International Economic Law Clinic

EU-ACP ECONOMIC PARTNERSHIP AGREEMENTS (EPAS): A CASE FOR AFRICAN STATES

16 December, 2019, Nairobi

Submitted by

Quinter Otieno, Samuel Mwendwa, Rabin Albert and Maleehah Khandwalla

To : International Institute for Sustainable Development (IISD)
info@iisd.org

TradeLab

International rules on cross-border trade and investment are increasingly complex. There is the WTO, World Bank and UNCTAD, but also hundreds of bilateral investment treaties (BITs) and free trade arrangements ranging from GSP, EU EPAs and COMESA to ASEAN, CAFTA and TPP. Each has its own negotiation, implementation and dispute settlement system. Everyone is affected but few have the time and resources to fully engage.
TradeLab aims to empower countries and smaller stakeholders to reap the full development benefits of global trade and investment rules. Through pro bono legal clinics and practica, TradeLab connects students and experienced legal professionals to public officials especially in developing countries, small and medium-sized enterprises and civil society to build lasting legal capacity. Through 'learning by doing' we want to train and promote the next generation of trade and investment lawyers. By providing information and support on negotiations, compliance and litigation, we strive to make WTO, preferential trade and bilateral investment treaties work for everyone.

More at: https://www.tradelab.org

What are Legal Practica

Legal practica are composed of small groups of highly qualified and carefully selected students. Faculty and other professionals with longstanding experience in the field act as Academic Supervisors and Mentors for the Practica and closely supervise the work. Practica are win-win for all involved: beneficiaries get expert work done for free and build capacity; students learn by doing, obtain academic credits and expand their network; faculty and expert mentors share their knowledge on cutting-edge issues and are able to attract or hire top students with proven skills.
Practicum projects are selected on the basis of need, available resources and practical relevance. Two to four students are assigned to each project. Students are teamed up with expert mentors from law firms or other organizations and carefully prepped and supervised by Academic Supervisors and Teaching Assistants. Students benefit from skills and expert sessions, do detailed legal research and work on several drafts shared with supervisors, mentors and the beneficiary for comments and feedback. The Practicum culminates in a polished legal memorandum, brief, draft law or treaty text or other output tailored to the project's needs. Practica deliver in three to four months. Work and output can be public or fully confidential, for example, when preparing legislative or treaty proposals or briefs in actual disputes.

Kenyatta University

Contents

Executive Summary

The European Union (EU) trades with the African, Caribbean and Pacific (ACP) states in three ways; the first is under the Everything but Arms (EBA) scheme which governs trade relations between the EU and ACP states that are least developed. Under this scheme, all products except arms from Least Developed Countries (LDCs) are granted duty free and quota free access to EU markets. The second way was through which EU trades with ACP states is through the Economic Partnership Agreements (EPAs) which would still allow for duty and quota free access of ACP products to EU markets while providing for the gradual opening up of ACP markets over an agreed period of time so as to ensure reciprocity. The third way is through the General System of Preferences (GSP) and GSP+ in accordance with the enabling clause and part IV of the GATT that provides for non-reciprocal preferential treatment to developing countries by developed countries in a non-discriminatory manner.

Of great focus to this paper are the EPAs, their status, their legal implication, their compatibility with the WTO rules and the possibility of legally exiting the EPAs. This paper also considers the possible cause of action in the event African states choose to exit the EPAs, the trade pillar under the Cotonou Partnership Agreement as well as the impact of BREXIT on the ACP-EU trade relations.

Currently, there are 9 EPAs between EU and ACP member states. Of the nine, seven are from African states. Out of the seven, two are stepping stone EPAs between Cote d'Ivore and the EU as well as Ghana and the EU. The remaining EPAs stem from the various regional blocs; the ECOWAS, EAC, SADC, ESA and the Central Africa region. Of the 5 EPAs from the regional blocs, only the SADC, ESA and Central Africa are under provisional application. The ECOWAS and EAC EPAs are not under application due to the failure of certain EAC and ECOWAS member states to sign and ratify the EPAs. The current status of the EPAs has been further canvassed in the substantive part of this paper.

There are various impacts of the EPAs such as trade liberalisation, impediment of the sovereignty of the ACP member states as a result of the unequal bargaining power that exists between the EU and the ACP member states. There is also the competitive disadvantage

occasioned on products from ACP states as a result of the subsidies given by the EU to products from the EU.

On the conformity of the EPAs with WTO rules, there are certain elements of the EPAs that fall short of the same. The specific provision is article 24 of the GATT despite the fact that they have been notified under the same. This is because it could be argued that they have failed to meet the qualitative threshold of the substantially all trade requirement under article 24 as well as exceeding the time frame for liberalisation envisioned under the said article. This shall also be substantiated in the substantive section of this research.

