corresponds to its very aspirations and rather assured it had enough space to proceed with its agenda.

The attention of ECOWAS has to be drawn on these facts as to better plan its future intervention in the EPA.

Moreover, It is important to remind as negotiation are about to take off once again that recent meetings in Brussels shows that an additional work is needed to hammer out differences on issues such as rules of origin, the Most Favoured Nation (MFN) clause or the link with the Cotonou agreement<sup>166</sup>.

However, there is a concern on the presence of services and trade related issues arrangements in the IEPA as well as in the EPA initialed by ECOWAS that need to be dealt with. In fact, since an EPA does not need to include those arrangements to ensure WTO compatibility<sup>167</sup> their presence under the EPA seem pointless.

If an agreement on trade related areas and services can create opportunities and develop economic sectors in developing countries<sup>168</sup>, one should not dismiss what they may carry in terms of constraint as studies show that it is rather those that are reforming and already have reasonably strong domestic institutions that are likely to gain from ratifying an investment agreement<sup>169</sup> which is not the case for ECOWAS.

ECOWAS have to pay attention to what is needed under an EPA and avoid committing itself unnecessarily. Trade in services and related issues though only pointed out without being discussed in detail in the IEPA are still intended to be included into full EPA.

This is alarming given the provisions and clause embodied in current investment Agreements. Let us quote to this regard the now famous *“Investor-state provisions”* that enables Investors to directly sue governments if a regulation is seen as “tantamount to

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<sup>166</sup> West Africa and the EC met in Brussels from 22 to 26 March 2010 to discuss the way ahead in EPAs Talks (Flash news from EU Trade) [www.eu-acp-tarde.org](http://www.eu-acp-tarde.org).

<sup>167</sup> Christopher Stevens: “EPAs: Entering the Danger Zone” Trade Negotiation Insight Vol.6 N°.4 July- August 2007 Page 1 available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org).

<sup>168</sup> See the NAFTA Agreement between the United States and Canada.

<sup>169</sup> Mary Hallard-Driemeier: “Do Bilateral Investment Treaties Attract FDI? Only a bit and they could bite”, page 23 (June 2003 World Bank, DECRG).

expropriation”<sup>170</sup>. Many countries have witnessed difficulties due to this clause which is the case of Canada that had been led to thwart a proposed health bill after being sued by an American Investor and has managed to consider only two new environmental regulations since the signing of NAFTA<sup>171</sup>.

Since there is no guarantee that the EC will not also require such a clause, ECOWAS for now should agree on what is needed for the EPA to be WTO compatible; and in the case an arrangement on trade in services and trade related issues turn out to be relevant, then the size of the suits and the potential constraints on policy choices should give it signatories pause over the precise nature of the terms it will agree to.

Fortunately, the inclusion of these agreements into full EPA is to be discussed as set out in the *rendez-vous clauses*<sup>172</sup>. ECOWAS could use this state of fact as to think properly the inclusion of arrangements on trade related issues under in the EPA.

Preliminary conclusion:

Recently, the debate on EPAs has been oriented toward updating the content of these agreements<sup>173</sup>. It is probably the stalling of the negotiations as well as the growing concern that EPAs are not development friendly that led to this conclusion. Thus, with regard to what have been said, there is indeed a need to update the legal provisions of the EPAs.

If its content is to be updated, then the approach adopted by both parties in the negotiations has to be revisited.

The rather hesitant and weak position of ECOWAS and Cote d’Ivoire combined with the strong, overwhelming approach of the EU has resulted in the current IEPA. Then, any attempt to update the EPAs will require from ECOWAS to move from ignorant and weak to strong and aware of the challenges EPAs represent.

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<sup>170</sup> Kevin. P Gallagher: “Globalisation and the Nation states: Reasserting policy Autonomy for Development” Page 11. The author even point out to the fact that several social and environmental policies have been called into question in Investor-states disputes under NAFTA (North American Free Trade Agreement) and a host of bilateral deals.

<sup>171</sup> Recent cases on compensation of expropriation. “Highlighting Regulatory Takings” by Mary Hallard-Driemeier; (June 2003 World Bank, DECRG).

