

## CHAPTER 7 NEPAD, THE NEW GLOBAL PARTNERSHIP FOR DEVELOPMENT AND THE RTD

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### 7.1 Introduction

The vital question in this chapter is the following: Is NEPAD capable of setting up the new global partnership needed for the realisation of the RTD?

Early in this study, it was observed that the RTD is made of a bundle of rights, that the state is the primary duty bearer and that the international community has a vital role to play through international co-operation to ensure the enjoyment of the right. Subsequently, it was demonstrated that NEPAD, through the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance,<sup>1439</sup> is all about realising the bundle of rights elements

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<sup>1439</sup> Assembly of Heads of State and Government, 38<sup>th</sup> Ordinary Session of the OAU, 8 July 2002, Durban South Africa, NEPAD Declaration on Democracy, Political, Economic and Corporate Governance AHG/235 (XXXVIII) Annex I. For more insights on this instrument, see K R Hope ‘Practitioner perspective –towards good governance and sustainable development: the African Peer Review Mechanism’ (2005) 18 (2) *Governance: An International Journal of Policy, Administration, and Institutions* 288.

of the RTD, though the plan was hindered by the lack of popular participation and lack of resources among others; it was also shown that the continental plan addresses the role of the state through the APRM as well as through its mainstreaming into national development policies. To complete the coverage of the RTD elements through NEPAD, this chapter will focus on the place of international co-operation or partnership in the NEPAD programme.

Article 22(2) of the ACHPR calls upon African states to act ‘individually and collectively’ for the realisation of the RTD in Africa; collectively, this entails measures through international co-operation amongst African states, where the *pacta sunt servanda* principle applies.

However, on the international plane, the UN Charter,<sup>1440</sup> the UNDRD<sup>1441</sup> as well as the Vienna Declaration<sup>1442</sup> calls upon states to come together through international partnership in view of realising a better life for all or realising the RTD. Nonetheless, as mentioned earlier, the collective responsibility for the realisation of the RTD is very controversial.

Nevertheless, aware that decisions taken in New York or Geneva affects people’s lives in Yaounde (Cameroon) or Arusha (Tanzania), NEPAD, amongst its strategies to end Africa’s developmental ill and realise the RTD, intends setting up a new global partnership with the international community including multilateral agencies.<sup>1443</sup>

The aim of this chapter is to examine to what extent such a partnership is possible or feasible. To achieve its goal, the chapter will be divided in four parts including this introduction. The second one revisits the concept of partnership; the third one focuses on NEPAD capacity to get a new partnership from the international community. In this section, the examination of the feasibility of a new global partnership will be done through a brief analysis of the partnership between NEPAD and the G8, its role in the World Trade Organisation (WTO)

<sup>1440</sup> Art 55 & 56.

<sup>1441</sup> Art 6(1) & art 7.

<sup>1442</sup> Para 10(4), 12 & 13.

<sup>1443</sup> NEPAD 2001, part VI, 51.

with a special attention to the TRIPS and AoA Agreements, the ACP Agreement and the EPAs. The last part of the chapter will summarise the chapter in providing concluding remarks.

## 7.2 Brief overview of the concept of partnership

Originally the term partnership derives from the 1968 World Bank report, ‘Partners in Development’, which was produced under the guidance of the ex-Canadian Prime Minister Lester Pearson.<sup>1444</sup> The report emphasised discontent with existing aid relations at the time and demonstrated its preference for the concepts of donor and recipient in future development co-operation.<sup>1445</sup> It is also believed that the concept of partnership came from the radical solidarity movement of the 1960s and 1970s based in Latin America.<sup>1446</sup> This movement advocated that ‘international solidarity lay at the heart of development ideology’.<sup>1447</sup> Partnership is informed by the principle of equality between states and mutual commitments, shared responsibility and equitable sharing of benefits.

In their work on the RTD, Chowdbury and De Waart emphasised that partnership is based on the ‘principle of equality’<sup>1448</sup> between states. They states that

[t]he principle of equality (substantive and participatory) intends to bring about a just balance between the diverging and converging interests, particularly between the developed and developing countries...since all states are legally equal, they have the right to participate fully and effectively in the

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<sup>1444</sup> H Stokke ‘Conditional partners? Human rights and political dialogue in the EU-ACP relations’ 1, paper presented at the Annual Conference of the Association of Human Rights Institutes, Vienna, 8-10 September 2006 (working group III).

<sup>1445</sup> Stokke (2006) 1.

<sup>1446</sup> Stokke (2006) 1.

<sup>1447</sup> Stokke (2006) 1.

<sup>1448</sup> S R Chowdbury & P J I M De Waart ‘Significance of the right to development in international law: An introductory view’ in S R Chowdbury, E.M.G. Denters and P J I M De Waart (eds) (1992) *The right to development in international law* 19.

international decision-making process for the solution of the economic, financial and monetary problems as a matter of participatory equality.<sup>1449</sup>

This approach was implemented by the UNDP that replaced the terms ‘donor’ and ‘recipient’ with the terms ‘principal contributor’ and ‘project country’ respectively in its language.<sup>1450</sup> In this context, the creation of an international level playing field should be the rule whereby developing countries are seen as partners with developed ones and not as mere recipients and caretakers of decisions made by others.<sup>1451</sup>

Mutual commitments, shared responsibilities and equitable sharing of benefit are the corollaries of the principle of equality. Such a principle implies that developing countries’ obligations are matched by reciprocal obligations to be carried out by the international community. From this perspective, at international level, an ‘ultimate rule’ or foundation of the global social contract can be established for the realisation of the RTD. In the same light, Sengupta aptly suggests the ‘development compact’ or ‘global social contract’,<sup>1452</sup> whereby developing countries forgo certain prerogative to acquire more development co-operation. The ‘development compact’ actualises the social contract at the global level.

The need to establish a true partnership to ensure a better life for all is secured in international development policies such as the MDGs, discussed earlier,<sup>1453</sup> the Group of 8 richest countries (G8),<sup>1454</sup> and the Least Developed Countries (LDCs)<sup>1455</sup> initiatives. Following this

<sup>1449</sup> S R Chowdbury & P J I M De Waart (1992) 19.

<sup>1450</sup> Maggio & Lynch (1997).

<sup>1451</sup> Maggio & Lynch (1997).

<sup>1452</sup> A Sengupta, 4<sup>th</sup> Report to the Open-Ended Working Group on the Right to Development, E/CN.4/2002/WG.18/2, para 4.

<sup>1453</sup> See MDG No 8 which calls for the creation of a global partnership for development.

<sup>1454</sup> The G8 Official Notice, Genoa 2001: ‘We will also enhance co-operation and solidarity with developing countries, based on mutual responsibility for combating poverty and promoting sustainable development’.

perspective, NEPAD sees the establishment of a ‘new global partnership’ as a strategy to eradicate poverty and stop the marginalisation of the continent to ensure the RTD. Now, to what extent is such a partnership achievable?

### **7.3 NEPAD and the new global partnership**

Aware that Africa is the ‘cradle of humanity’,<sup>1456</sup> and has various resources,<sup>1457</sup> NEPAD commits itself to establish sound macroeconomic policies, social development, accountable government, capacity building, create a favourable climate for investment and savings, and peaceful relations between African countries. In return, NEPAD expects external partners to create trustworthy assistance opportunities for developing countries on the global market, capacity building and technology transfer and ‘to meet the target level of Official Development Assistance flows equivalent to 0.7% of each developed country’s GNP’.<sup>1458</sup> In addition, developed countries have the responsibility to admit African goods into their markets, but more importantly to ‘negotiate more equitable terms of trade for African countries within the [World Trade Organisation] (WTO) multilateral framework’.<sup>1459</sup> How possible is such a partnership? Is this partnership not a simple dream? This question will be answered in four parts: the first one will focus on the partnership between NEPAD and the G8, the second one on the role of NEPAD in the WTO, the third part will quickly look at the ACP Agreement and how it unfolded into the EPAs in which the role of NEPAD will be looked at in the last part of the section.

#### **7.3.1 Partnership between NEPAD and the G8**

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<sup>1455</sup> DCs Programme of Action, 2001: Partnership based on mutual commitment by LDCs and their development partners. Spirit of solidarity and shared responsibility; common but differentiated responsibilities of developing and developed countries.

<sup>1456</sup> NEPAD 2001, para 177.

<sup>1457</sup> NEPAD 2001, para 172, 176 &179.

<sup>1458</sup> NEPAD 2001, para 185.

<sup>1459</sup> NEPAD 2001, para 185.

In its early days, NEPAD presented its new partnership proposal to the G8 seeking a partnership covering the G8 and Africa as a whole through NEPAD. However, the G8 response to NEPAD at its Kananasaki summit in 2002 proved that a true partnership is not for now. In a 12 pages document called *G8 African Plan*, the G8 agreed to build partnership with individual countries in Africa, not collectively as G8 and not with Africa as a whole, but on a bilateral selected basis. This will open doors to interference in countries' sovereignty, because G8 countries will assess African countries according to their own criteria. This is a consecration of 'the rule of the strongest'. The will of the donors will always prevail in the process rather than the one of the receivers. The standards of the donors will be imposed on Africa and they will withhold aid any time they conclude that their standards are not met and can even impose sanctions depending on their will. This leads to the conclusion that there is no strategy in the NEPAD agenda to respond to this 'power game'.<sup>1460</sup> In fact, among others the G8 response limited itself to focus on education, health, governance and others, but ignored the development of infrastructure which is one of NEPAD priorities. Though the debt question was also neglected by the G8, it was finally successfully resolved in 2006 when the G8 played an important role in the debt cancellation of African countries.<sup>1461</sup>

However, as correctly observed by Rukato,<sup>1462</sup> the G8 response was too general and lacked precision and selected countries to be rewarded; most importantly, the G8 response showed that the G8 action is not informed 'by collective responsibility, but rather by collective interest'.<sup>1463</sup> In other words, nothing is done by the G8 from a human rights perspective, the G8 has no obligation or no duty to realise human rights within the context of its partnership with NEPAD which is part of the AU human rights based system. The G8 action is primarily based on its interest. This can only put NEPAD on the weakest side of the balance and as a

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<sup>1460</sup> I Taylor 'The New Partnership for Africa's Development and the global political economy: towards the African century or another false start' 2, <http://www.codesria.org/Links/conferences/Nepad/taylor.pdf> (accessed 15 June 2008).

<sup>1461</sup> Rukato (2010) 201.

<sup>1462</sup> Rukato (2010) 201.

<sup>1463</sup> Rukato (2010) 203.

result such a partnership does not enhance the prospects of the realisation of the RTD through NEPAD. In fact, as discussed in the institutionalism theory, wealthy countries use institutional power to set the rules of the game. As correctly argued by Barnett and Duvall, they use ‘neoliberal institutional approaches that focus on the behavioral constraints’ to weaken third world institutions such as NEPAD that ends up being unable to eradicate poverty.

Taking the discussion to the APRM, the ‘power game’ problem affects the ownership and legitimacy of the APRM. Whereas the Guidelines for countries to prepare for and to participate in the APRM stresses that ‘national ownership and leadership by the participating country are essential’ for a real Peer review,<sup>1464</sup> African leaders highlight the African ownership of the APRM. In this respect, just a day before his country peer review, President Kibaki of Kenya observed:<sup>1465</sup>

The African Peer Review Mechanism is our own process as Africans to enable us to govern our nations better, turn Africa into a working continent, and prepare the way for our children and grandchildren to live in an Africa that is politically and economically stable.

Similarly, at the Eighth Gathering of the African Partnership Forum in Berlin, Germany from 22 to 23 May 2007, APRM representatives claimed that APRM was ‘Africa’s innovative thinking on governance’.<sup>1466</sup> They clearly emphasised that the Mechanism is a ‘unique African instrument, it is African in origin, African inspired and African owned’.<sup>1467</sup> The same claim was made two years earlier by the APRM Eminent Person, the Cameroonian Jeuma in her speech to a panel discussion on Multi-Stakeholders Perspectives on the Implementation of NEPAD organised by the Office of the Special Adviser on Africa to the UN Secretary

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<sup>1464</sup> NEPAD/APRM/panel13/Guidelines/11-2003/Doc-8, para 12.

<sup>1465</sup> Press Statement for H.E. President Mwai Kibaki on the Occasion of the APR Heads of State Forum, July 2006, available at [www.nepadkenya.org/key\\_issues.htm](http://www.nepadkenya.org/key_issues.htm) (accessed 20 January 2007).

<sup>1466</sup> APRM’s Presentation at the Eighth Gathering of the African Partnership Forum in Berlin, Germany from 22 to 23 May 2007.

<sup>1467</sup> APRM’s Presentation at the Eighth Gathering of the African Partnership Forum in Berlin, Germany from 22 to 23 May 2007.

General<sup>1468</sup> and more recently by President Bouteflika who views the APRM as the proof of Africa's understanding that 'good governance provided a plus value to its development and had never been a constraint imposed from the outside'.<sup>1469</sup> These statements clearly emphasises that Africa exercises full sovereignty over the APRM.