When it comes to the possibility of exiting the EPAs, there are various options provided for under the Vienna Convention on the Law of Treaties (VCLT). There are those that apply exclusively for treaties under provisional application and those that apply for treaties that have already entered into force. Of relevance to ACP states are the express exit clauses provided under the EPAs. In the event African states exit the EPAs, the most feasible alternative to maintain trade relations is through seeking a waiver under the GATT which allows WTO members to waive obligations imposed on a WTO Member by WTO multilateral agreements, including GATT itself.

As regards the trade pillar, the same is provided for from article 34-52 of the Cotonou Partnership Agreement (CPA) and exclusively deals with the trade relations between the EU and ACP states. It is to be implemented through the EPAs. The ACP states can base the argument on exclusion of the same from the 2020 negotiation rounds on the grounds that it provides for the blanket opening of ACP markets albeit gradually with no limitation for sensitive products. Further, they can also argue that the trade pillar has already been implemented through the EPAs hence there is no need to include it. However, an alternative to the total exclusion of the trade pillar would be renegotiation the provisions of article 36(1) of the CPA to provide protection for sensitive industries in the ACP states.

When it comes to BREXIT, The UK formulating its own trade policy following Brexit is likely to have implications for the existing Economic Partnership Agreements (EPAs) between the European Union (EU) and some African, Caribbean and Pacific (ACP) countries. In the absence of equivalent market access, these countries may face higher most-favoured nation (MFN) tariffs

in the UK market or revert back to GSP scheme regardless of the fact that the United Kingdom remains a major trade, investment and development cooperation partner for many sub-Saharan African countries.

Abbreviations

EPA; Economic Partnership Agreements

ACP; African, Caribbean and Pacific

CPA; Cotonou Partnership Agreement

EU; European Union

EAC; East African Community

ECOWAS; Economic Community for Western African States

ESA; Eastern and Southern Africa

LDC; Least Developed Countries

WTO; World Trade Organisation

VCLT; Vienna Convention on the Law of Treaties

1. Brief Background on the EU-ACP EPAs

The trade relations between the European Union (EU) and the African, Caribbean and Pacific (ACP) states can be traced back to the 1957 Rome convention that established the European Economic Community. The treaty had a special section on the cooperation between the EEC and former Colonies[1]. The purpose of this cooperation was to promote social and economic development and mainly covered former French Colonies[2]. As more colonial territories gained independence, the need for a more comprehensive treaty arose which led to the conclusion of the first and second Yaoundé conventions. The Yaoundé conventions were initially between 19 ACP states and the European Economic Community (EEC) member states. After the United Kingdom joined the EEC, the Lome Convention of 1975 was negotiated between the EEC member states and 46 ACP member states which included former British colonies. Under this convention, the main focus was to facilitate development of ACP States[3].

The convention allowed for non-reciprocal opening up of EEC markets to products originating from ACP states. However, this arrangement was found to be inconsistent with the WTO principles in the *EC Bananas case* where the WTO panel found that EEC was supposed to accord all products from developing countries the same treatment and to the extent that it only allowed ACP products preferential treatment. The panel held that the same was against WTO rules since it violated the enabling clause that provided for non-discriminatory preferential treatment of developing countries.[4] The EU[5] subsequently sought a five year waiver for the Lome convention pending negotiations to bring the trade relations between EU and ACP into conformity with WTO rules.[6]

[1] Karin Arts, *Lome/Cotonou Conventions*, Max Planck Encyclopedia of International Law(2018).
[2] Adrian Flint, *The End of a ''special relationship" The new EU-ACP Economic Partnership Agreements' Review of African Political Economy* (2009).
[3] S Roy, African Development and ACP-EU Partnership, Economic and Political Weekly, 40(6)(2005) 521-523 http://www.jstor.org/stable/4416164 (accessed 18 November 2018).
[4] European Communities — Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
[5] The European Economic Community became the European Community in 1993 and was replaced by the European Union in 2009.
[6] Roman Grynberg, *The WTO incompatibility of the Lome Convention trade provision*, Asia Pacific School of Economics and Management (1998).

This led to the Cotonou Partnership Agreement (CPA) of 2000 that was supposed to ensure WTO compliance[7]. Under this agreement, EU was to trade in two ways with the ACP states[8]. The first one is through the special treatment to be accorded to Least Developed Countries (LDCs). Article 85 of the CPA recognises that LDCs will be accorded preferential treatment[9]. It is as a result of this that the EU developed the Everything but Arms (EBA) scheme through which all products except arms from LDCs would be granted duty free and quota free access to EU markets.[10] A country enjoys the EBA mechanism where it has been listed as a Least Developed Country (LDC) by the UN Committee on Development Policy. It can equally be withdrawn for systematic violations human rights and labour rights, however, the EBA does not have an expiry date and the entry into a Free Trade Agreement does nullify the application of the EBA.[11]

As at December 2018, ACP states had 28 LDCs with African States having 25 out of 55, the Caribbean having 1 out 25 states of while the Pacific States have 2 out of 11 .[12] The LDCs are; Benin, Burkina Faso, Burundi, Central African Republic, Chad, Democratic Republic of Congo, Eritrea, Ethiopia, Gambia, Guinea, Guinea- Bissau, Liberia, Malawi, Madagascar, Mali, Mozambique, Niger , Rwanda, Sierra Leone, Somalia, South Sudan, Sudan, Togo, Uganda, United Republic of Tanzania, Vanuatu, Tuvalu and Haiti.