<sup>172</sup> Source: The new EPAs, ODI-ECDPM, 31 March 2008. [www.ecdpm.org](http://www.ecdpm.org)

<sup>173</sup> See “Essays on the Future of Economic Partnership Agreements” (Economy Policy Paper Series 9).

What need first of all to be update is the way parties understand this agreements and how they behave toward the achieving of its purposes.

In addressing past mistakes and anticipating those that are not yet done, ECOWAS will have a strong bargaining position in negotiating the EPA.

#### **CHAP IV: CONCLUSION: SOME PROPOSITIONS TO ECOWAS NEGOTIATORS: ARGUMENTS AND MEASURES THAT COULD BE ADOPT BY THE REGION.**

In order to minimize the impact of EPAs on ECOWAS countries trade, several suggestions were made. However, a few examines how developing countries can use existing policy space, and enlarge it, without opting out of international commitments. In fact, if EPA are stressed to be far from development friendly, not to sign an agreement of any kind with the EU can turn out to be harmful in the long run for ACP countries' economies<sup>174</sup>.

It is important with this regard to mention that in 2007 EU imports alone into the region amounted to €40.2 billion and ACP exports €39.7 billion<sup>175</sup> which means that the EU is a market of significant importance to ECOWAS countries.

At the current stage of their relationship, it is advice that ECOWAS takes full advantage of development space still available while battling for more flexibility under the EPAs instead of turning its back to bilateral commitments.

Even though some authors<sup>176</sup> argue that PTAs have a negative impact on developing countries as they are contradictory to diversification which is the underlying goals for such agreements, PTAs such as the African Growth Opportunity Act (AGOA) \_which is however not the emphasized of this chapter \_should be taken advantage from to avoiding relying exclusively on trade with the EU<sup>177</sup> .

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<sup>174</sup> See annexe 2.

<sup>175</sup> Journal on Economic Policy Reform, on the Empirics of Market Integration in ECOWAS, Daniel Gbetnkom, 01 December 2006, page 4.

<sup>176</sup> Mueller Tina: "the effect of the African Growth and Opportunity act (AGOA) on African Exports to the US"; article available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org).

<sup>177</sup> Maxinne Kenneth, Director of the Southern Africa Trade Hub (United State Agency). Information obtains from class notes (LLM Trade & Investment, Centre for human Rights University of Pretoria).

Moreover, it is argued that a meaningful context for policy space must extend beyond trade policy and include macroeconomic and structural policies that will achieve developmental goals more effectively<sup>178</sup>.

Under this chapter, some propositions are made that do not cover for obvious reasons the wide range of suggestions encountered on the subject.

In the EPAs context, the rationale behind many arguments of the EC can be called into question and constitute the basis on which ECOWAS can bargain to obtain more flexibility. Thus, there are in addition instruments to ameliorate current development space should the opting out from the EPA be detrimental for ECOWAS.

#### 1. Measures that can be adopted by the region to reduce the EPA impact.

These can be considered as instruments that target an attitude ECOWAS can espouse in order to pursue its development objectives without compromising itself internationally. With no intention to advocate for a passive approach that implies a somewhat docile behavior from ECOWAS in the negotiations, we highlight the fact that development can be reached by the region without turning completely its back to international and bilateral commitments.

If EPAs have been stressed to shrink current development space, several propositions are made in order to enlarge the space available. These are national and international measures to enlarge policy space. They are related to macro economic policies and structural policies, mainly trade and Industrial that can be followed at a national and regional level<sup>179</sup>.

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<sup>178</sup> United Nations Conference on Trade and Development, "Policy Space: What, for What and Where?" (discussion paper N° 191 October 2008; [www.unctad.org](http://www.unctad.org))

<sup>179</sup> Ibid Page 14.

a) National measures to enlarge policy space.

Concerning the macro economic policies, *source of current restriction may be related to De facto* (particularly financial) integration, Loan conditionality of international financial institutions Aid conditionality of donors and could be addressed at the national level by the reassessment of policy targets and instrument target relationships, from emphasizing monetary stabilization towards emphasizing real economic variables and the interrelationship between stabilization and growth enhancing policies.

Existing restriction on trade are related to the “*De jure*” trade integration through both multilateral agreements, and in particular bilateral and regional North-South agreements.