From a different angle, it can also be argued that Africa does not own the mechanism. In line with this view, it can be said that the incentive to comply with APRM is that it shapes the way donors and developed countries respond to countries on the continent. After the February 2003 meeting of G7 Finance Ministers and Central Bank Governors, a press release stated:<sup>1470</sup>

Consistent with the G8 Africa Action Plan, we are ready to provide substantial support to African countries that implement [the] New Partnership for Africa's Development (NEPAD) principles and are committed to improving governance and demonstrate solid policy performance.

In other words, donors use the APRM to interfere in Africa's sovereignty. In this perspective, the same Finance Ministers and Central Bank governors emphasised their support for the NEPAD/APRM through a 2003 Working Paper in theses words:<sup>1471</sup>

With respect to Africa, we renew our support to the NEPAD process and look forward to progress in the implementation of the African Peer Review Mechanism, including its governance aspect. We will ask the IFIs [International Financial Institutions] to look for opportunities to coordinate their monitoring and surveillance mechanism with NEPAD's own work.

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<sup>1468</sup> Report of the Panel Discussion on multi-stakeholders' perspectives on the implementation of New Partnership for Africa's Development (NEPAD): four years after, 13 October 2005, United Nations Headquarters, New York.

<sup>1469</sup> 'Algerian President urges AU to integrate NEPAD' *BuaNews* 1 July 2008, available at <http://allafrica.com> (accessed 25 November 2008).

<sup>1470</sup> Government of Canada 2003a, 2 Statement of G-7 Finance Ministers and Central Bank Governors, Paris February 2003 at <http://www.g8.gc.ca/menu-en.asp> (accessed 22 June 2006).

<sup>1471</sup> Government of Canada 2003b, 5 – G7 Finance Working Paper: Aid effectiveness available at [http://www.g8.gc.ca/working\\_paper\\_aid\\_effectiveness-en.asp](http://www.g8.gc.ca/working_paper_aid_effectiveness-en.asp) (accessed 22 June 2006).

These quotes clearly call needy African countries to participate in the APRM if they expect any assistance from donors. Therefore, acceding to the process might just be giving up a state's sovereignty to get help from the international community. In this perspective, it could be argued that the parties are not equals and it is difficult to see how a real partnership can take place between them. In fact, NEPAD and Africa does not set the term of partnership, but obey the rule of partnership set by donors. This led to argue that the economic dependence of Africa on the West will not lead to a proper promotion of human rights.<sup>1472</sup>

Nevertheless, from a different line of thought, it can be argued that the APRM does not open doors to international interferences, especially when one notices that donors are never in the room during peer review processes. Thus, participation in the APRM has nothing to do with pleasing donors, but to enhance good governance and successfully fight poverty in Africa. Former President Mbeki underlined the need to achieve good governance<sup>1473</sup>

[n]ot because we seek to improve our relations with the rest of the world as a first objective, critically important as this is, but to end political and economic mismanagement on our continent, and the consequential violent conflicts, instability, denial of democracy and human rights, deepening poverty and global marginalisation.

However, given NEPAD's financial constraints highlighted earlier, it is very difficult for NEPAD to operate without assistance from the international community. It is equally difficult for donors to give their money without opening an eye on how it is used. Consequently, NEPAD is the weakest link in the relation and will not be able to trade with donors as equal partners. If this is to happen, NEPAD should start by being more self-reliant in terms of financing its activities. This will in return enhance its capacities of achieving the RTD through partnership.

### **7.3.2 NEPAD in the WTO**

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<sup>1472</sup> Appiagyei-Atua (2006) 524.

<sup>1473</sup> T Mbeki 'Letter to the right honourable Jean Chretien, Prime Minister of Canada' 8 November 2002 (on file with author).

Established during the Uruguay Round Agreements (URAs) of its precursor the General Agreement on Tariffs and Trade (GATT), the WTO is the ‘only truly global international organisation dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by world trading nations and ratified in their parliaments’.<sup>1474</sup> It has a membership of 152 countries as of 16 May 2008.<sup>1475</sup> The WTO intends to facilitate and liberalise international trade and work for the economic development of the planet. It seems to be the appropriate platform for NEPAD to realise its priority of setting up a new global partnership for Africa’s development because it is the real place to address unfair trade rules and other impediments to Africa’s development. In fact, the GATT in its Preamble emphasise the need to use trade to better human condition by providing employment and enough resources for all,<sup>1476</sup> especially in the developing world where countries are given preferential treatment and are not bound by the principle of reciprocity in trade.<sup>1477</sup>

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<sup>1474</sup> ‘What is the WTO?’ at [http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) (accessed 16 June 2008).

<sup>1475</sup> ‘What is the WTO?’ at [http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) (accessed 16 June 2008).

<sup>1476</sup> GATT Basic Instruments and selected documents, vol 1.

<sup>1477</sup> Art. XXIV:8 of the GATT reads: ‘The developing contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to trade of less-developed contracting parties. In the same vein, art 18 of CERDS reads: ‘Developed countries should extend, improve and enlarge the system of generalised non-reciprocal and non-discriminatory tariff preferences to the developing countries consistent with the relevant agreed conclusions and relevant decisions as adopted on this subject, in the framework of the competent international organisations. Developed countries should also give serious consideration to the adoption of other differential measures, in areas where this is feasible and appropriate and in ways which will provide special and more favourable treatment, in order to meet the trade and development needs of the developing countries. In the conduct of international economic relations, the developed countries should endeavour to avoid measures having a negative effect on the development of the national economies of the developing countries, as promoted by generalised tariff preferences and other generally agreed differential measures in their favour’. For more on trade and development, see J Bhagwati ‘Introduction’ in Bhagwati, J and Hudec R (eds) (1996) *Fair Trade and Harmonisation*.

At the centre of these provisions, it is the duty of states to contribute to the development of international trade of goods, particularly by means of arrangements and by the conclusion of long-term multilateral commodity agreements, which improve life in every part of the world. All states share the obligation to promote the regular flow and access of all commercial goods traded at stable and fair prices, thus playing a part in the equitable development of the world economy.

However, few years after the creation of the WTO in 1995, it soon became obvious to governments throughout developing countries as they attempt to implement these agreements, that their interests were not considered during the negotiations leading to the adoption of the agreements in question. In fact, using compulsory power, they were clearly in opposition to the concerns and requests of the developing countries, but emphasised the interests and priorities of developed countries. Unfair trade rules such as agriculture subsidies by rich countries, complex and strict rules for food imports, and other protectionist policies imposed on developing countries are legitimised. The most powerful industrialised countries freely hamper the implementation of those URA terms that are contrary to their interests. For example, the US is good in avoiding the implementation of its URA commitments to eradicate its tariff and quota constraints on textile and clothing exports from developing countries.

Nevertheless, it cannot be argued that the URA and even the WTO are worthless for Africa. They create a framework where world poverty can be addressed. In August 2003, a consensus was reached on Trade Agreements on Intellectual Property Rights and public health, empowering poor countries to import medicines for public health reasons under compulsory licenses. However, this was just empty noise because by the end of the WTO Ministerial Conference held in Hong Kong in 2005, many issues were still unaddressed and even today, the question remains unanswered, hence the continuous bad health condition in developing countries and in Africa in particular. Nevertheless, the good news was the agreement on the elimination of agricultural subsidies by 2013.

However, international trade is characterised by self-interest and countries are definitely not there to assist each other on the ground of equality of states. On the contrary, they behave like in a jungle where the strongest beasts eat the weakest. Sharing this view, Keet argues that the WTO is a very complicated negotiation ground where

[r]uthless hard bargaining is driven by powerful corporate and national vested interests, not the polite diplomatic positioning or posturing of Heads of State. And, with the WTO Secretariat clearly biased towards the interests and demands of the most powerful member states, and the expansion of the liberalised global trade regime, the WTO is not a neutral open forum or assembly of nations where world leaders gather to debate and ‘influence’ each other’s positions.<sup>1478</sup>

Apart from being cruel, WTO rules are extremely complex, hence the call for ‘technical assistance and support to enhance the institutional capacity of African states to use the WTO and to engage in multilateral trade negotiations.’<sup>1479</sup> This call had been answered by the WTO which ‘supports NEPAD’s main objectives in the field of trade, particularly through its technical assistance activities for African countries’.<sup>1480</sup> In 2004, out of 501 Trade-Related Technical Assistance, 178 or 36% benefited African countries.<sup>1481</sup> In addition, African countries are included in 12 weeks Geneva-based training courses for government officials; the regional three-month trade policy courses, the Doha Development Agenda Advanced Training courses.<sup>1482</sup> The integrated framework for trade-related technical assistance is another initiative established to assist poor countries to harmonise their poverty reduction strategy with the rules of international trade. There are also various programmes under the

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<sup>1478</sup> D Keet ‘Proposals on the role of trade within the New Partnership for Africa’s Development (NEPAD) – challenges and questions’ Presentation at workshop of African trade union organised by the National Labour and Economy Development Institute (NALEDI), 22-23 May 2003, in Johannesburg, South Africa. Available at [http://www.transcend.org/t\\_database/pdfarticles/584.pdf](http://www.transcend.org/t_database/pdfarticles/584.pdf) (accessed 20 May 2007).

<sup>1479</sup> NEPAD 2001, para 167.

<sup>1480</sup> WTO support to NEPAD, Period of Report: 2004-2005, 1 available at <http://www.un.org/africa/osaa/2005%20UN%20System%20support%20for%20NEPAD/WTO.pdf> (accessed 15 June 2008).

<sup>1481</sup> WTO support to NEPAD, Period of Report: 2004-2005, 1 available at <http://www.un.org/africa/osaa/2005%20UN%20System%20support%20for%20NEPAD/WTO.pdf> (accessed 15 June 2008).

<sup>1482</sup> WTO support to NEPAD, Period of Report: 2004-2005, 1 available at <http://www.un.org/africa/osaa/2005%20UN%20System%20support%20for%20NEPAD/WTO.pdf> (accessed 15 June 2008), 1-2.

Joint Integrated Technical Assistance Programme as well as the Trade Policy Review Mechanism,<sup>1483</sup> all aiming to enhance poor countries' ability to have a say on the international plane.

However, these training programmes do not yield results because of the uneven bargaining power at the negotiation table. In this regard, it is argued that African representatives are vulnerable to pressures and are influenced by their Northern aid and trade partners, who usually approach them openly and in secret far from the negotiations table to oppose and challenge African views.<sup>1484</sup>

Most importantly, training provided might be useless because the fundamental question is to know whether 'technical' assistance from the North is adequate to solve problems in the South; are the contexts and environments similar? The other question on 'technical' assistance is that it is certainly not disinterested, and its content will replicate the views of the pro-WTO institutions and agencies providing the technical assistance or 'capacity building'.<sup>1485</sup>

Nonetheless, it can also be argued that the WTO is international and that its rules are applied universally. There are no specific rules for Africa; claiming that technical assistance from the North cannot solve problems in the South is not true. The problem is not about the nature of technical assistance, but the nature of the rules of international trade. Do they cater for Africa's interests? It does not help to have training programmes based on 'wrong' or inequitable rules. What are needed here are equitable rules or fair trade mechanisms before talking of 'technical assistance'.

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<sup>1483</sup> WTO support to NEPAD, Period of Report: 2004-2005, 1 available at <http://www.un.org/africa/osaa/2005%20UN%20System%20support%20for%20NEPAD/WTO.pdf> (accessed 15 June 2008), 1- 3.

<sup>1484</sup> Keet (2003) Available at [http://www.transcend.org/t\\_database/pdfarticles/584.pdf](http://www.transcend.org/t_database/pdfarticles/584.pdf) (accessed 20 May 2007).

<sup>1485</sup> Keet (2003).

Nevertheless, the Aid-For-Trade (AFT) initiative was launched at the WTO 6<sup>th</sup> Ministerial Conference in Hong Kong in 2005. Its objective was to help developing countries including African ones to use trade as a tool for development.<sup>1486</sup> To operationalise the AFT, the ADB in collaboration with the WTO, UNECA and the Tanzanian government co-organised an Aid-For-Trade Conference in Dar-Es-Salaam, Tanzania from 1 to 2 October 2007. Economic Ministers from African governments' donors, NGOs, government organisations, Regional RECs, private sector, the media and other stakeholders were present at the forum looking for ways to enhance Africa's role in the world trade. A subsequent AFT meeting was held from 19 to 21 November in Geneva and an AFT Advisory Group gathered on 21 January 2008 at the WTO to assess and discuss the initiative further.<sup>1487</sup>

As mentioned earlier, the problem is not the lack of forum for discussing trade or enhancing Africa's capacity to trade, but the unfairness of international trade rules. The ADB calls for 'a shift from awareness to implementation' of AFT.<sup>1488</sup> This thesis shares this view, but also calls for the establishment of fair trade rules before moving to their implementation phase.

Reiterating the demand for global justice through international co-operation, the first UNCTAD (1964), General Principle No 8 specifically called for preferential concessions to developing countries through this statement:<sup>1489</sup>

Developed countries should grant concession to all developing countries and extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions from developing countries.

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<sup>1486</sup> K Bedourama (Secretary General of ADB) 'Information paper on the New Partnership For Africa's Development (NEPAD): 2008 Annual Report'; ADB/BD/IF/2008/47, para 2.36 (on file with author).

<sup>1487</sup> Bedourama (2008), para 236.

<sup>1488</sup> Bedourama (2008), para 236.

<sup>1489</sup> Proceedings of the UN Conference on Trade and Development, first session vol1, Final Act and Reports (1964).