The second way was through which EU trades with ACP states is through the Economic Partnership Agreements (EPAs) which would still allow for duty and quota free access of ACP products to EU markets while providing for the gradual opening up of ACP markets over an agreed period of time so as to ensure reciprocity.

Article 34(4) of the Cotonou Partnership Agreement stipulates that cooperation in trade shall be done in full compliance with the WTO principles. The EPAs were to be concluded between 2002

[7] Geneva Resource Centre, *The most favoured nation provision in the EC-EAC EPA and its implications* (2009).
[8] The status of trade preference in WTO.
[9] Cotonou Partnership Agreement.
[10] Keijzer N & Bartels L, 'Assessing the Legal and Political Implications of the Post-Cotonou Negotiations for the Economic Partnership Agreements' 2017 German Institute of Development
[11] European Commission, *Everything But Arms* https://trade.ec.europa.eu/tradehelp/everything-arms (accessed 18 November 2019).
[12] United Nations Committee for Development Policy (https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf) accessed 18 November 2019

and 2007[13]. This therefore necessitated the request for a waiver from article 1(1) of the GATT to allow for the non-reciprocal trade arrangement between the EU and ACP states would continue until 2007 when the EPAs were to be concluded.[14] The waiver was then adopted in November, 2001 in the Doha ministerial conference.[15] However, as at the expiry of the waiver on 31st December 2007, only the Carriforum EPA had been successfully concluded. The EU then set a deadline of October 2014 for concluding the EPA negotiations and threatened ACP states with reverting to the less favourable Generalized System of Preferences.[16] As at 2014 the EPAs had been negotiated and some had been signed and ratified while others were still pending signing and ratification[17].

2. Alternatives systems to EPAs

Apart from the preference grated by EPAs and the EBA Scheme, there are also other schemes granted by the EU namely the General System of Preferences (GSP) and GSP+ in accordance with the enabling clause[18] and part IV of the GATT that provide for non-reciprocal preferential treatment to developing countries by developed countries in a non-discriminatory manner.[19]

2.1.Standard GSP

The Standard GSP offers tariff reductions to developing countries (low and lower-middle income) and entails removal of customs fully or partially on two thirds of tariff lines (66%). The EU can withdraw the Standard GSP in exceptional circumstances notably serious and systematic violation of fundamental human rights and labour rights conventions. GSP can be withdrawn where a particular country exports highly competitive products which do not need preferences to access the world markets. Currently, GSP is withdrawn where the average value of imports from

[13] Roy (n 3 above).
[14] Achille Bassilekin, 'Possibility of obtaining a new ACP-EU waiver at WTO' Discussion paper no 70 of March 2007, European Centre for Development and Policy Management.
[15] DOHA WTO MINISTERIAL 2001: THE ACP-EC PARTNERSHIP AGREEMENT WT/MIN(01)/15 14 November 2001 https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_acp_ec_agre_e.htm
[16] International Centre for Trade and Sustainable Development, 'EPA: West Africa and the EU conclude a deal' 2014 https://www.ictsd.org/bridges-news/bridges-africa/news/epa-west-africa-and-the-eu-conclude-a-deal
[17] Niels Keijzer Lorand Bartels, *Assessing the legal and political implications of the post Cotonou negotiations for the economic partnership agreements*, German Development Institute(2017).
[18] WTO Trade and Development Committee, 'Special and Differential treatment Provisions' https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm
[19] Simon Lester, Bryan Mercurio and Arwel Davies, 'World Trade Law: Texts, Materials and Commentaries', (2012) 2ed Hart Publishing

a GSP beneficiary over 3 years exceeds the threshold of 57% and for vegetable products, animal and vegetable oils when the percentage exceeds 17.5%.[20] The GSP is valid until 2023.

2.2.GSP+

The GSP+ entails full removal of tariffs on essentially the same product categories as those covered under the general agreement and they are generally granted to countries which ratify and implement 27 core international conventions relating to human and labour rights, environment and good governance.[21] For a country to benefit under the GSP+, they must fulfil the conditions for gaining a Standard GSP together with two additional requirements: vulnerability criteria and sustainable development criteria. To satisfy the vulnerability criteria, a country's import share should have an average of less than 6.5% of the import share and it has to fulfil a diversification criterion where the seven largest sections of the GSP covered imports represent 75% of the total GSP imports by that country over a three year period.[22] With regards to the sustainable development criteria, a country must have ratified the 27 GSP+ relevant conventions and must not have formulated reservations. Additionally, the most recent conclusions of the monitoring bodies under those conventions must not identify any serious failure to effectively implement them.[23]

3. The status of the current EPAs

Currently, there are 9 EPAs between EU and ACP member states. Of the nine, seven are from African states. Out of the seven, two are stepping stone EPAs between Cote d'Ivore and the EU as well as Ghana and the EU. The remaining EPAs stem from the various regional blocs; the ECOWAS, EAC, SADC, ESA and the Central Africa region.