National measures are pertaining to the reassessment of policy targets and instrument-target relationships, from emphasizing maximization of export market access and FDI inflows toward maximizing creation of domestic value added and linkages.

More important is the avoidance of additional constraints from bilateral trade and investment agreements.

b) International measures to enlarge policy space.

At the international, tighter multilateral disciplines over macroeconomic and exchange-rate policies of countries that have the greatest impact on global monetary and financial stability are advised as well as better macroeconomic and exchange-rate policy coordination between key currency countries, regional monetary and financial cooperation among developing countries.

As far as concern trade and industrial policies, International measures consist in avoiding further tightening of WTO disciplines on developing countries' industrialization strategies and of multilateralisation of WTO-plus rules on intellectual property rights, investment, government procurement, etc; but rather Tightening WTO disciplines on developed-country use of trade contingency measures (e.g. zeroing in antidumping) and agricultural support and protection.

The issue of Institutional norms though not the target of this chapeau should be also mentioned.

In fact, developed countries' dominance of multilateral norm setting and their use of their own institutional settings as a blueprint for national institutions in developing countries should be challenged at the national level with a reorientation from efficiency-enhancing to growth-enhancing institutions and at an International level through the reassessment of global economic governance structure to allow developing countries to become proactive norm setters.

*(Propositions made by the United Nation Conference on Trade and Development; discussion paper N° 191 October 2008; table 1).*

## 2. Arguments ECOWAS can use in negotiating the full EPA.

Authors acknowledge several arguments that can be in favour of ACP countries in negotiating a more flexible framework under EPA. Whether or not the EU will take them into account is another debate yet, these are arguments that may be helpful and are mostly related to technology transfers, the period for tariffs dismantling and RoO.

### a) Arguments related to the transfer of technology.

The purpose of the EPA as stated in the Cotonou agreement is for both parties to open their market to each other while allowing for the smooth entering of the ACP region in the world economy.

Development is also targeted and with this regard transfer of technology is a very important subject. In fact, International transfers of technology have become acknowledged as one of the effective mechanisms that promote growth and development in developing countries<sup>180</sup>. This is because the possibility of increasing local productivity by means of technological transfer allows the creation of indigenous technical knowledge and leads to a substantial level of technological catch-up<sup>181</sup>.

Apart from the Cotonou agreement where it is emphasized in article 23(j) that “*cooperation between parties shall support the enhancement, transfer and absorption of new technologies*”, the issue is not given a place in the EPAs.

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<sup>180</sup> See Robert M. Solow: “Technical Change and the Aggregate Production Function” (The Review of Economics and Statistics 39 (1957): 312-320).

<sup>181</sup> Richard D. Robinson: “the International Transfer of Technology: Theory, Issues and Practice” (Cambridge: Ballinger, 1988), 25 et Seq.

However, article 41 (4) of the IEPA which states that “*parties shall also directly exchange information on areas which they agree to be of potential importance for their trade relations, including food safety issues, the sudden appearance of animal or plant diseases, scientific opinions and other noteworthy events relating to product safety*” is the occasion for ECOWAS to ask for a cooperation on technology transfer since this will serve the interest of both parties.

In fact, how can ECOWAS prove *with due regard to its rather low technological skills* that, (as required by article 6 (3) of the Sanitary and Phytosanitary Agreement), an area is a *pest or disease free area* or an area of low *pest or disease prevalence* if not by having the technology necessary to do so.

Moreover, trade in general is very often about trade in knowledge and in technology embodied in new traded goods and cannot be viewed isolated from technologies transfers and knowledge of production process<sup>182</sup>.

As a result, the learning process in international trade may well be the most important dynamic gain occurring from trade<sup>183</sup> and we believe that EPAs should embody this gain.

b) Arguments with regard to the RoO, export taxes and the period for tariff dismantling.

As a as concern export taxes, the potential solution might be to leave export taxes to be agreed in a multilateral setting at the WTO since it is arguably the best place for disciplines on export taxes, since a partial or “*second best*” solution – applied only in limited bilateral trade – could in practice and under certain conditions lead to further distortions in global supply chains through trade diversion<sup>184</sup>.