Put differently, developed countries should facilitate the development of poor countries; they should give them the same opportunities they grant to one another without expecting anything in return. In this respect, UNCTAD II in 1968 clarified the objectives of the preferential treatment and non reciprocal concessions to be allocated to the developing countries. They were: firstly to increase export earnings to developing countries; secondly to promote industrialisation, and thirdly to speed up the rate of development.<sup>1490</sup> From this stand point, after the 1979 Tokyo Round, the legal basis for trade co-operation among developing countries was the enabling clause. Accordingly, the contracting parties were allowed to:<sup>1491</sup>

Accord differential treatment and more favourable treatment to developing countries without according such treatment to other contracting parties, and such preferential treatment covers regional or global arrangements among the developing countries for the mutual reductions or elimination of tariffs and other barriers.

Accordingly, not only should co-operation ensure an equitable international economic order, it should take into account the needs and interests of all countries with special attention on developing ones.

However, Africa is faced with compulsory power imposed through the terms and hindrances imposed on regional trade arrangements (RTAs) as established by the WTO. These hindrances make sure that RTAs do not ‘raise barriers that discriminate against third parties in the world economy. Countries in regional economic communities, such as those in Africa, are asked to lower their individual and collective tariff provisions, and remove other external ‘barriers’, in order to ‘integrate the globalised world ‘for their own good’.<sup>1492</sup> In other words, the kind of preferential trade terms and common external terms as well as common external tariffs that categories of countries might exploit for their mutual benefit and ease heavy

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<sup>1490</sup> Proceedings of the UN Conference on Trade and Development, 2<sup>nd</sup> session, Final Act and Reports (1968), Resolution 21 (II).

<sup>1491</sup> Tokyo Round, Decision of 28 November 1979.

<sup>1492</sup> Keet (2003).

pressures from external ‘third parties’ are severely limited by the WTO’s article 24.<sup>1493</sup> In this regard, the Belize Minister of Foreign Affairs and Foreign Trade, Eamon Courtenay correctly observed in his statement at the failed Doha round in 2006:

There is something inherently wrong with a system, which promises development and delivers lower prices for exports. We say there is something fundamentally unfair in a system, which promises a development agenda and delivers suspended negotiations and less market to small, vulnerable economies... Of the 6 billion people on planet earth, 1 billion has more than 80 per cent of world income and 5 billion has less than 20 per cent of the income. Our common charge is to right the imbalance’.<sup>1494</sup>

There is a need to amend this contentious article if the spirit of the 1979 Tokyo Round, offering ‘special and differential terms’ for developing countries is to be respected. So far, NEPAD is yet to address this question. In fact, the current developments at the WTO do not comply with the CERDS according to which

[a]ll States share the responsibility to promote the regular flow and access of all commercial goods traded at stable, remunerative and equitable prices, thus contributing to the equitable development of the world economy, taking into account, in particular, the interests of developing countries.<sup>1495</sup>

The assumption that the ‘marginalisation’ of Africa from the processes of globalisation has been the reason of its underdevelopment and that Africa’s potential has been unproductive because of its limited integration into the global economy is one of the characteristic of the NEPAD’s document. Nonetheless, NEPAD does not convincingly provide the remedies to give a rightful place to Africa in the WTO for example. As long as such remedies are not found, prospects for the RTD in Africa remain very low.

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<sup>1493</sup> Art 24 of the WTO requests amongst others, that regional agreement covers ‘substantially all trade’ and does not take into consideration individual trade arrangements. In short it assumes that all countries are equal and that rules should be applied without exception or rather universally.

<sup>1494</sup> M Gorelick ‘The sixty-first General Assembly: Transcending rifts on development and beyond’ UN Chronicle, online edition, 2006 at [http://www.un.org/pub/chronicle2006/issue\\_4/o406cont.htm](http://www.un.org/pub/chronicle2006/issue_4/o406cont.htm) (accessed 5 January 2009).

<sup>1495</sup> Art 6.

To show the effect of the power game on the international plane and illustrate the points made above, it is important to have a quick look the TRIPS as well as the AoA agreements.

### 7.3.2.1 The TRIPs agreement and the RTD

The main objective of this section is to demonstrate that NEPAD is the weakest link when it comes to use the TRIPs agreement to improve the standard of living on the continent. The section is divided in two parts. The first one presents a brief overview of the TRIPS and the second one discusses its effects on the realisation of the RTD while showing how NEPAD is unable to remedy the challenges.

#### *Brief overview of the TRIPS Agreement*

Prior to the TRIPS Agreement, intellectual property was characterised by a lack of a standardised protection mechanism, hence the reaction of the WTO that established a multilateral framework to address issues relevant to the protection of intellectual property through the Agreement which came into effect on 1 January 1995.<sup>1496</sup> According to the WTO, ‘Intellectual property rights are the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period of time’.<sup>1497</sup> The TRIPS Agreement caters for intellectual properties such as copyrights and related rights, trademarks, industrial design, geographical indications, patents layout design of integrated circuit and undisclosed information. The TRIPS Agreement is the vehicle through which the international community agreed to set up standards, cater for dispute resolution and address various issues related to intellectual property. It is the platform through which NEPAD Should act for the improvement of lives in Africa.

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<sup>1496</sup> Summary of the TRIPS Agreement at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm) (accessed 29 December 2010).

<sup>1497</sup> WTO ‘What are Intellectual Property Rights?’ at [http://www.wto.org/english/tratop\\_e/TRIPS\\_e/intell\\_e.htm](http://www.wto.org/english/tratop_e/TRIPS_e/intell_e.htm) (accessed on 29 December, 2008).

The TRIPS Agreement sets out the minimum standards of protection in each intellectual property to be respected by parties to the WTO. The minimum standards include the identification of the main elements of protection, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. According to the Agreement, member states should be free to adopt measures<sup>1498</sup> to protect public health and nutrition, to promote socio-economic and technological development and to protect against the abuse of intellectual property rights.<sup>1499</sup> However, due to their low level of development, developing countries are given more time to implement the Agreement whereas developed ones had until 1996 to implement the agreement.<sup>1500</sup>

The Agreement also provides that in case of disputes between WTO members in relation to respect for the minimum standards, the WTO dispute settlement procedures will come into play.<sup>1501</sup> In the occurrence of a dispute, a panel of trade experts is appointed to take care of the matter and produce a report. The panel's decision is not final; it may be subjected to appeal to the WTO Appellate Body. If a party to a dispute fails to abide by a decision, the other party can impose trade sanctions on the member if the Dispute Settlement Body is of the view that it is the appropriate way to handle the issue.<sup>1502</sup>

The TRIPS Agreement can also be reviewed through the biennial Ministerial Conferences. This forum is 'the highest decision-making body of WTO and it can make decisions on all matters under any of the WTO Agreements, including the TRIPS Agreement'.<sup>1503</sup> In all, the

<sup>1498</sup> TRIPS Agreement art 1(1).

<sup>1499</sup> TRIPS Agreement, art 8.

<sup>1500</sup> As above, art 66 (1).

<sup>1501</sup> For more on the dispute settlement, see art 64 of the TRIPS Agreement.

<sup>1502</sup> Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-second session 'Economic, Social and Cultural Rights – The impacts of the Agreement on Trade-Related Aspects of Intellectual Properties Rights on human rights' Report of the High Commissioner, UN doc E/CN.4/Sub.2/2001/13 27 June 2001, para 7.

<sup>1503</sup> UN doc E/CN.4/Sub.2/2001/13 27 June 2001, para 8.

TRIPS Agreement aim is to regulate and harmonise the protection of intellectual property on the international plane. Though article 7 of the Agreement recommends that

[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations,

The question remains: to what extent does the TRIPS Agreement take human rights into consideration? Or rather, to what extent is the compensation of the innovator balanced with human welfare? Can NEPAD influence the agreements for the good of Africans?

### ***The TRIPS Agreement, the right to health and the right to development***

As argued earlier, like other organs of the international community, the WTO has the duty to provide for a social and international order that is conducive to the realisation of human rights and the RTD. It is also important to note that most member states of the WTO are also parties to the ICESCR. Article 12 of the ICESCR obliges states to respect, protect and fulfil the right of everyone to the highest attainable standard of physical and mental health. However, articles 27 of the Universal Declaration and 15 of the ICESCR are the main provisions addressing both the protection of the right of an innovator and the protection of human rights.

Article 27 of the Universal Declaration reads:

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

In the same vein, article 15 of the ICESCR provides:

1. The States parties to the present Covenant recognise the right to everyone:
  - (a) To take part in cultural life;
  - (b) To enjoy the benefits of scientific progress and its applications;
  - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

According to articles 27 and 15 of the Universal Declaration on Human Rights and the ICESCR respectively, members of the international community and states parties to the covenant have the obligation to guarantee the cultural rights of everyone. In addition, states parties must ensure that everyone without discrimination enjoys the benefits of scientific progress and its applications. In other words, whenever there is a new book, a new technology or a new drug, states parties to the Covenant are obliged to take the innovation to their people. Nonetheless, articles 27 (2) of the Universal Declaration and 15 (1) (c) of the ICESCR clearly recognise the right of an author to protect and enjoy the moral and material benefits of his creation. Put differently, states parties to the Covenant must ensure that every innovator benefits from his work. Therefore, there is a strong need to find the appropriate balance between the protection of the right of a creator and the protection of human rights, hence the comment that the

ICESCR could be said to bind States to design IP [intellectual property] systems that strikes a balance between promoting general public interests in accessing new knowledge as easily as possible and in protecting the interests of authors and inventors in such knowledge.<sup>1504</sup>

Now, does the TRIPS Agreement strike the appropriate balance between protecting both interests? Without intellectual protection, there will be less innovation and less progress. Researchers must be given incentives to do their job which contributes to the realisation of human dignity. Unprotected creativity will be copied and sold cheaply by dishonest people and this will not encourage the most needed innovation for the betterment of human well-being. Thus, the setting up of copyright, patents, trademarks and other mechanisms mentioned earlier to protect authors is clearly justified. Nevertheless, what is the need to create things that are not accessible to the needy people? Is it correct to live in permanent crisis while remedies are packed and sealed in boxes?

It might be unfair to claim that drugs are sealed in boxes because the manufacturer's rights are not always protected. The patents granted to inventors are sometimes temporary.<sup>1505</sup>

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<sup>1504</sup> UN doc E/CN.4/Sub.2/2001/13 27 June 2001, para 10.

<sup>1505</sup> UN doc E/CN.4/Sub.2/2001/13 27 June 2001, para 11.

Accordingly, throughout the period of protection which is 20 years,<sup>1506</sup> the creator or patent holder can exclude competitors from manufacturing, using and selling the drug or book or any innovation, but after the expiry of the protection timeframe, everyone can access the medicine. Nevertheless, what if by the expiry date of the protection of the rights of the innovator, all the needy people are dead? Knowing that human rights are inalienable, the right to health, development and life of people should not be surrendered to a patent holder.

The 2000 World Health Organisation (WHO) Report describing the health crisis notes that only 11% of health spending globally happens in the third world which account for 90% of the world disease. In the same vein, it is worth repeating that in the 1, 393 new drugs permitted between 1975 and 1999, only 13 were for tropical diseases<sup>1507</sup> found in places like Africa and that out of these 13 new drugs, five were byproducts of veterinary research and two commissioned by the military.<sup>1508</sup> This is sad because will people not survive in places like Africa. Aren't African human beings? There is a strong need to gear international policies to ensure access of medicine by deprived people.

However, it could be argued that the international community has been working towards the eradication of diseases in the developing world. In 1970, there was a Special Programme for research and Training in tropical diseases initiated by the WHO and co-sponsored by the United Nations Children Fund (UNICEF), the UNDP and the World Bank.<sup>1509</sup> In addition, there is a Special Programme for Research and Training in Tropical Diseases which relied on

<sup>1506</sup> Pogge (2007) 37.

<sup>1507</sup> Pooge (2007)37.

<sup>1508</sup> Pogge (2007) 37.

<sup>1509</sup> 12<sup>th</sup> Session of the Working Group on the Right to Development, 5<sup>th</sup> Session of the High Level Task Force on the implementation of right to development agenda item 4 of the provisional agenda 'Implementation of the work plan for the period of 2008-2010 endorsed by the human rights council in resolution 9/3 – Assessment of global partnerships in the areas of access to essential medicines, debt relief and transfer of technology, as well as dialogue with MERCOSUR – The Global Funds to Fight Aids, Tuberculosis and Malaria, the Special Programme for Research and Training in Tropical Disease and the right to development'; UN doc A/HRC/12/WG.2/TF/CRP.4/Rev.1, Para 5.

stewardship, empowerment and explores uncared for diseases. In order to promoting access to medicine in poor areas, the Special Programme caters for research and development and building and enhancing capacity in partnership with the pharmaceutical companies in manufacturing medicine needed in the developing world.<sup>1510</sup>

Nevertheless, the 2000 and current health situation in the third world shows that such programmes did not work. Similarly, the Resolution WHA 27.52 calling for the ‘intensification of research on tropical parasitic diseases’ adopted in May 1974 by the World Health Assembly<sup>1511</sup> could not stop the 2000 health crisis.