	Economic Partnership	**Current status[24]**

[20] European Commission, *Standard GSP* https://trade.ec.europa.eu/tradehelp/standard-gsp (accessed 18 November 2019).
[21] European Commission, *Generalized Scheme of Preferences (GSP)* https://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/ (accessed 18 November 2019).
[22] European Commission, *GSP+* https://trade.ec.europa.eu/tradehelp/gsp (accessed 18 November 2019)
[23] European Commission (n 29 above).
[24] European Commission, *Overview of Economic Partnership Agreements* (2019).

<table>
<tr><td></td><td>Agreement</td><td colspan="2"></td></tr>
<tr><td>1.</td><td>Economic Community of Western African States(ECOWAS)</td><td colspan="2">All EU member states and 13 West African states signed the EPA in December 2014 with the exception of Nigeria, Mauritania and Gambia.
Gambia signed on 9 August 2018 while Mauritania on 21 September 2018. Nigeria has still not signed.
Stepping stone EPAs[25]</td></tr>
<tr><td></td><td></td><td>Cote d’Ivore</td><td>Signed on 26 November 2008 and approved by the European Parliament on 25 March 2009. Ratified by Cote d’Ivore on 12 August 2016 and entered into provisional application on 3 September 2016</td></tr>
<tr><td></td><td></td><td>Ghana</td><td>Signed on 28 July 2016. Ratified by Ghana on 3 August 2016. Approved by European Parliament on 1 December 2016. Entered into provisional application on 15 December 2016</td></tr>
<tr><td>2.</td><td>Eastern and Southern Africa (ESA)</td><td colspan="2">Was signed in 2008 by Mauritius, Seychelles, Zimbabwe and Madagascar.</td></tr>
</table>

[25] Were negotiated pending the signing and ratification of the ECOWAS EPA by all the ECOWAS member states.

		• Has been provisionally applied since 14 May 2012. • The European Parliament gave its consent on 17 January 2013 • Comoros also begun applying the EPA in 2019 • Currently there are negotiations to deepen the scope of the existing agreement.
3.	East African Community (EAC)	• Negotiations successfully concluded in October 2014. Among the EAC member states, only Kenya and Rwanda have signed the EPA. • This was done on 1 September 2016. • Kenya has also ratified the EPA. All the EU member states and the EU have also signed the EPA
4.	Southern African Development Community (SADC) EPA Group	• Signed by the EU and SADC EPA group on 10 June 2016. • EU parliament gave its consent on 14 September 2016. • Came into provisional application on 10 October 2016 pending ratification by all EU member states. Provisional application for Mozambique started on 4 February 2018.[26]
5.	Central Africa	• Cameroon signed on 15 January 2009 and ratified in July 2014 and is the only country in Central

[26] European Commission, 'Overview of Economic Partnership Agreements' updated March, 2020 https://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf

		Africa which has done so. • Congo Brazaville trades with EU under the GSP whereas the remaining countries are LDCs hence benefit from the EBA scheme save for Gabon which is neither an LDC nor has qualified for the GSP but still has not signed the EPA.[27] • European parliament gave its consent to the EPA on June 2013. • Entered into provisional application on 4 August 2014.
6.	Caribbean EPA	• Signed in October 2008 and approved by the European Parliament in March 2009 • Carriforum states to benefit from 100% duty free, quota free access to EU markets while gradually opening up 80% of their markets over 25 years. • Under provisional agreement.
7.	Pacific	• Signed in 2009 by Fiji and Papua New Guinea. • European Parliament gave its consent on 19 January 2011. • PNG ratified in 2011. Fiji started provisional application in 2014.

[27] European Commission, 'Economic Partnership Agreements' https://ec.europa.eu/trade/policy/countries-and-regions/regions/central-africa/

4. Legal Impact of the Economic Partnership Agreements (EPAs)

4.1.Trade Liberalization

One of the impacts of the EPAs will be trade liberalization which is to be achieved through market access. Article 37(4) of the Cotonou Partnership Agreement obliges the European Union (EU) to aim at improving current market access for African, Caribbean and Pacific (ACP) countries. It is argued that the opening up of EU markets is beneficial for ACP states since it leads to an increase in export opportunities, however, the disadvantages outweigh the benefits. Trade liberalization under the EPA will result in lost income and limited opportunities to industrialize for ACP countries and Africa in this case being one of them will have to compete in European markets which is cumbersome considering that their goods will be up against established brands that already command a consumer familiarity and taste which is the opposite of the treatment goods from Europe will get in ACP markets.