Concerning the RoO, some regions have suggested that additional criteria should be considered, including the possibility that rules of origin be made asymmetric, (i.e. that the rules of origin governing EU exports into ACP markets should be more stringent than those

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<sup>182</sup> Amit Bhaduri: “Toward the Optimum Degree of Openness: Some Implication of Globalisation for Developing Countries”, (Putting Development First, Page 69).

<sup>183</sup> Ibid Page 70.

<sup>184</sup> Argument made by San Bilal and Dan Lui ([www.ecdpm.org](http://www.ecdpm.org) ECDPM). Discussion paper N° 89, March 2009.

applicable to ACP exports into EU markets). There have also been calls for full cumulation to apply<sup>185</sup>.

Furthermore, one of the sensitive points of the negotiation is the period for tariffs dismantling which ECOWAS stressed to be too short. There is a possibility to argue for a longer period in referring to the mixed nature of the EPA.

In fact, considering that it is a free trade area between developed countries on the one part and developing countries on the other; considering also the implicit recognition of a possible asymmetry by the EC which proposes a 100% liberalization, we have come to the conclusion that the 80% rate is a weighted average that allows West African countries to propose an opening up of their markets for up to 60%<sup>186</sup>.

The fact of the matter is that the members' practice, which appears to be a consensus, suggests that an RTA, of which approximately 80% of products are liberalized, will be accepted without any difficulty by WTO members<sup>187</sup>. Thus, Article XXIV.8 of the GATT states clearly that *substantially all the trade* that must be liberalized relates to products originating in the constituent territories of the Free Trade Area." There is then no attempt at distributing liberalization charges between the parties and the numerous RTAs signed under the auspices of Article XXIV almost never confer perfectly equal liberalization charges to parties<sup>188</sup>.

Therefore, as the EU already proposed 100% of market opening, to reach the weighted average of 80% of liberalized trade in the EPA, nothing but a unilateral political will of ECOWAS, or an efficient pressure of the EC, should force them to go beyond the opening up of 60%.

Thus, as pointed out by the economist Amsden: *"the bark of the WTO appears worse than its bite"* and many bilateral agreements have taken advantage of this situation where necessary adhering creatively to the letter and not necessarily to the spirit of the WTO on

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<sup>185</sup> Marc Pearson: "Agreeing EPA rules of origin: a strategy unfolds" (Trade Negotiations Insights From Doha to Cotonou Vol.6 No.4 July - August 2007).

<sup>186</sup> Article XXIV of GATT and the EPA: Legal Arguments to support West Africa's Market Access Offer; Author: Dr El Hadji A. DIOUF (Analytical document of Enda Third World, prepared on behalf of the West African Platform of Civil Society Organizations on the Cotonou Agreement; POSCAO- AC)

<sup>187</sup> Ibid page 22

<sup>188</sup> Ibid page 28



specific matters avoiding in so doing its bite<sup>189</sup>. This could inspire EPAs parties in the seeking for more flexibility in the volume of trade that should be liberalised as well the tariff dismantling period.

More at stake is that no RTA concluded with transition periods beyond the standards has been deemed incompatible with WTO. The main guideline for RTA is no longer the idea of compliance with the WTO Law, but the taking into account of the specific interests of the parties to a RTA.

The practice has provided interesting cases such as the trade Free Trade Agreement between USA and morocco that provide for a 24 year period for tariffs dismantling. There is also the USA –Australia FTA with an 18 year period for tariffs dismantlement.

This is interesting given that though a developing country; Morocco is far more advanced economically than any of ECOWAS states. Thus, if a FTA between 2 advanced economies such as the USA and Australia provides for an 18 year period for tariffs dismantling, how much should a FTA between Europe and one of the poorest regions of the World should provide for?

In fact, these periods reflect the realities of the economies in presence. As an emerging country, Morocco cannot however compete with the USA on the same basis. And no matter how advanced Australia is, there is still a gap between it and the USA that need to be bridged. Obviously, These FTA are more realistic than the EPAs of the ACP-EU trade relationship and thus are likely to born fruit which may not be the case for the EPAs.

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<sup>189</sup> Kevin P. Gallagher: “Globalisation and the Nation-State: Reasserting Policy Autonomy for Development” (putting Development First page 13).