The Global Fund to Fight AIDS, Malaria and Tuberculosis<sup>1512</sup> was amongst other initiatives<sup>1513</sup> set up to ensure better health in the developing world. Though this initiative has broadened its capacity, it is yet to reach issues that matter to poor communities such as access to medicine.<sup>1514</sup>

In such circumstances, nothing can be done at national level or by NEPAD to realise the right to health and the RTD. No matter how good national or regional policies are good on the question, nothing or very little can be achieved because the answer lies at the international level where NEPAD is voiceless. The protection of authors should not override human dignity which includes the right to food, health and development. In fact, as explained by the General Comment No 14 on the right to health, the achievement of the right to health should consider

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<sup>1510</sup> Report of the high-level task force on the implementation of the right to development on its fifth session UN doc A/HRC/12/WG.2/TF/2, para 33.

<sup>1511</sup> UN doc A/HRC/12/WG.2/TF/2, also UN doc A/HRC/12/WG.2/TF/CRP.4/Rev.1, para 9.

<sup>1512</sup> A/HRC/12/WG.2/TF/CRP.4/Rev.1 above, part 3.

<sup>1513</sup> Global Forum for Health Research, *Medecin Sans Frontieres*, Bill & Melinda Gates Foundation Initiatives on research for neglected diseases and medicines for malaria venture to list few of them.

<sup>1514</sup> Report of the high-level task force on the implementation of the right to development on its fifth session A/HRC/12/WG.2/TF/2, para 44; also UN doc A/HRC/12/WG.2/TF/CRP.4/Rev.1, part 3 (A).

‘the existing gross inequality in the health status of people, particularly between developed and developing countries’.<sup>1515</sup>

In an attempt to reverse the 2000 health crisis, the ‘Global Alliance for Vaccine and Immunisation’ created the same year saved around 2.9 millions lives and encouraged more research on illness affecting the poor,<sup>1516</sup> but a very small proportion of development spending is committed to illnesses accounting for 90% of the world’s health problem.<sup>1517</sup>

Addressing the WTO institutional challenges in 2004, the WTO Consultative Board underlined article 7 of TRIPS Agreement emphasising the need to protect both the creator and human welfare as well as the WTO’s view according to which ‘the case for trade is made very definitely in terms of enhancing human welfare, [and that] trade is a means to an end, not an end in itself.’<sup>1518</sup>

Notwithstanding such statements, it can be argued that health crisis and poverty are exacerbated by the TRIPS Agreement. For example HIV/AIDS is destroying the third world; but the expensive anti-retroviral agents (ARVs) needed to cope with the disease are patented and beyond the reach of the poor African who lives on less than 2 dollars a day. The TRIPS Agreement does not allow third world scientists to manufacture generic ARVs to improve health and human rights in their regions, though item 17 of the Doha Declaration notes that the TRIPS Agreement must be interpreted in a manner supportive of public health and therefore should give room for more accessible ARVs generically. On the contrary, in their interest pharmaceutical companies and some developed countries will rather spread the rumor that

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<sup>1515</sup> Committee on ESCR General Comment No 14 ‘The right to highest attainable standards of health’ 11/08/2000, E/C.12/2000/4, para 38.

<sup>1516</sup> GAVI’s new vaccine strategy prioritises deadly diseases at [http://www.gavialliance.org/media\\_centre/index.php](http://www.gavialliance.org/media_centre/index.php) (accessed on 10 July 2008).

<sup>1517</sup> Global Forum for Health Research Report 2002.

<sup>1518</sup> WTO Consultative Board Report ‘*The future of the WTO: Addressing institutional challenges in the new millennium*’ (2004) 10.

generic medicines are less effective.<sup>1519</sup> Nevertheless, as pointed out by MacDonald, there have been reports testifying that ‘there was no significant difference in efficacy between generic and commercial anti-retroviral drugs’.<sup>1520</sup> In fact, rich countries determine a poorer nation’s right to health. In this regard, on 26 June 2003, Fiona Fleck from the *British Medical Journal* reported the removal of two generic AIDS medicines from its approval drugs by the WHO almost a year earlier, before revealing 3 months later (September 2003) in the same magazine that the WTO had re-approved the same medicine after a long battle with the USA delegation.<sup>1521</sup>

This is totally unacceptable. Health is a fundamental human right, and a right whose realisation is crucial for the achievement of other human rights and freedoms, including the RTD. Trade should cease to be a business only and be humanised as a matter of urgency. In fact, the economic effects of HIV/AIDS are amongst the biggest constraints to the realisation of the RTD in Africa. It is been reported that households taking care of a family member with AIDS experience striking decline of earnings.<sup>1522</sup> The education system is destroyed by HIV/AIDS which reduces the number of healthy teachers and students;<sup>1523</sup> second, health treatment reduces the family education budgets;<sup>1524</sup> third, HIV/AIDS increases the number of orphans who may lack parental support to attend school.<sup>1525</sup> The agricultural sector is also affected. In this regard, sickness of farmers and farm workers affect their capacity to produce

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<sup>1519</sup> T H MacDonald *Health, Trade and Human Rights* (2006) 13.

<sup>1520</sup> MacDonald (2006) 13.

<sup>1521</sup> MacDonald (2006)13.

<sup>1522</sup> Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2001/13 para 45; also UNAIDS, report on the global HIV epidemic, Geneva, June 2000 (UNAIDS/OD.13E), 26 ff.

<sup>1523</sup> E/CN.4/Sub.2/2001/13, para 45.

<sup>1524</sup> A E/CN.4/Sub.2/2001/13, para 45.

<sup>1525</sup> E/CN.4/Sub.2/2001/13, para 45.

and threaten food security.<sup>1526</sup> The business sector is not spared because sick employees cannot report to work and this causes lower productivity, and higher overtime costs for workers obliged to work longer hours to replace sick colleagues.<sup>1527</sup> If international HIV/AIDS policy is not adjusted to assist national or regional efforts, the right to health and the RTD will not be achieved.

Nevertheless, there have been positive reports<sup>1528</sup> from the WHO Commission on Intellectual Property Rights, Innovation and Public Health, claiming that intellectual property rights provided significant motivation for the development of new drugs and medical technologies.<sup>1529</sup> However, the reports also observed that intellectual property rights are not an effective incentive in small and poor communities.<sup>1530</sup> In other words, they did not make a difference where medicines are much needed. Therefore, there is a need to think of an efficient way to facilitate access to medicine to the poor.

In looking for a better solution, in May 2006, the WHA set up the Working Group to develop a Global Strategy and Plan of Action for ‘needs-driven’, vital health research and development relevant to sicknesses that unreasonably impinge on poor countries, to encourage creation, build capacity, enhance access and mobilise resources.<sup>1531</sup>

Though the Global Strategy and Plan of Action contents, many RTD criteria such as broad-based participation, in the development of the Strategy and the establishment of monitoring,

<sup>1526</sup> E/CN.4/Sub.2/2001/13 para 45.

<sup>1527</sup> E/CN.4/Sub.2/2001/13 para 45.

<sup>1528</sup> The WHO Commission on Intellectual Property Rights, Innovation and Public Health, 2006 Report.

<sup>1529</sup> 12<sup>th</sup> Session of Working Group on the Right to Development, Report of the high-level task force (5<sup>th</sup> Session) on the implementation of the right to development A/HRC/12/WG.2/TF/2, para 26.

<sup>1530</sup> A/HRC/12/WG.2/TF/2, para 26.

<sup>1531</sup> A/HRC/12/WG.2/TF/2, para 26.

assessment and reporting systems,<sup>1532</sup> the Plan did not address Trade-Related Aspects of TRIPS plus rules, and the lack of involvement of non governmental organisations amongst other things.<sup>1533</sup> To address such shortcomings, The Working Group on the RTD recommended the addition of an explicit language to highlight the right to health in the Global Strategy and Plan of Action, recommended the assessment of access to essential medicines in the fulfilment of the right to health in national constitutions and international development policies, the total involvement of poor countries in appraising the improvement on the objectives of the plan.<sup>1534</sup>

To alleviate the problems linked to TRIPs Agreement, the World Intellectual Property Organization (WIPO) was established in 2007. It aims to tackle the development dimensions of intellectual property and access to global technology for development.<sup>1535</sup> Though the institution is still young and it may be early to look at its achievement, the High-level task force on the implementation of the RTD is of the view that from an RTD approach, the transfer of technology should go beyond information and communication technology and incorporate intellectual property amongst other things.<sup>1536</sup>

Article 5 of the ICESCR, clearly underlines that nothing in the Covenant can justify any act aimed at the destruction of any of its rights or freedoms or to limit a right beyond what is provided for in the Covenant. However, this obligation seems to have been misunderstood or misinterpreted by the authors of the TRIPS Agreement. In regard of the HIV/AIDS crisis, they seem to alienate the right to health and the RTD in protecting authors' rights, which is also a wrong application of articles 27 of the Universal Declaration and 15 of the ICESCR. In the same perspective, the TRIPS Agreement violates the General Comment no 14 on the right

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<sup>1532</sup> A/HRC/12/WG.2/TF/2, para 26.

<sup>1533</sup> A/HRC/12/WG.2/TF/2, para 27.

<sup>1534</sup> A/HRC/12/WG.2/TF/2, para 26.

<sup>1535</sup> MDG 8 (F).

<sup>1536</sup> 12<sup>th</sup> Session of the Working Group on the Right to Development, A/HRC/12/WG.2/TF/2, para 81.

to the highest attainable standard of health<sup>1537</sup> which calls upon states to take into account HIV/AIDS in respecting, protecting and fulfilling the right to health as provided by article 12 of the ICESCR.<sup>1538</sup>

In contrast to this view, article 8 of the TRIPS Agreement underlines that WTO members may ‘adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socio-economic and technological development’. Nonetheless, according to the same article, such measures should be consistent with the TRIPS Agreement which struggles to find a right balance between ensuring human welfare and protecting the creator’s rights.<sup>1539</sup> But, it should be acknowledged that

[m]embers may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.<sup>1540</sup>

In the same vein, the consideration or protection of human welfare is provided for through the provision according to which parties to the TRIPS Agreement may remove ‘diagnostic, therapeutic and surgical methods for the treatment of humans or animals’.<sup>1541</sup>

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<sup>1537</sup> Committee on ESCR General Comment No 14, para 10.

<sup>1538</sup> Art 12 of the ICESCR reads:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - (b) The improvement of all aspects of environmental and industrial hygiene;
  - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

<sup>1539</sup> The Agreement identifies the need to balance human rights with creators’ rights (art 15) but does not direct on how to achieve such a balance.

<sup>1540</sup> Art 27 (2) of the TRIPS Agreement.

<sup>1541</sup> Art 27 (3) (a) of the TRIPS Agreement.

A good look at the Agreement reveals that human rights are protected incidentally. The core purpose of the agreement is not to promote human rights which are known to be inalienable, hence the correctness of the comment that

[t]he various links of the subject matter of human rights – the promotion of public health, nutrition, environmental and development – [that are all fundamental for the realization of the RTD] are generally expressed in terms of exceptions to the rule rather than the guiding principles themselves and are made subject to the provisions of the Agreement.<sup>1542</sup>

It is imperative to change such an approach and show some respect for human beings in the third world. Considering the difficulties related to accessing HIV/AIDS drugs in the developing world, it can be argued that the protection of the right to health and the RTD by the TRIPS Agreement remains inadequate.

Notwithstanding the economist perspective of Bhagwati claiming that human rights cannot be part of the WTO's agenda,<sup>1543</sup> it is fundamental to emphasise Sen's perspective that 'rights make human beings better economic actors'.<sup>1544</sup> The WTO is part of the international community and as such, not only has the obligation not to harm the poor, but to ensure that all its actions improve human well -being. In this vein, it is important to comply with the Marrakesh Agreement establishing the WTO which reads as follows:

[r]elations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development.<sup>1545</sup>

<sup>1542</sup> Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2001/13, para 22.

<sup>1543</sup> J Bhagwati 'Introduction' in J Bhagwati and R Hudec (eds) *Fair Trade and Harmonisation* (1996) 1.

<sup>1544</sup> UNDP 2000 Report.

<sup>1545</sup> Paragraph 1 of the Preamble.

This provision clearly establishes human rights obligations of the WTO that should view human well being as paramount. The paramount character of human well-being in ‘trade business’ was emphasised by the Committee on ESCR at its 21st session held in Geneva from 15 November to 3 December 1999.<sup>1546</sup> This was in fact the legalisation of the WHO’s ‘Health for all 2000 (HFA 2000)’ Campaign. This campaign championed by Dr Halfdan Mahler was announced at the 1997 meeting of the World Health Assembly at Alma Ata in the Crimea in Ukraine.<sup>1547</sup> Amongst other things, the HFA 2000 emphasised the access to healthcare on the basis of needs. Thus in principle, Africans should have been given free access to medicine on the basis of their needs.

However, under the powerless NEPAD, the current TRIPS Agreement hinders the realisation of the right to health. While forwarding *Health, Trade and Human Rights* Mogobe Ramose observes that ‘the nature and practice of trade under the regimes of the International Monetary Fund, the World Bank, and the World Trade Organization are a crime against the law of the preservation of the good health of the people, in particular the poor’.<sup>1548</sup> In the same vein, the 1999 UNDP, Human Development Report notes that the TRIPS Agreement impacts negatively on public health, food security, biodiversity, agriculture and indigenous knowledge, and this happens under NEPAD that may seem powerless.