4.2.Competitive disadvantage as a result of subsidised products from EU

Another impact of the EPAs is the competitive disadvantage occasioned to products from ACP states given that for products from developed countries, producers receive total support in terms of subsidies making their products cheaper than those found in the ACP states therefore occasioning a disadvantage to similar products from ACP states that are not subsidised.

Subsidies can be defined as payments made by a government to a private entity. They are generally provided for under the Subsidies and Countervailing Measures (SCM) Agreement which provides that they shall be deemed to exist if two conditions are met:[28] there must be a financial contribution by a government or any public body or any form of income or price support and that a benefit must be conferred.

Under the World Trade Organization (WTO) rules, there is insistence on a 'government' or 'public body' being involved and the Appellate Body in *US-Antidumping and Countervailing duties (China) Case* held that a public body envisaged by Article 1(1) of the SCM Agreement is an entity that possesses, exercises or is vested with governmental authority and that the precise characteristics differ from state to state.

[28] Subsidies and Countervailing Measures Agreement, art 1(1).

On the aspect of financial contribution, Article 1(1) (a) of the SCM Agreement states that financial contribution will be deemed to exist where: there is a governmental practice involving a direct transfer of funds or potential direct transfer of funds or liabilities; government revenue that is due is forgone or not collected; government provides goods or services other than general infrastructure or purchases the goods; and a government makes payments to a funding mechanism or directs a private body to carry out one or more of the functions above which would normally be vested in the government.

On the requirement of income or price support, the General Agreement on Tariffs and Trade (GATT) does not define what income or price support entails[29] but these terms are mostly used in the context of agricultural products and they serve to guarantee farmers' incomes at certain levels through government payments or to support the prices of products at a certain level through governmental guarantees to buy the product of the product should fall below that level.[30]

Finally for there to be a subsidy, there must be a benefit that is conferred. The Appellate Body has elaborated on this fact stating in *Canada-Aircraft* that the determination of whether a benefit is conferred implies some comparison in the marketplace because the marketplace provides an appropriate basis for the comparison in determining whether a benefit has been conferred because the trade distorting potential of a financial contribution can be identified by determining whether the recipient has received a financial contribution on more favourable terms than those available to the recipient in the market.

In the context of the European Union, there exists an agricultural policy that provides for setting aside roughly 60 billion euros per year to subsidise farmer[31]. This already qualifies it as a financial contribution by the government in context of the above discussed criteria. Moreover, there is a requirement that a benefit must be conferred. The agricultural policy provides direct payments to farmers and also aims to cushion farmers from the effects of a sudden drop in

[29] Simon Lester et al, *World Trade Law* 2nd ed (2012) Hart Publishing.
[30] Simon Lester et al, *World Trade Law* 2nd ed (2012) Hart Publishing.
[31] Welcome Europe, EU fund and call for proposals for agriculture and fisheries (https://www.welcomeurope.com/european-subsidies-sector-Agriculture+Fisheries.html) accessed 16 November 2019.

demand which in themselves constitute a benefit as per the requirements of the SCM agreement.[32]

Subsidies are generally allowed under the WTO. However, export subsidies and domestic content subsidies are prohibited. Of relevance to this discussion is export subsidies and analysing whether the subsidies granted by the EU qualify as such in order to determine whether or not they are prohibited. [33]

In order for a subsidy to qualify as an export subsidy, the facts must demonstrate that the granting of a subsidy was made contingent upon export performance is tied to actual or anticipated export earnings. The Appellate Body in *EC-Aircraft* elaborated on Article 3(1) of the SCM Agreement held that the term anticipated means expected and that it was the granting authority that anticipates that the exportation will occur after granting the subsidy hence it grants the subsidy on the anticipation of the exports. Further, it held that there must exists a relationship of conditionality between the granting of the subsidy and anticipated exportation and to determine conditionality, it set out a test where one needs to assess whether the granting of the subsidy is geared to induce the promotion of future export performance by the recipient. For the condition to be met, the subsidy should have been given in order to provide an incentive to the recipient to export in a way that is not reflective of the conditions of supply and demand in domestic and export markets undistorted by the granting of the subsidy.

4.2.1. Are the EU Subsidies prohibited?

In the present context the EU subsidies for instance under the agricultural policy was introduced with the aim of supporting farmers, ensuring stability in food production, dealing with climate change among others[34]. It is therefore clear that the same was not made contingent on export performance hence the said subsidies do not qualify as export subsidy and thus are not prohibited under the SCM agreement.