## Final Conclusion:

There are many challenges facing by the region in the EPA, so are the potential solutions proposed. If all of them cannot be acknowledge here as to fully enumerate subjects that have to be changed, what is clear in return is that for the EU to build a true partnership with West Africa, words must be backed up by deeds<sup>190</sup>. The EPAs as they currently are have to be update to meet the objectives and principles at the origin of their drafting<sup>191</sup>.

Several ambiguities must be clarified in good faith and more as stake from an ECOWAS perspective, the issue of compatibility to the WTO must not take preference over sustainable development.

Though not to reach an agreement in the long term may be detrimental for the region economy, ECOWAS needs to diligently guard against being coerced to enter into an EPA that does not meet its development goals as the consequences for this would indeed be dire to its population.

In fact, without governments' direct action and intervention, widening relative and, at times, absolute poverty becomes a very likely outcome of the market process<sup>192</sup>. The fact of the matter is that, to date, globalisation has turned out to be a flawed game whose asymmetrical rules are fixed to the advantage of the richer more powerful nations<sup>193</sup>.

Indeed, it must be pointed out to the need for greater flexibility in setting rules, taking into account the different stage of development of different countries while emphasised on the internal rather than the external market by national governments contrary to the present trends in globalisation<sup>194</sup>.

This is because while PTAs and BIT are stressed to undermine the functionality of the WTO multilateral trading system, FTAs which were supposed to bridge the gap between WTO

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<sup>190</sup> Eric Hazard: "The complexities of Negotiating a West Africa EPA", (Oxfam International Regional Trade Campaign Manager; Trade Negotiation Insight, From Doha to Cotonou vol 6 n°4 July-August 2007 available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org)).

<sup>191</sup> Emily Jones and Darlan F. Marti: "Updating Economic Partnership Agreements to Today's Global Challenges"; (Essay on the Future of Economic Partnership Agreements, Economy Policy Paper Series 09).

<sup>192</sup> Amit Bhaduri: "Toward the Optimum Degree of openness: Some Implication of Globalisation for Developing countries". (Putting Development First Page 70).

<sup>193</sup> Ibid page 72.

<sup>194</sup> Ibid page 76.

rules and bilateral agreements have worsened the situation infringing sometimes WTO rules<sup>195</sup>.

To the extent that unaccommodating trade policies are impediments to economic expansion and development, ECOWAS must have the courage to challenge them for their amelioration.

Thus, if there is a common agreement that EPAs must be designed to serve development, there is indeed a close consensus that parties need to show increased flexibilities in their approach to move the negotiations forward, particularly in light of the ongoing financial crisis<sup>196</sup>.

The fact of the matter is that though globalisation has enhanced the opportunity for success, it has also posed new risks for developing countries<sup>197</sup>. These risks have to be acknowledge by both parties and deal with in good faith to reach a development friendly EPA; and this imply first of all a clear recognition by the EC of the insufficiencies contain in the current agreement. At that stage of the negotiation, we only voiced the hope that ECOWAS will be wise enough to ensure the full realization of promises held under a regional EPA cleared from all the imperfections contain in IEPA of Cote d'Ivoire.

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<sup>195</sup> See Article 15 of the Cote d'Ivoire IEPA on the "Stand Still Clause". Available at [www.acp-eu-trade.org](http://www.acp-eu-trade.org).

<sup>196</sup> Updating Economic Partnership Agreement to Today's Global Challenges: Essays on the Future of EPAs. (Economy Policy Paper Series 09).

<sup>197</sup> Joseph E. Stiglitz: "Development Policies in a World of Globalisation" (Putting Development First page 32).

**ANNEXES: COMMUNICATION VIA EMAL WITH SAN BILAL.**

The following emails are communications with the Author and have been kept in their original version for testimony.

Mr San Bilal is the Head of the Economic and Trade Cooperation Programme at the European Centre for Development Policy Management (ECDPM).

He has published widely on the Economic Partnership Agreements Negotiations and has participated to the writing of most of the relevant papers on the issue. He is also the initiator of the [www.acp-eu-trade.org](http://www.acp-eu-trade.org) web site that provides for recent news on EPAs issues with regard to each regional grouping.

**ANNEXE 1**

A.