Though the WTO is of the view that ‘to date the TRIPS Agreement is the most comprehensive multilateral agreement on intellectual property’,<sup>1549</sup> the Sub-Commission on the Promotion and Protection of Human Rights thinks otherwise and observes:

Actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights in relation to, inter alia, impediments to the transfer of technology to developing countries, the consequences for the enjoyment of the right to food, of plant

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<sup>1546</sup> Statement of Committee on ESCR to the third Ministerial Conference of the WTO, E/C.12/1999/9.

<sup>1547</sup> MacDonald (2006) 3.

<sup>1548</sup> M Ramose ‘Forward’ in MacDonald (2006).

<sup>1549</sup> WTO ‘Overview: the TRIPS Agreement’ [http://www.wto.org/english/tratop\\_e/TRIPS\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/TRIPS_e/intel2_e.htm) (accessed 29 December 2010).

variety rights and the patenting of genetically modified organisms, ‘bio-piracy’ and the reduction of communities’ (especially indigenous communities’) control over their own genetic and natural resources and cultural values, and restriction on access to patented pharmaceuticals and the implications for enjoyment of the right to health.<sup>1550</sup>

In addition, the Sub-Commission states that

[s]ince the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right to health, the right to food and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law on the other.<sup>1551</sup>

The two quotes above explain clearly how the TRIPS Agreement limits the prospects of the RTD, hence the call on the WTO in general and the Council on TRIPS during its ongoing review of the TRIPS Agreement in particular, to take fully into account the existing state obligations under international human rights instruments.<sup>1552</sup>

From a different standpoint, every national government should be responsible for the welfare of its citizens, not the international community. Thus, the WTO has no human rights obligation. This view sustained by Professor Charnovitz<sup>1553</sup> ignores that in this time of globalization, decisions taken in New York affect people’s life beyond the USA borders. As much as it is true that development and poverty eradication is the primary responsibility of the ‘nation - state’, it is also true that the international community has a vital role to play because decisions taken at international level impact the ability or capacity of a state or a continent to provide for its citizens. Positive or fair international trade rules will enhance national governments capacity to ensure the welfare of their people.

No matter what Cameroon or South Africa and NEPAD can do at national level to cope with poverty, they cannot succeed if globalisation is viewed through the eyes of Henry Kissinger,

<sup>1550</sup> Resolution on Intellectual Property Rights and Human Rights, E/CN.4/ Sub.2/2000/7, 17 August 2000.

<sup>1551</sup> Resolution on Intellectual Property Rights and Human Rights, E/CN.4/ Sub.2/2000/7, 17 August 2000.

<sup>1552</sup> Resolution on Intellectual Property Rights and Human Rights, E/CN.4/ Sub.2/2000/7, 17 August 2000, para 8.

<sup>1553</sup> S A Aaranson and J M Zimmerman (2008) 39.

former American Secretary of state (1973-1977) under Presidents Nixon and Ford. He said in a public lecture in Dublin, Ireland, on 12 October 1999:

The process of development begins by widening the gap between the rich and the poor in each country... The basic challenge is that what is called globalization is really none other than the name given to the dominant role of the United States.<sup>1554</sup>

Africa is trapped in a vicious circle called globalisation and the only way out seems to be the replacement of free trade with fair or just trade. Proponents of Kissinger's definition of globalisation should switch side to the view advocated by Aaronson and Zimmerman. According to them, the signing of the UN Declaration by the community of state was a commitment through multilateral mechanisms

[t]o further the enjoyment by all States...of access, on equal terms, to the trade and the raw materials of the world which are needed for their economic prosperity; to bring about the fullest collaboration between all nations in the economic field with the objective of securing for all, improved labour standards, economic advancement and social security;...and they hope to see established a peace ... which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want.<sup>1555</sup>

In this perspective, on 30 August 2003, the WTO took a decision<sup>1556</sup> in the form of an 'interim waiver' to article 31(f) of the TRIPS Agreement<sup>1557</sup> to allow poor countries that are unable to manufacture pharmaceutical to import cheap generic medicines to solve health issues. Commenting on the decision, the former WTO Director-General was of the view that WTO

<sup>1554</sup> H Kissinger quoted from MacDonald (2006) 28.

<sup>1555</sup> Aaranson & Zimmerman (2008) 12.

<sup>1556</sup> General Council Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 and Corr.1, adopted on 30 August 2003, (the Waiver); available at [http://www.wto.org/english/tratop\\_e/trips\\_e/implem\\_para6\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm) (accessed 29 December 2010).

<sup>1557</sup> Article 31(f) of the TRIPS Agreement says products made under compulsory licensing must be "predominantly for the supply of the domestic market". This applies directly to countries that can manufacture drugs — it limits the amount they can export when the drug is made under compulsory licence. And it has an indirect impact on countries unable to make medicines and therefore wanting to import generics. They would find it difficult to find countries that can supply them with drugs made under compulsory licensing.

ministers ‘recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics’.<sup>1558</sup> More importantly, WTO members agreed to transform the 2003 ‘waiver decision into a permanent decision on 6 December 2005. This was done through a decision on ‘Amendment of the TRIPS Agreement.’<sup>1559</sup> Pascal Lamy the current WTO Director-General express his satisfaction in these words:

This is personal satisfaction to me, since I have been involved for years in working to ensure that the TRIPS Agreement is part of the solution to the question of ensuring the poor have access to medicines.<sup>1560</sup>

Unfortunately, access to medicine remains a mystery for the poor. For instance, there was a report on a new seizure by the authorities of the Netherlands of generic drugs being shipped from India to Brazil.<sup>1561</sup> This shows that in spite of the commitment addressing the ‘Amendment the TRIPS Agreement’ mentioned above, it might be too early to celebrate because two thirds of the WTO’s members must accept the change for the amendment to be finalised. The first deadline was the 1 December 2007,<sup>1562</sup> but was extended to the 31 December 2009<sup>1563</sup> and now it has been extended to 31 December 2011. In five years, only 30

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<sup>1558</sup> ‘Decision removes final patent obstacle to cheap drugs imports’ *WTO News*, 30 August 2003 Press Releases available at [http://www.wto.org/english/news\\_e/pres03\\_e/pr350\\_e.htm](http://www.wto.org/english/news_e/pres03_e/pr350_e.htm) (accessed 29 December 2010).

<sup>1559</sup> Decision of the WTO General Council of 6 December 2005 on the Amendment of the TRIPS Agreement.

<sup>1560</sup> ‘Members OK amendment to make health flexibility permanent’ *WTO News* 6 December 2005 Press Releases.

<sup>1561</sup> 12<sup>th</sup> Session Working Group on the Right to Development, 5<sup>th</sup> Session High Level Task Force on the Right to Development, A/HRC/12/WG.2/TF/2, para 32.

<sup>1562</sup> General Council Decision on Amendment of the TRIPS Agreement—Extension of the period for the acceptance by Members of the Protocol Amending the TRIPS Agreement, WT/L/711, adopted on 18 December 2007.

<sup>1563</sup> General Council Decision on Amendment of the TRIPS Agreement—Second Extension of the period for the acceptance by Members of the Protocol Amending the TRIPS Agreement, WT/L/785, adopted on 17 December 2009.

members of the WTO including only two African countries (Mauritius and Zambia) and the EU have accepted the change. This raises the question of: what is in it for Africa since only Mauritius (on 16 April 2008) and Zambia (10 August 2009) sent their acceptance. The advent of NEPAD and its participation to trainings and WTO's workshops did not increase Africa's share of international trade. In fact, Africa is marginalised, hence former President Mbeki's argument that

[T]here is little doubt that we all need to work together to overcome the challenges of development. This will require a massive resource transfer into developing countries and a broad-based development round at the WTO to address the issues. As developing countries we have to be recognized. We want to be part of the rule making process so that our needs can be recognized and addressed.<sup>1564</sup>

Though Mbeki has a good point, it is also important to look inwards. Africa should learn to present one position, 'the African position' at international forums. It can be the NEPAD/AU position. In accepting the protocol amending the TRIPS Agreement studied above, the EU presented one 'instrument of acceptance' for its community. This is an example of common position to be emulated by Africa through NEPAD or the AU. The single acceptance of the TRIPS Agreement amendment by Mauritius is not a good sign.

The TRIPS Agreement also impacts negatively on the right to food that will be discussed in the next section. The encroachment on the right to food and therefore to health by the TRIPS Agreement lies in the case of genetically modified (GM) crops. It is well known that in Africa and other third world countries, people die because they have no food and consequently no health; but these vulnerable people do not have access to GM crops because they are patented. Even in the name of international solidarity or global justice, the poor should be given unconditional access to seedless crops that are resistant to various parasites. This will go a long way in protecting their RTD and even their lives. Nevertheless, it is important to acknowledge that some GM crops may have some negative side effects on human health, hence the need for a special examination and research on the adequacy of GM crops for human consumption.

Overall, the TRIPS Agreement as it stands does not enhance the prospects of the RTD for various reasons: There are still serious inequities in the repartition of the benefits of

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<sup>1564</sup> P Galli 'Mbeki lashes WTO, globalization for fuelling SA's woes' *Business Report*, 25 May 2000.

globalisation; allowing least-developed countries to manufacture drugs without paying royalties until 2016 as decided by the WTO in December 2005<sup>1565</sup> is a good step, but will not make any difference since they do not have the capacity to manufacture drugs. Lesotho is not equal to Canada and has no means to manufacture drugs and this should be considered while establishing trade rules. In other words, WTO member states should consider the needs of developing countries with a special goal to ‘provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs’ and to ‘take measures to prevent, treat and control epidemic and endemic diseases’.<sup>1566</sup> One way of doing this is to set up a system that differentiates the pricing of drugs, allows parallel importation of medicines, and generic substitution of patented drugs. And, to protect the creator, this should be done according to the needs and specific situations of each and every country. Though this approach will have its own shortcomings, it has the potential to address the welfare of the poor. At the same time, Africa through NEPAD should be able to speak the same language at the negotiation’s table and emphasise the need to use a human rights approach in implementing the agreement.

### **7.3.2.2 Agreement on Agriculture and the RTD**

This section looks specifically at the impacts of the AoA on the realisation of the right to food which influences the realisation of the right to health and is at the same time another building block of the RTD. Like the previous section, this one also shows that NEPAD is powerless in using the AoA to better people’s lives in Africa. In terms of structure, the section highlights the main elements of the AoA before assessing their implication on the right to food and the RTD.

#### ***Main elements of the Agreement on Agriculture***

Before the Uruguay Round, the agricultural trade was in a mess. It was characterised by intense domestic support, use of export subsidies by some wealthy countries, and an

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<sup>1565</sup> Art 31 (f) TRIPS Agreement.

<sup>1566</sup> Statement of Committee on ESCR to the third Ministerial Conference of the WTO, E/C.12/1999/9, para 22 & 37; also Committee on ESCR General Comment No 14, para 43 & 44.

unpredictable world market.<sup>1567</sup> In reaction to this unpleasant situation, governments used the Uruguay Round from 1986 to 1994, to comprehensively regulate the liberalisation of agricultural trade. The AoA came into force in 1995. According to its Preamble, the AoA aim is ‘to establish a fair and market-oriented agricultural trading system’ and ‘to provide for substantial progressive reductions in agricultural support and protection’. To achieve its objectives, the AoA strategy is underpinned by

- Market access
- Domestic support
- Exports subsidies

The market access strategy aims to enhance agricultural trade by reducing tariffs such as taxes duties and other border constraints and the limitation of the quantity of agricultural goods entering a market.<sup>1568</sup> It is important to note that protectionism can be important in developing local production and improved domestic producers’ right to a better life, even though consumers will face high food prices. However, on the other hand, as the Commission on Human Rights correctly observes, free trade can enlarge national markets and increase the accessibility of global market to national producers.<sup>1569</sup> Therefore, enhancing market access will yield different results depending on the specificity and capability of each country.

The AoA domestic support implies the reduction of level of support provided by states to their farmers. Generally, the basket of such support is made of subsidies for production of agricultural product, guaranteed prices and subsidies for agricultural research. However, domestic supports can be provided if they

Meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:

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<sup>1567</sup> Commission on Human Rights 58 session para 18; also FAO *Multilateral Trade Negotiation in Agriculture – A Resource Manuel* ‘Agriculture in the GATT: a historical account’ part I, module 4.

<sup>1568</sup> WTO Agreement on agriculture at [http://www.wto.org/english/tratop\\_e/agric\\_e/agric\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/agric_e.htm) (accessed 29 December 2010).

<sup>1569</sup> Commission on Human Rights 58 session, para 20.

- (a) The support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers;
- (b) The support in question shall not have the effect of providing price support to producers.<sup>1570</sup>

These exemptions to domestic support are known as the ‘Green Box’. However, there is a controversy or disagreements on the content of the ‘Green Box’ and the mechanisms to handle food security and access to food. Though domestic supports enhance farmers’ capability, they become distortions to international trade when limited to farmers of wealthy countries only and therefore, constraint the realisation of the RTD of third world countries.