The WTO has developed a remedy for Members that may be affected by the granting of subsidies and it gives them the option of using countervailing measures which are meant to impose restraints on subsidised imports. The imposition of the countervailing duties will be

[32] https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance_en
[33] Subsidies and Countervailing Measures Agreement, art 3(1).
[34] https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance_en

beneficial for the ACP States in their territory while trying to deal with the imports from the EU but in terms of the ACP exports to the EU, ACP states would not benefit from the countervailing measures. Therefore, although the EU subsidies are not incompatible with the SCM Agreement, they have a negative effect since they promote unfair competition especially in terms of agricultural products which are a major export commodity for ACP. This is an important bottleneck for future agro-industrial development since in terms of the EU ACP trade, unsubsidised ACP agricultural products would have to bear with the stiff competition that exists in the EU markets for products that benefit from the EU agricultural policy[35].

4.3.Unequal bargaining power and undermining the sovereignty of ACP states

The current state of EPAs with ACP states, especially the African Countries, have the effect of undermining the sovereignty of the African people. The recent EPA negotiations have been plagued with lack of relevant stakeholder involvement as shall be demonstrated below. Article 21 of the Universal Declaration of Human Rights provides that every person has the right to take part in the government of his country directly or through freely chosen representatives. The same is reiterated in Article 25(a) of the International Covenant on Civil and Political Rights (ICCPR). The Cotonou Partnership Agreement similarly appreciates the critical role that participation plays in trade.[36] It states that partnerships are to be open to ACP parliaments and local authorities and different kinds of other actors in order to encourage the integration of all sections of society including the private sector and Civil Society Organisations into the mainstream of political, economic and social life.

The Cotonou Agreement further goes on to acknowledge sovereignty of all ACP states in determining the development principles, strategies and models of their economies and society.[37] It goes on to recognize the complimentary role of and potential for contributions by non-state actors, ACP national parliaments and local decentralised authorities to the development process at national and regional levels.[38] The non-state actors are to where appropriate be informed and involved in consultation and cooperation policies and strategies on priorities for cooperation especially in areas that concern or directly affect them. The negotiators are supposed to facilitate

[35] https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance_en
[36] Cotonou Partnership Agreement, art 2.
[37] Cotonou Partnership Agreement, art 4.
[38] Cotonou Partnership Agreement, art 4.

capacity building in order to reinforce capabilities of these actors especially with regards to organization and establishment of consultation mechanisms including channels of communication and dialogue.[39]

The lack of stakeholder involvement has been exposed by the number of law suits that have been filed in ACP states courts for example in Kenya, small-scale farmers filed a suit seeking to stop negotiations during the Doha Round.[40] The petitioners were a representative group of Small Scale Farmers and they argued that the operationalization of the Cotonou Partnership Agreement and commencement of the EPA was not in the best interests of small scale farmers. They averred that the coming into force of the EPAs will lead to massive losses in agricultural produce and could push a large number of farmers out of work owing to the heavy subsidization that agricultural products from the EU receive. Additionally, they stated that the coming into force of the EPA could lead to food insecurity, undermine Kenya's food sovereignty and impede their right to self-determination which will all be brought about by the unfair competition that would occur.

The court reached a decision that there was indeed no participation and directed that the state establish a mechanism for involving stakeholders in the ongoing EPA negotiations and that the state also publish information regarding the negotiations for public awareness and in order to stimulate public debate. The court was of the view that it was not too late in the particular case for the State to involve the public in the negotiations. Additionally, at the time, Kenya did not have a framework on Treaty making and ratification therefore the State could not be held liable taking into account the fact that the Treaty Making and Ratifications Act provides for various methods of approval of the agreements which do not need to take place at the pre-legislative process.[41] However, even without the Act in force, the court was of the view that Parliamentary approval could not replace public participation as was held in *Matatiele Municipality and Others vs. President of the Republic of South Africa and Others.*[42] The court additionally stated that in as much as public participation was envisioned, any directly affected group did not have the

[39] n 27 above.
[40] *Kenya Small Scale Farmers Forum & 6 others v Republic & 2 others* (2013) eKLR.
[41] See Section 6 of the Treaty Making and Ratifications Act, the Executive and State Department to be bound by the values and principles of the Constitution. Article 10(2) of the Constitution of Kenya provides that participation of the people is one of the national values.
[42] (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)

unconditional right to choose the modalities of participation in the conduct of public affairs. Nevertheless, the court did not exonerate the State because the minimum requirements under the CPA and it was not too late to rectify their mistake because the negotiations were still ongoing.

Three years after the decision was made, another law suit was filed this time at the regional level at the East African Community Court of Justice in *Castro Pius Shirirma v The Attorney General (Burundi, Kenya, Rwanda, South Sudan, Tanzania, Uganda) & Secretary General of the East African Community*.[43] The present application was brought under a certificate of urgency pending the hearing of the substantive petition.[44] The application was brought about by Kenya's decision to ratify the EPA between the East African Community(EAC) and the EU despite the 17th EAC Extra-ordinary Summit decision halting the signing the EPA to enhance further consultation.[45]

The applicant contended that the EU had unilaterally set 1st October 2014 as the deadline for the conclusion of EPA negotiations and had threatened that after the date had passed, exports from East Africa would lose preferential treatment and be subject to the Generalized Scheme of Preferences. He deposed that the signing of the EPA would not be in the interest of the Partner States to the Community as it posed economic risks to the East African region because there was uncertainty in the relationship between the Community and the EU following UK's Brexit.