From: PRISCA DADEHYS GAH <dadehys@yahoo.fr>  
To: sb@ecdpm.org  
Date: 01/04/2010 01:57 PM  
Subject: Queries from an llm student in trade law at the university of Pretoria.

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Dear Professor San Bilal,

I was wondering if you could answer some of my preoccupations on the Cote d'Ivoire IEPA. It is about the information you gave me a few weeks ago concerning the Cote d'Ivoire which unilaterally delayed the implementation of the IEPA, pending in doing so the conclusion of a full EPA for the region namely ECOWAS.

The 1st question is: why do you think this current situation impede on parties ability to reach a comprehensive EPA for the whole region?

2nd: what are the reasons put forward by Ivory Coast to justify such decision and what can be its possible consequence? (The web site of the republic of Cote d'Ivoire is very busy with the next election to the extent that recent developments on EPAs are merely given a place).

3rd: I acknowledge that I read many of your papers on the issue (I should even admit that most of the material I have for my research come from the ECDPM web site) still, I would like to know from your personal point of view: is it a good decision for a country such as Cote d'Ivoire to opt out of EPA if it were to do so?

I hope these are not too many questions at the same time and that you can briefly handle them whenever you like to. I would also like to thank you for being available because I know that you might be very busy. I will appreciate to read you soon.

Best regards.

DADEHYS NOELLIE GAH  
LLM IN INTERNATIONAL TRADE LAW  
CENTRE FOR HUMAN RIGHTS UNIVERSITY OF PRETORIA (SOUTH AFRICA).



B.

From: SAN BILAL <sb@ecdpm.org >  
To: dadehys@yahoo.fr  
Date: 01/04/2010 01:57 PM  
Subject: Re: queries from an llm student in trade law at the university of Pretoria.

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You're catching me at an extremely busy time; so briefly;

1. The fact that CdI has concluded an EPA does split in principle UEMOA, a CU which must have a CET, so that's a problem; the fact CdI doesn't implement its EPA (= no market opening for EU imports) means that the UEMOA CU is preserved and that helps (not impede) the current regional EPA negotiations
2. CdI does not implement the EPA so as to continue to respect its CU obligations under UEMOA Treaty, i.e. apply the UEMOA CET; opening up to EU products would be in breach of UEMOA Treaty, and would most likely be condemn by UEMOA Court of Justice...
3. the current situation is not sustainable in the long run; but for the time being, provided a regional EPA is concluded soon, it is the best practical option.

Hope this helps!

Best wishes

San Bilal



## ANNEXE 2

A.

From: PRISCA DADEHYS GAH <dadehys@yahoo.fr>  
To: sb@ecdpm.org  
Date: 02/23/2010 09:59 AM  
Subject: Re:

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Dear Professor San Bilal,

I am Dadehys Prisca from the LLM programme in trade Law at the University of Pretoria. I am very interesting in the interim EPA of western Africa and will really appreciate if you can answer some of my preoccupations.

According to the stepping stone agreement signed by Ivory coast in late 2007, the Parties were supposed to establish a reciprocal common regime governing the rules of origin by 31 July 2008 at the latest, based on the rules of origin set out in the Cotonou Agreement and providing for their simplification, in view of the Ivorian Party's development objectives, stated article 14 of the EPA. I have been trying to find out whether this common regime was established without success and hope you will be able to answer this question.

Best Regards

DADEHYS NOELLIE GAH  
MASTER STUDENT IN TRADE LAW  
UNIVERSITY OF PRETORIA,  
SOUTH AFRICA.



B.

From: SAN BILA <sb@ecdpm.org >  
To: dadehys@yahoo.fr  
Date: 02/23/2010 09:59 AM  
Subject: Re:

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Dear Dadehys Noellie Gah,

to my knowledge, they have, as I remember their negotiations in 2008 to that effect. The final interim agreement was published in the Official Journal in 2009. See <http://www.acp-eu-trade.org/index.php?loc=epa/agreements.php>

But please note that Ivory Coast has unilaterally delayed the implementation of the agreement, pending the conclusion of a regional ECOWAS EPA.

Best wishes,

San Bilal

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Dr Sanoussi Bilal  
Head of the Economic and Trade Cooperation Programme  
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