Finally the AoA provision on export subsidies prohibits payment of export agricultural cost by governments as well as any introduction of new subsidies. However, WTO members can provide exports subsidies provided they specify for each year the maximum quantity of products subject to export subsidies and the maximum level of outlay for these subsidies and commit themselves to reduce the level of subsidies calculated according to a base period of 1986-1990.<sup>1571</sup>

Export subsidies if allowed, might tear small farmers apart by increasing the load of products on the world market and lowering their price. Farmers from poor countries or unsubsidised farmers will see their market flooded with cheap imported goods that will undermine their capacity to compete and thus, reduce the prospect of their RTD. However, net-food importing countries might gain in the short term due to lower prices of imports from subsidizing export countries.<sup>1572</sup> Nevertheless, relying on cheap exports is dangerous because they are uncertain, unstable and above all, they enhance the culture of dependency which is not the receipt to achieve development.

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<sup>1570</sup> AoA, Annex 2 domestic support – The basis for exemption from the reduction commitment

<sup>1571</sup> AoA, art 9 (2) (a) (b).

<sup>1572</sup> Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights E/CN.4/Sub.2/2001/13, para 21.

In all, the nature of the AoA and the extent of commitment to market access, domestic support and exports subsidies can impact on the WTO's ability to protect the right to food and the RTD. The assessment of the AoA as a key to ending world hunger and achieve the RTD is the object of the next session.

### ***The Agreement on Agriculture, the right to food and the right to development***

This section of the thesis demonstrates that developments and practices related to the AoA are characterised by absence of NEPAD which has done very little or nothing to ensure the right to food and the RTD in Africa. From Pogge's perspective, the AoA should promote an adequate standard of living for all by ensuring the realisation of the right to food as prescribed by several instruments.<sup>1573</sup>

A proper significance of the right to food as it relates to international trade is provided by the ICESCR. Article 11 (2) recognises 'the fundamental right of everyone to be free from hunger, and the vital role of international cooperation to ensure this rights with a specific attention 'the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need'.<sup>1574</sup> This right is also covered by the Committee on ESCR<sup>1575</sup> and should be respected by all elements of the international community including the WTO, hence the correctness of the argument that

[t]he member States of the WTO hold concurrent responsibilities to promote and protect human rights as well as to implement trade rules and that the norms and standards of human rights [with special attention to the right to food] provide a legal framework to protect the social dimensions of globalization.<sup>1576</sup>

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<sup>1573</sup> The 1974 Universal Declaration on the Eradication of Hunger and Malnutrition, art 1; the 1979 Declaration of Principles of the World Conference on Agrarian Reform and Rural Development, art 1(7) & 1(14); the 1996 Rome Declaration on World Food Security, art 1; the 1996 Plan of Action of the World Food Summit, objective 7.4; the 1989 CRC (art 24(2)); the 1979 Codex Alimentarius Commission of the Code of Ethics for International Trade emphasized art 2(1) & 2(2).

<sup>1574</sup> The ICESCR, art 12 (b).

<sup>1575</sup> General Comment No 2.

<sup>1576</sup> Commission on Human Rights 58 session, para 8.

However, the question of food from a human rights perspective has not been the priority of trade policy makers' especially in GATT era. Even during the Uruguay Round discussion on the liberalisation of agricultural trade, food availability was discussed as non-trade concerns.<sup>1577</sup> The question was so complex that parties to the WTO Agreement choose to postpone the negotiation on non trade-concerns.<sup>1578</sup> Nonetheless, as Aaranson and Zimmerman put it, they 'agreed to cushion the effect of trade liberalization upon the poor and upon developing countries' and that 'food-importing nations could get both food aid and financial assistance to buy food if they needed'.<sup>1579</sup> This looked like a break through to resolve non-trade concern especially when in 2001 at Doha, Qatar, the parties agreed to give strong consideration to developing countries' needs.<sup>1580</sup>

Unfortunately, the Doha commitment was mere noise. By 2003 parties were divided in 3 groups: The first one including Japan, South Korea, Norway and Switzerland believing that there is a need to improve negotiation on non-trade concern issues. They stand for the adoption of additional mechanisms and argue for specific agricultural measures including human rights because of the specificity of agriculture.<sup>1581</sup> The second group led by the USA, Canada, Australia and South Africa are of the view that subsidies and other government supports should not be on the agenda of agricultural trade liberalisation. Nevertheless, the USA can be accused of preaching what it does not practice because it subsidises its cotton farmers. Lastly, the third or developing countries group stand against the use of subsidies in developed countries because of the inequality between countries and argue for special and differential treatment for poor countries.<sup>1582</sup>

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<sup>1577</sup> Aaronson and Zimmerman (2008) 55.

<sup>1578</sup> AoA, art 20.

<sup>1579</sup> Aaronson and J M Zimmerman (2008) 55.

<sup>1580</sup> Aaronson and J M Zimmerman (2008) 56; also The Doha Declaration Explained at [http://www.wto.org/english/tratop\\_e/dda\\_e/dohaexplained\\_e.htm#top](http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#top) (accessed 29 December 2010)

<sup>1581</sup> Aaronson and Zimmerman (2008) 56.

<sup>1582</sup> Aaronson and Zimmerman (2008) 56 - 57.

While this debate is going on, people are dying of hunger and international instruments protecting the right to food, to a better standard of living are not respected. In desperation, advocates of the right to food commit the ultimate sacrifice. This is proven by the death of the Korean farmer named Lee Kyung-hae who killed himself in protest against trade liberalisation under the WTO. This sad event happened in 2003 during the WTO Conference in Cancun where Lee Kyung-hae climbed to the top of the security fence and told his fellow protestors, ‘don’t worry about me, just struggle your hardest’ and plunged a knife in his chest.<sup>1583</sup>

The AoA should address the needs of the poor who usually rely on agriculture for food, employment, housing, education, development and more importantly to stay alive. As it stands the AoA does not enhance the prospects of the RTD. For instance, the suppression of subsidies to small farmers in Ghana and the opening of market in the framework of the SAPs created a calamity in the country. Cheap goods were offloaded in the country and unsubsidised local farmers could not compete with heavy developed industries as well as subsidised farmers from wealthy countries.<sup>1584</sup> The same causes produce similar effects in Zambia where the liberalisation of maize was followed by the collapse of the producer price and the raise of the consumer one.<sup>1585</sup> The situation was horrible because people rely on maize to have food on the table. As Lumina puts it

There was a 20% drop in maize consumption and an attendant increase in malnutrition and mortality. Owing to increase level of poverty, health indicator declined and many families were unable to send their children to school.<sup>1586</sup>

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<sup>1583</sup> J Watts, ‘Field of tears,’ *The Guardian*, Tuesday 16 September 2003 available at <http://www.guardian.co.uk/world/2003/sep/16/northkorea.wto> (accessed on 29 December 2010).

<sup>1584</sup> C Lumina ‘Free trade or just Trade? The World Trade Organisation, human rights and development’ paper presented at the University of Pretoria, Human Right and Development Course 21, 30 July 2005 (on file with author).

<sup>1585</sup> Lumina (2005).

<sup>1586</sup> Lumina (2005).

On the effects of international trade on poor countries, Archbishop Emeritus Desmond Tutu says that ‘the poor nations had been forced to accede to the dictate of ‘free trade’ rather than ‘fair trade’, thus exposing their populations to even greater impoverishment and ill health.’<sup>1587</sup>

From a different angle, it can be argued that the AoA regulates agricultural trade and that free trade can enhance the enjoyment of the right to food and the RTD. This reasoning is based on the fact that free trade has the potential for economic growth, employment creation, better health care, human empowerment and the distribution of technology and capital. In this regard, the Commission for human rights said that

[i]ncreased levels of trade in agriculture can contribute to the enjoyment of the right to food by augmenting domestic supplies of food to meet consumption needs and by optimizing the use of world resources.<sup>1588</sup>

From the same standpoint, the Food and Agriculture Organisation (FAO) is of the view that the AoA is conducive to the realisation of human rights because it promotes transparency and accountability which are capital for the realisation of human rights.<sup>1589</sup>

Why encourage free trade in agriculture when millions of peoples around the world are starving? Is it the solution for hunger in the third world? On January 13 2008, it was reported that for a long time, Malawi’s soil was one of the worst in Africa.<sup>1590</sup> Therefore, the government’s policy allowed poor farmers to acquire fertiliser at a third of the normal price. Nonetheless, this was seen as a market distortion at international level, hence Malawi in need of loans was pressurised by the World Bank to remove such subsidies. After the removal of subsidies, the country plunged into hunger and poverty. However, in 2006, Malawi could not take it anymore and carried on with subsidies’ policy and by early 2008, Malawi was the ‘single biggest seller of corn to the World Food Programme in Southern Africa and was

<sup>1587</sup> D Tutu ‘Forward’ in T H MacDonald (2006) xi.

<sup>1588</sup> Commission on Human Rights 58 session, para 33.

<sup>1589</sup> Commission on Human Rights 58 session, para 33.

<sup>1590</sup> J Hari ‘Free trade is no fair deal for poor countries’ *The Sunday Independent* 13 January 2008, 15.

giving tons of corn to Zimbabwe'.<sup>1591</sup> This short story on Malawi is a counter argument to the WTO's view sustaining that 'trade liberalization is generally a positive contributor to poverty alleviation',<sup>1592</sup> hence the correctness of the argument claiming that 'free trade does not automatically feed the hungry'.<sup>1593</sup>

The right to food and the RTD will not become a reality if the AoA does not address the question of food security in the context of a country's development programme. This implies taking into account the needs and the situation of each and every country because of countries' inequality. Taking into account the content of the new EPAs studied below, it can be argued that things are not heading to the right direction or towards fair trade which is needed for the achievement of the RTD. 'Real' special preferential measures should be included in the AoA to provide food for the most vulnerable and neediest groups and this can be done through a special attention on projects in the neediest countries. This will go a long way in ensuring their RTD.

In July 2006, before suspending the WTO negotiations for lack of result, the Director-General of the WTO Pascal Lamy said 'failure of this Round would be a blow to the development prospects of the more vulnerable Members, for whom integration in international trade represents the best hope for growth and poverty alleviation'.<sup>1594</sup> Unfortunately, the 2006 pattern was followed in 2008 when the WTO failed to reach an agreement in the Doha Round in Geneva. This failure of the WTO can only enhance unfair trade rules, hence the comment that not getting a new WTO agreement would imply tariffs can be raised and domestic assistance amplified to further distort international transactions<sup>1595</sup> and hinder a good standard of living in the poor regions of the world.

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<sup>1591</sup> Hari (2008)15.

<sup>1592</sup> D. Ben-David, H. Nordstrom & L.A. Winters, *Trade, income disparity and poverty*, WTO special study No. 5, Geneva, 2000.

<sup>1593</sup> General Assembly Resolution (A/56/210) on the right to food in 2002.

<sup>1594</sup> Aaronson and Zimmerman (2008) 57.

<sup>1595</sup> 'No global pact after WTO Summit' *Calgary Sun*, July 30 2008, available at <http://calsun.canoe.ca/News/National/2008/07/30/pf-6305486.html> (accessed 30 July 2009).

At the same time, developing countries should understand that their well-being will not come from heaven. To influence agriculture negotiations at the WTO, Africa should speak the same language on the international plane. In the Doha Round negotiation, South Africa is shoulder to shoulder with wealthy countries and not with other African countries.<sup>1596</sup> Kenya and Mali for example are all members of the WTO Africa Group, but each country sits at the negotiation table with its own proposal.<sup>1597</sup> As mentioned earlier, it is imperative for African countries to consult one another and act within the NEPAD/AU framework. If this does not happen, fair trade might remain a mere dream, the right to food security will not be achieved and the prospects for the RTD can only be reduced.

This section showed through the examination of TRIPS and AoA how NEPAD and Africa are dominated in the WTO. It showed how NEPAD is powerless in front of institutional power exercise through the WTO by western countries.

### 7.3.3 NEPAD, the ACP Agreement and the RTD

On 25 March 1957, the European Economic Community (EEC) was established through the Treaty of Rome signed by Germany, France, Italy and the Benelux countries (Belgium, Holland and Luxembourg). During the signing of the Treaty, France required and obtained a section (Section 4 of the Treaty) allocated for an ‘Association Agreement’ with Overseas Countries and Territories. In fact, it was a space reserved for countries associated with France or ‘France friends’ that received the first European Development Fund (EDF).<sup>1598</sup> In 1963 in Yaounde, Cameroun, this friendship yielded the signing of a convention between the

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<sup>1596</sup> WTO ‘Agriculture negotiations: backgrounder –countries, alliances and proposal’ available at <http://calsun.canoe.ca/News/National/2008/07/30/pf-6305486.html> (accessed 10 July 2009).

<sup>1597</sup> WTO ‘Agriculture negotiations: backgrounder –countries, alliances and proposal’ available at [http://www.wto.org/english/tratop\\_e/agric\\_e/negs\\_bkgrnd04\\_groups\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd04_groups_e.htm) (accessed 10 July 2010).

<sup>1598</sup> ‘50 years of ACP-EU cooperation’ *The Courier* March 2008, Special Issue. For more on this including the EPAs, see R Haule & F Werema ‘EC-ACP Economic Partnership and their economic impacts on developing countries’ (2008)1 *Journal of African and International Law* 27 - 50.