The main reason why some of the EAC Partner states were quick to cower and ratify the EPA with the EU was because going back to the GSP would mean that for the EAC Partner States to qualify for the GSP, they had to be classified as having an income below upper middle income by the World Bank and the countries should not be beneficiaries of another agreement granting them preferential access to the EU market. Moreover, all GSP beneficiaries have to respect the principles of 15 core conventions on human rights and labour rights listed in Annex VIII of Regulation (EU) No 978/2012 of the European Parliament and of the Council.

The application was dismissed because the applicant was unable to prove irreparable harm to him and by the time the main petition came up for hearing, the matter had been withdrawn.

[43] Application No. 11 of 2016.
[44] Reference no. 8 of 2016.
[45] *Castro Pius Shirirma v The Attorney General (Burundi, Kenya, Rwanda, South Sudan, Tanzania, Uganda) & Secretary General of the East African Community* Application No. 11 of 2016, para 20.

Despite it not succeeding it is important to note the mischiefs revealed in the negotiations including the coercion of EAC states with a deadline to comply by and the fact that after Brexit, the EAC may cease to derive benefits from the EU-EAC EPA since with UK's exit, the EAC will get a lesser value from the EU than it had bargained for when early negotiations were concluded while the EU will continue enjoying the same benefits it had bargained for.

From the above, it is clear that there is great concern regarding the impact of the BREXIT since it may be deemed that preferential access to the UK market may be lost leading to reduced trade. This all depends on the trade policy that the UK opts to use, however, to avoid affecting the flow of goods the UK should build on what the EU is already doing so that there is a smooth transition because any form of a new approach may have negative economic impacts.

Moreover, the African states to tackle the impact that may be caused by BREXIT could make use of the AfCFTA as it will provide an opportunity to deal with the trade fragmentation. A number of countries such as South Africa will be affected by BREXIT because the UK is its eighth largest import and export market and its GDP is predicted to shrink by 0.1% which would result in slower economic growth as a result of potentially weaker trade and investment ties with traditional overseas markets which will translate to less job creation.[46] Similarly, Kenya (Britain's 3rd largest market in Africa) could witness capital flight after BREXIT since most investors might be persuaded to seek safe havens in other countries that may not face the economic impact of BREXIT. This might result in the weakening of the Kenya shilling and the increase in import costs. Another key concern is the impact BREXIT may have on the flower industry considering that the UK and the Netherlands (which is similarly threatening to leave the EU) are the top destination for Kenyan flowers. Due to BREXIT, trade relations between Kenya and its EU counterparts will be altered leading to a decrease in demand for Kenyan products in the EU.[47] Kenya will thus be left with the predicament of having to negotiate separate deals with the EU and UK because once the UK leaves, Kenya might lack presence in the EU flower market and since the UK will be controlling its own trade, it may seek new agreement terms. The

[46] '*Africa after Brexit*' August-November 2016 https://www.un.org/africarenewal/magazine/august-2016/africa-after-brexit (accessed 16 December 2019).
[47] n 45 above.

negotiation of new deals might prove difficult since any delay in the negotiations may lead to export delays and eventually loss of export revenue.

The above reveals the negative impacts of the reliance of preferential trade agreements therefore to avoid falling victim to overreliance on foreign aid, the AfCTFA may be the proper mechanism because it provides an opportunity for self-reliance and regional cooperation among African States which could tackle the challenges ahead. However, in as much as the AfCFTA may provide alternative markets for African countries, this may not be able to fill the gap left by prior engagements with the EU. The AfCFTA will provide an opportunity to areas that had been disadvantaged and this may lead to increased competition. The smaller countries will have to compete against larger countries that have the financial muscle and technical capability to produce outstanding products therefore limiting the countries that would benefit from the trade. Moreover, the African market may not be big enough to cover the benefits that trickled down from the EU access.

5. Compatibility of the EPAs with WTO Law

Preferential Trade Agreements (PTAs) violate the Most Favoured Nation Treatment Principle, and this is made possible since they fall under the exceptions to the MFN like Article XXIV GATT, the Enabling Clause and possibility of a waiver under Article XXV: 5 which will be discussed below.

Article 34(4) of the Cotonou Partnership Agreement stipulates that economic and trade cooperation shall be implemented in full conformity with the rules of the WTO. However, there are certain elements of the EPAs that are not in conformity with the WTO rules and in particular article 24 of the GATT despite the fact that they have been notified under the same.[48]

5.1.Substantially all trade

Article XXIV: 8(b) requires that an FTA should include eliminating duties and other restrictive regulations of commerce on substantially all trade between the constituent territories in products originating in such territories.