European communities and the ‘Associated African states and Madagascar’ for five years. It was the Yaounde Convention between 6 European countries and 18 Africans countries. This partnership agreement was characterised by free trade between the parties. ‘European products received preferential treatment on the Markets of the associated African countries and vice versa’.<sup>1599</sup> This agreement supported by the EDF was renewed for 5 more years in 1969.

In 1973, when the United Kingdom, Ireland and Denmark joined the European Community, they stood for the integration of Commonwealth countries from Africa, Caribbean and Pacific in the Yaounde Convention. The parties to the treaty were broadened into 46 African, Caribbean and Pacific (ACP) states and nine European countries. In early February 1975, the Lomé Convention was concluded for every 5 years and was the main instrument of co-operation between the EEC, current EU and the ACP.<sup>1600</sup>

At Lomé 1 in 1975, (1975-1980) it was clear on the part of ACP countries that the agreement was purely economic co-operation and that human rights had no place. Contrary to the Yaounde Agreement, Lomé 1 established the trade preferences of the ACP countries on a non reciprocal basis. It also established a mechanism known as Stabex to protect ACP countries from trade deficit linked to the price fluctuation on the market, to protect privileges of the poorest of the ACP countries, level and constancy of aid allocations, and an administration system consisting of joint institutions. At the time, the EEC did not introduce conditions because it did not want to be perceived as being in discord with the principle of non interference and the Chairman of the ACP Council of Ministers said: ‘we are in an agreement that deal with trading, economic, technical and financial co-operation and the provisions of the new convention should relate to that’.<sup>1601</sup> This approach considered African needs and was likely to lead to the achievement of the RTD.

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<sup>1599</sup> ‘50 years of ACP-EU cooperation’ *The Courier* March 2008, Special Issue.

<sup>1600</sup> ‘50 years of ACP-EU cooperation’ *The Courier* March 2008, Special Issue.

<sup>1601</sup> L Pagni ‘P.J. Patterson, Chairman of the ACP Council of Minister: so far as we are concerned, we are negotiating a new convention’, *The Courier* no 49 May - June 1978, 6-7; note that the section on the ACP-EU Agreement discussing Lomé 1 – Lomé 4 bis is also reliant on Stokke ‘Conditional partners? Human rights and political dialogue in the EU-ACP relations’.

Lomé 2 (1980-1985) followed the same approach despite the insertion of rural development notion. In addition, the Sysmin which is a mechanism similar to the Stabex was inserted in the agreement to protect the production capacity of the ACP countries mining sector.

At Lomé 3 (1985-1990) however, the EU introduced a section containing more general co-operation objectives. The so-called ‘policy dialogue’ section included in the agreement was viewed as a political intrusion and as a way of bringing in conditionalities because they added more difficulties in accessing assistance. Moreover, references to human rights were integrated in the Preamble and annex sections of the Lomé 3 agreement.<sup>1602</sup>

Lomé 4 (1990-2000) brought some changes: for instance, the timeframe of the agreement was doubled (from five to ten years), compliance with human rights was compulsory to qualify for development assistance;<sup>1603</sup> ACP countries had to show that aid was used according to the template designed by donors.

At Lomé 4 (bis), or during the mid term review of the Lomé 4, a suspension clause<sup>1604</sup> was added. Furthermore, the development policy is not only connected to human rights, but also to ‘the recognition and application of democratic principles, the consolidation of the rule of law

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<sup>1602</sup> Annex 1(1) referred to human dignity as an inalienable human right, 1(2) to the obstacles preventing individuals and peoples from enjoying to the full their economic, social and cultural rights and 1(3) to the elimination of all forms of discrimination with a specific mention of apartheid.

<sup>1603</sup> Art 5(1) says “cooperation shall be directed towards development centered on man, the main protagonist and beneficiary of development, which thus entails respect for and promotion of human rights. Cooperative relation shall thus be conceived in accordance with the positive approach, where respect for human rights is recognised as a basic factor of real development and where cooperation is conceived as a contribution to the promotion of these rights”. See also <http://www.acpsec.org/en/treaties.htm> to have the Lomé 4 Conventions and the current Cotonou Agreement.

<sup>1604</sup> This clause allows the suspension of a state if essential elements were violated; see art 366a (2) and (3) of Lomé 4 (bis).

and good governance'.<sup>1605</sup> However, it is important to note that the Lomé Convention allowed ACP industrialised products into the EU on a tax-free basis, except for that quotas were inserted for some products such as sugar for example. The Greek representative, speaking for the EU told the CHR in 2003: 'The Cotonou Partnership Agreement between the European Union and the African, Caribbean, and Pacific countries constitutes a concrete contribution to the fight against poverty and a further step towards the realisation of the right to development'.<sup>1606</sup>

Finally under the currently applicable Cotonou Agreement (2000-2020) the conditionality is more pronounced. Article 9(2) of the Agreement reads: 'respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU partnership, shall underpin the domestic and international policies of the parties and constitutes the essential elements of this agreement'. Moreover, in the revision of the Cotonou Agreement in 2005, and taking into account recent geopolitical developments, 'the proliferation of weapons of mass destruction and their means of delivery, both to state and non state actors' was added. In addition, the parties should also fight terrorism through international co-operation.

From a rather unconditional regime in the mid-1970s, the mid-1990 partnership was characterised by a partnership driven by unilateral donor's policies underpinned by political and economic interests. Stokke correctly argues that the present ACP regime is far more politicised than before and that the aid provider can describe what conditions are to be suitable for the partnership.<sup>1607</sup> He adds that 'if conditions are imposed by one partner on the other, then it is quite clear that the partnership is not based on shared values and objectives, but on conditions to be accepted unilaterally before a partnership can be entered into'.<sup>1608</sup> It is

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<sup>1605</sup> Art 5(1).

<sup>1606</sup> Ambassador Tassos Kriekoukis, Head of the Delegation of Greece on Behalf of the European Union, Statement at the Commission on Human Rights, 59th Sess., Item 7: The Right to Development ( 25 March, 2003).

<sup>1607</sup> Stokke (2006) 12.

<sup>1608</sup> Stokke (2006) 12.

important to note that a partnership characterised by conditionalities has very little chance or no chance to succeed. In this regard, Arts observes that

[d]eveloping countries are being confronted with an increasing set of human rights, democracy and good governance issues integrated into the European Community (EC) development co-operation. Consequently, one would expect the level of ownership to be low, which raises doubt about the prospect for success.<sup>1609</sup>

It is difficult to believe that a real partnership can be established between Africa and the developed world, which will put aside its economic concerns to respond to Africa's problems. In this respect, one commentator rightfully observes:<sup>1610</sup>

It is easy to make all the right noises about making globalisation inclusive, but what does this means when the rich countries of the North spend 1 billion a day subsidising their farmers, with an annual subsidy three times as large as the entire amount spent on aid budget? Not a lot.

In the same perspective, Umozorike is correct in calling upon international law to 'provide the legal framework within which the new international economic order [which underpinned the RTD] can be achieved'.<sup>1611</sup>

By the look of things, current international co-operation seems to hinder Africa's development. However, NEPAD's faithful or fundamentalists<sup>1612</sup> could argue that NEPAD was not there when the ACP agreement was concluded. Nevertheless, from 2001 until today, NEPAD could not influence the Agreement. More importantly, where is NEPAD in the ongoing discussion on the EPAs? An analysis of the EPA agreement will provide a response to this question

<sup>1609</sup> K Arts *Integrating human rights into development cooperation: The case of the Lomé Convention* (2000) 136.

<sup>1610</sup> *Mail and Guardian* (Johannesburg), 2- 8 February 2001.

<sup>1611</sup> U O Umozorike *International law and colonialism in Africa* (1979) 138.

<sup>1612</sup> Former Presidents Mbeki and Obasanjo of South Africa and Nigeria for example.

### 7.3.4 NEPAD, the EPAs and the RTD

The revision of the Cotonou Agreement in 2005 brought back the practices of the Yaounde Agreement whereby ‘European goods received preferential treatment in developing countries and vice versa. This is the abolition of the ‘preferential system’,<sup>1613</sup> a core element of the ACP Agreement which is now in process of being replaced with a system (EPAs) compatible with the WTO Agreements.<sup>1614</sup>

The EPAs bring nothing on the table, but remove preferential rules of trade. Consequently, rich and powerful countries from the EU will trade on ‘equal’ footing with small and weak developing countries. For instance, Sweden will trade on equal footing with Malawi. Notwithstanding its conditionality aspects, the Lomé Conventions recognised the huge economic difference between the EU and ACP countries and provided trade preference to ACP countries without expecting them to reciprocate. Under the EU-ACP agreements, ACP countries had free access to EU markets and had the right to protect their producers from subsidised EU exporters. EPAs expect both partners to open their markets equally to each other as if they were at the same level. Developing countries and African countries in particular do not have the capacity to face the heavy competition from the EU; their economic and financial institutions are weak; their negotiators are ill-prepared and their farmers are as not subsidised as their western counterparts. Most importantly, if ACP countries open up their markets to EU exporters, they will be bombarded with manufactured goods and this will hinder the industrialisation of the developing world in general and Africa in particular. A worried Festus Mogae, President of Botswana states ‘we fear that our economies will not be able to withstand the pressure associated with liberalisation’.<sup>1615</sup> Though, it can be argued that the aim of the EPAs is to harmonise the integration of ACP countries in the world economy, it is important to note that pushing for free trade between David and Goliath will swallow

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<sup>1613</sup> The preferential system is the component of the *Lomé* Conventions and Cotonou Agreement empowering ACP countries to export freely to the EU without having to reciprocate to the EU countries.

<sup>1614</sup> The WTO’s enabling clause allows countries to provide preferences to developing countries as a whole, or just LDCs countries.

<sup>1615</sup> CAFOD ‘The rough guide to Economic Partnership Agreements (EPAs) at <http://www.cafod.org.uk/var/storage/original/application/phpnAorth.pdf> (accessed 10 June 2008).

custom revenues that is the main source of government income in the developing world. What will Uganda do without its trade taxes representing 48% of its total revenues?<sup>1616</sup>

However, proponents of EPAs argue that the EU will provide adjustment cost through the EDF which was a practice in assisting ACP countries to cover health care, education, and other infrastructural expenses and was disbursed in five-year cycle. In 2006, the EU committed itself to increase the amount under the European Development Fund funding cycle (2008-13) to 22.7 billion Euros.<sup>1617</sup>

Nevertheless, as Oxfam correctly observed, instead of using the EDF to cover development expenses (education and health care), most of the money will be used to adjust to EPAs arrangements.<sup>1618</sup> This is not empowering ACP countries. More interestingly, the EDF is usually not delivered entirely and in time. For instance in the 1995-2000 five years cycle, 14.6 billion Euros were promised, but the first load of disbursement was made in the third year and by the end of the cycle, only 20% of the money was disbursed. In the same vein, in the 2001-2006 cycle, from the 15 billion Euros in aid promised to ACP countries, only 28% was disbursed by the end of the cycle.<sup>1619</sup> Thus, it is correct to argue that the funds allocated to EPAs adjustment will never be a substitute to tax revenues. Koffi Anan the former UN Secretary General is of the view that EPAs will jeopardise Africa's ability to realise the MDGs. He notes:

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<sup>1616</sup> CAFOD 'The rough guide to Economic Partnership Agreements (EPAs) at <http://www.cafod.org.uk/var/storage/original/application/phpnAorth.pdf> (accessed 10 June 2008).

<sup>1617</sup> Oxfam briefing note 'Unequal partners: how EU-ACP Economic Partnership Agreement (EPAs) could harm the development prospects of many of the world's poorest countries' at <http://www.markettradefair.org/en/assests/english/EPAfinalbriefingnote.pdf> 9-10 (accessed 10 June 2008).

<sup>1618</sup> CAFOD 'The rough guide to Economic Partnership Agreements (EPAs) at <http://www.cafod.org.uk/var/storage/original/application/phpnAorth.pdf> (accessed 10 June 2008).

<sup>1619</sup> CAFOD 'The rough guide to Economic Partnership Agreements (EPAs) at <http://www.cafod.org.uk/var/storage/original/application/phpnAorth.pdf> (accessed 10 June 2008).

A major concern is the impact that the trade liberalisation to be wrought by EPAs would have on fiscal revenue. The prospect of falling government revenue imposes a heavy burden on your countries and threatens to further hinder your ability to achieve the Millennium Development Goals.<sup>1620</sup>

Regional integration was the core element of the Cotonou Agreement. Its article 35(2) clearly observes that ‘economic and trade co-operation shall build on regional integration initiative of ACP states, bearing in mind that regional integration is a key instrument of ACP countries into the world economy’. More importantly, article 37(5) makes a commitment that negotiation will take ‘into account the regional integration process within the ACP’. EPAs make the same commitment in these terms: ‘economic and trade integration shall build on regional integration initiatives of ACP States’.<sup>1621</sup>

However, the EPAs commitment is mere rhetoric. ACP countries have no choice, but to negotiate through EPA regional bodies established by the EU. Eastern and Southern Africa Group (ESA), ECOWAS, SADC, COMESA and Economic and Monetary Community of Central Africa (CEMAC) are EPA negotiating bodies in Sub-Saharan Africa while the Caribbean Forum (CARIFORUM) and the Pacific ACP Group caters for the Caribbean states and the Pacific region respectively.<sup>1622</sup> Nevertheless, more importantly, the SADC’s EPA regional body is different from the well known SADC. Under the EPAs, Malawi, Mozambique, Zambia and Zimbabwe are moved from SADC to ESA. In this regard, pointing out Africa’s disintegration by EPAs, Oxfam, in its 27 September 2006 briefing note quoted Dame Billie Miller Barbados, Minister of Foreign Affairs and Chair of ACP Ministerial Trade Committee who said:

The EC’s insistence on trying to determine what is best for the ACP and how we should configure our economic space seems more than a little disingenuous. It is difficult to see how the [European]

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<sup>1620</sup> CAFOD ‘The rough guide to Economic Partnership Agreements (EPAs) at <http://www.cafod.org.uk/var/storage/original/application/phpnAorth.pdf> (accessed 10 June 2008).

<sup>1621</sup> European Community (EC) EPAs Negotiating Guidelines, art 35(2), 2002.

<sup>1622</sup> Oxfam briefing note ‘Unequal partners: how EU-ACP Economic Partnership Agreement (EPAs) could harm the development prospects of many of the world’s poorest countries’ at <http://www.markettradefair.org/en/assests/english/EPAfinalbriefingnote.pdf> 9-10 (accessed 10 June 2008).

Commission can reconcile its current negotiating approach with the statements made by various Commission officials that it is up to ACP regions to determine the pace and priorities of their regional integration.

Echoing the same concern, the AU called upon the:

European Commission to honour the commitment made by the Council [of Europe] in Brussels on 27 May 2008 to make EPAs an instrument for the promotion of development, support to regional integration, and gradual integration of African, Caribbean and Pacific (ACP) group of States in the world economy, and urges the European Commission to fully reflect this commitment in the negotiation and conclusion of full and comprehensive EPAs.<sup>1623</sup>

SADC's EPA negotiating body put non-least developing countries (Non-LDC) such as Botswana and Swaziland in the same basket with LDC ones (Angola for example). Such a practice does not enhance regional integration because under the 'everything but arms' (EBA) agreement LDC countries already have free access to EU market for everything except arms. Therefore, they do not need further agreements which open their markets for almost nothing in return and if they quit or reject EPAs and stay in their REC for example, they will still be affected by the EU imports entering their countries through their non-LDC regional neighbours. Furthermore having double and overlapping loyalties to an EPA regional group and to an African regional community will lead to region disintegration. Nevertheless, this is not the concern of the EU which in 2006, while preparing for the EPA mid-term review focused extensively on the completion of the agreement scheduled for December 2007 and not on the content as if the latest was perfect.<sup>1624</sup> Nonetheless, the ACP countries stood firm and obtained that the review be 'inclusive and consultative', 'conducted at national and regional levels' and must not forget to take account of 'the structure, process, and substance of the negotiations, the trade and development dimensions, as well as the capacity and preparedness to conclude the EPAs'.<sup>1625</sup>

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<sup>1623</sup> Assembly/AU/Dec.197 (XI) 1; Decision on the Report on negotiations of Economic Partnerships Agreement (EPAs). Doc. EX.CL/422 (XIII), para 6.

<sup>1624</sup> Draft ACP-EC Statement on EPA review, 9 June 2006.

<sup>1625</sup> Joint ACP/EU Declaration on the Review of the Economic Partnership Agreement (EPAs) Negotiations, July 2006.

Unfortunately, the ACP countries' victory was only on paper because as Oxfam puts it 'developing countries were forced to choose between guaranteeing existing exports to the EU on the one hand, and safeguarding small farmers' livelihood and future economic growth on the other' and 'it was an impossible choice'.<sup>1626</sup> Consequently, the signing of interim EPAs by Botswana, Lesotho, Swaziland and Mozambique (SADC region) on 23 November 2007 and five days later the signatures of Seychelles and Zimbabwe (ESA region) were obtained in Brussels. Similarly Kenya, Uganda, Tanzania, Rwanda Burundi from the Eastern Africa communities (EAC) signed the EPAs in Uganda on 23 November 2007.<sup>1627</sup> Analysing the interim EPAs Dr Ping, the Chairperson of the AU Commission observes:<sup>1628</sup>

The assessment of these Interim EPAs indicates that, contrary to the objectives set for EPAs in the Cotonou Partnership Agreement, they cannot serve as effective instruments for the promotion of sustainable development, the eradication of poverty, the reinforcement of Africa regional integration initiatives, and the gradual integration of the continent into the global economy. Not only have the Interim EPAs not adequately addressed the development dimension; they have had the implication of complicating rather than assisting Africa's integration efforts.

In other words, the EPA is not conducive to the realisation of the RTD. On the contrary this agreement is actually a roadblock for the achievement of the right, and this happens under NEPAD which is nowhere to be seen in the debate.

A quick look of the EU's EPA with SADC discloses that LDC will keep their advantage under EBA while non-LDC will enjoy EPAs benefits. More importantly, Botswana, Lesotho, Namibia, Lesotho and Swaziland agreed to 86% liberalisation in many years. 44% sensitive

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<sup>1626</sup> Oxfam GB 'Oxfam International on Economic Partnership Agreements in 2008' at [http://www.oxfam.org.uk/applications/blogs/pressoffice/2008/01/oxfarm\\_international\\_on\\_econom.html](http://www.oxfam.org.uk/applications/blogs/pressoffice/2008/01/oxfarm_international_on_econom.html) (accessed 13 June 2008).

<sup>1627</sup> December 2007 – Evolution of the EPAs at [http://www.aefjn.be/index.php?option=com\\_content&task=view&id=290&lang=en](http://www.aefjn.be/index.php?option=com_content&task=view&id=290&lang=en) (accessed 13 June 2008).

<sup>1628</sup> Address by Dr Jean Ping, Chairperson of the AU Commission at the opening of the 13<sup>th</sup> Ordinary Session of the AU Executive Council, 8; 27 June 2008, Sharm El Sheikh, Egypt.

tariff lines liberalisation is scheduled for 2015 and for 3 lines by 2018. Similarly, Mozambique agreed to liberalise 80% of trade immediately and 100 tariff lines by 2018. In other regions, the EPAs follow the same pattern characterised by a gradual liberalisation in ACP countries.

However, this looks like a very big trap for developing countries which in the long run will not be able to compete with giants and subsidised industries from the developed world. South Africa learnt the lesson the hard way. As a member of Southern Africa Customs Union (SACU),<sup>1629</sup> in 1999 South Africa concluded the Trade, Development and Co-operation Agreement (TDCA) with the EU without a consideration of its SACU membership. After the conclusion of the TDCA, there was a boom of South African export to the EU, but when it was time to implement lower tariff levels, the EU was the only beneficiary. Keet observes that ‘trade deficits between South Africa and the EU are growing at about two billion Euros per annum in the EU’s favor’.<sup>1630</sup> Keet also establishes a clear link between the ‘slow pace of employment creation in South Africa’ with the TDCA agreement which enhances the EU penetration in the financial service and high technology sectors in South Africa.<sup>1631</sup> Now, South Africa is arguing for a revision of the agreement on the ground that it should consider the interest of other SACU and SADC members. Obviously, the EU disagrees and will do so only in the context of the EPAs, which does not benefit South Africa. In reaction, on the 24 April 2008, South Africa through its Deputy Minister of Trade and Industry, Rob Davies called upon African Heads of State to stand together in opposition to EPAs.<sup>1632</sup> In the same vein, Zenawi, Ethiopian Prime Minister and current Chairperson of NEPAD used the 33<sup>rd</sup>

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<sup>1629</sup> SACU was established in 1910 and is made of Botswana, Namibia, Swaziland, Lesotho and South Africa.

<sup>1630</sup> A Kwa ‘Africa: EPA Threatens to Dismantle Oldest Customs Union’ *IPS News* at [http://www.eepa.be/wcm/index2.php?option=com\\_content&task=view&id=685&Itemid=137&pop=1&page=0](http://www.eepa.be/wcm/index2.php?option=com_content&task=view&id=685&Itemid=137&pop=1&page=0) (accessed on 13 June 2008).

<sup>1631</sup> A Kwa ‘Africa: EPA Threatens to Dismantle Oldest Customs Union’ *IPS News* at [http://www.eepa.be/wcm/index2.php?option=com\\_content&task=view&id=685&Itemid=137&pop=1&page=0](http://www.eepa.be/wcm/index2.php?option=com_content&task=view&id=685&Itemid=137&pop=1&page=0) (accessed 13 June 2008).

<sup>1632</sup> A Koranteng ‘Africa Leaders must unite against EPA agreements’ at [http://www.bilaterals.org/article.php3?id\\_article=11938](http://www.bilaterals.org/article.php3?id_article=11938) (accessed 16 June 2008).

ACP-EU Joint Council of Ministers held in Addis Ababa to present ACP's position. He stated:<sup>1633</sup>

We in the ACP are concerned that while the process made so far with respect to the EPA negotiations may be compatible with WTO rules, they are not adequately compatible with our development needs. We need to address those concerns in a spirit of understanding of each other's interests and accommodation.

In the same perspective, the AU at its 11<sup>th</sup> Summit in Egypt called upon the EU

[t]o consider providing an alternative trading arrangement, that is World Trade Organisation (WTO) – compatible but not less favourable than the Lomé /Cotonou trading regime, to African countries /groups that have not initialled Interim EPAs and may not be in a position to conclude full EPAs.<sup>1634</sup>

Thanks to EPAs, regional integration in Africa has many cracks. While Swaziland, Botswana and Lesotho are calling upon their neighbours to accelerate negotiation with the EU and intend finalise full EPAs, Namibia is cautious and intends to renegotiate the interim EPA before a final ratification and South Africa simply opts out. The life of SACU and even SADC is on the verge of becoming history. This sad situation is not unique to Southern Africa. It had been reported that Mamadou Diop, the Minister of Trade and Industry of Senegal had ‘criticised Ghana and Cote d’Ivoire for signing the EPA interim when the other subregional countries had advocated against it’. <sup>1635</sup> This may be one reason which led the AU to call on ‘African negotiating countries and groups to remain united in their engagement with the European Union Commission on EPAs.’<sup>1636</sup>

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<sup>1633</sup> M Zenawi ‘EU is ACP’s main Trading Partner’ ACP Press Statement at [http://www.acpsec.org/en/com/addis/pr\\_8.html](http://www.acpsec.org/en/com/addis/pr_8.html) (accessed 16 June 2008).

<sup>1634</sup> Assembly/AU/Dec.197 (XI) 1; Decision on the Report on negotiations of Economic Partnerships Agreement (EPAs). Doc. EX.CL/422 (XIII), para 8.

<sup>1635</sup> A Koranteng ‘Africa Leaders must unite against EPA agreements’ at [http://www.bilaterals.org/article.php3?id\\_article=11938](http://www.bilaterals.org/article.php3?id_article=11938) (accessed 16 June 2008).

<sup>1636</sup> Assembly/AU/Dec.197 (XI) 1; Decision on the Report on negotiations of Economic Partnerships Agreement (EPAs). Doc. EX.CL/422 (XIII), para 10.

However, the main question remains: where is Africa's voice in the whole process? Where is NEPAD? The African institution should be involved and defend African interests. It can at least send African RECs or countries on the negotiating table with 'one voice'. In this regard, the AU calls on 'the AU Commission to strengthen its coordination and harmonisation of the positions of the countries and groups in the negotiations of full EPAs.'<sup>1637</sup> In other words, NEPAD should play a role and ensure that EPAs consider Africa's development needs. In short, NEPAD must strive to humanise trade and request the establishment of global governance. This will be in line with the commitment in the 2005 World Summit Outcome 'to governance, equity and transparency in the financial, monetary and trading systems';<sup>1638</sup> NEPAD shall stand for an RTD approach in its partnership with the international community, using the revised draft RTD criteria established by the High Level Task Force (studied earlier) as the benchmark. In doing so, NEPAD through partnership will improve the prospects of the RTD in Africa.

#### **7.4 Concluding remarks**

The aim of this chapter was to examine to what extent NEPAD strategy to set up a new global partnership could be conducive to the realisation of the RTD. After a brief overview of the concept of partnership, the chapter looked at the partnership between NEPAD and the G8, focused on the possible role of NEPAD in the WTO in general and with specific attention to some aspects of the TRIPS and AoA agreement, looked at its place in the ACP Agreement and analysed its inputs in the EPAs. All these partnerships activities revealed that NEPAD is way behind its target of establishing a true partnership between Africa and the rest of the world. In fact, NEPAD and African countries are victims of powers. As a result, NEPAD appears to be the weakest link in all these partnerships endeavours. Indeed, in its relation with the G8 and in the WTO, it does not make a significant impact; the same observation is made in the development of the ACP Agreement to the APAs where NEPAD shines by its absence. By the look of things, one can argue that establishing a 'new global partnership' is the most

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<sup>1637</sup> Assembly/AU/Dec.197 (XI) 1; Decision on the Report on negotiations of Economic Partnerships Agreement (EPAs). Doc. EX.CL/422 (XIII), para 11.

<sup>1638</sup> General Assembly resolution 60/1, 2005 World Summit Outcome, para 36; also E/CN.4/2006/26, para 46.

difficult task on NEPAD's desk and this does not in anyway increase the prospects for the realisation of the RTD in Africa.