[48] Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 https://www.wto.or/english/docs_e/legal_e/10-24_e.htm (accessed 16 December 2019).

The concept of substantially all trade has never actually been clearly defined. Members could not agree on the meaning of substantially all trade. To determine the meaning of the said term, recourse would be made to Article 3(2) of the Dispute Settlement Understanding (DSU) and the Vienna Convention[49] which require the reliance on the ordinary meaning of a word. The word 'substantial' indicates that not all trade between the members of a Preferential Trade Agreement (PTA) need to be included in order for the PTA to be compatible with Article XXIV: 8.[50] However, this meaning still leaves unanswered the question of how much trade must be included to meet the Article XXIV:8 obligation.

During the Uruguay Round, the parties sought to clarify the real meaning but the only reference was made in the preamble as recognising that the contribution of free trade areas to world trade is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded.

The Appellate Body in the *Turkey-Textiles case* attempted to define what is meant by substantially all trade and it indicated that it is not the same as all the trade and at the same time is considerably more than merely some of the trade. The Panel on the other hand was of the view that the aspect of substantially all trade offered some flexibility to the constituent members of a custom union when liberalizing their internal trade, however, the degree of flexibility allowed is limited by the requirement that the duties and other restrictive regulations of commerce be eliminated with respect to substantially all trade.[51]

However, what can be gathered form the Turkey-Textiles decision was that the use of the term 'substantial' connotes that there are both qualitative and quantitative aspects to the term.[52]

5.2. Quantitative criteria for determining substantially all trade

According the Report of the Subgroup of the Committee on the European Economic Community, a Free Trade Area (FTA) would be considered Article XXIV: 8 compliant if the volume of the liberalized trade equals 80% of the liberalized trade. The most important thing to be considered

[49] Vienna Convention on the Law of Treaties, art 31.
[50] Simon Lester, Bryan Mercurio and Arwel Davies, 'World Trade Law: Texts, Materials and Commentaries', (2012) 2ed Hart Publishing
[51] Turkey –Textiles, Appellate Body Report, para 48.
[52] ibid

as per the report is whether the provisions of an FTA pointed towards a gradual increase of barriers affecting trade between the parties or a gradual reduction of those barriers.

Moreover, the report presented conflicting views on whether the quantitative assessment of trade liberalisation should be based on the total volume of trade including the intra-European trade among the EEC member states or the trade between EEC member states and non-member states exclusively. The European Union has also given an interpretation that is in tandem with the quantitative interpretation of substantially all trade arguing that it should entail a 90% threshold as the average of the total trade between the partners allowing for an asymmetrical approach to trade liberalization.[53]

5.3. Qualitative Criteria for determining substantially all trade

The qualitative interpretation of substantially all trade argues that a PTA could never comply with the substantially all trade obligation if it excluded a whole sector from its terms.[54] The report of the Working Party on the European FTA- Examination of the Stockholm Convention noted that by excluding trade in agricultural products from liberalization, it could not be maintained that duties and other restrictive regulations of commerce were being eliminated on substantially all trade. It was further noted that the qualitative aspect of substantially all trade implies that even where the percentage of trade covered amounted to 90%, the exclusion of a major sector of economic activity implies that Article XXIV: 8 has not been complied with. Therefore, when considering compliance with Article XXIV: 8, both qualitative and quantitative aspects must be taken into account. The exclusion of a whole sector no matter what percentage of current percentage it constitutes is contrary to the object and purpose of Article XXIV: 8 of the GATT. The object and purpose of GATT is set out in the preamble as to ensure entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce. Therefore, the exclusion of certain specific sectors would offend the reciprocity of the agreements and would be hindering the removal of barriers to trade.

[53] Jane Kelsey, *Legal Analysis of Services and Investment in the CARIFORUM-EC EPA: Lessons for Developing Countries*, South Centre International (2010).
[54] Simon Lester

5.4. Whether the EPAs are compliant with the requirements of substantially all trade

The EPAs between the EU and ACP states could be said to fall short of the requirement of substantially all trade under the qualitative criteria. This is because there is significant exclusion of certain sectors from liberalization. The European Commission Fact Sheet on Economic Partnership Agreements between the EU and ACP states notes that partner countries can be able to protect sensitive products through among other measures excluding them form liberalization.[55] However, a close study of the EPAs reveals significant exclusion of especially agricultural products.

It is worth noting that most ACP states mostly produce agricultural products. When it comes to for example Madagascar, according to annex 2 of the ESA EPA that has the schedule of commitment it has only excluded 19.19% of its products. Given that the EU has opened 100% of its market, it shows that the EU substantive threshold of 90% has been met. However, a close look at the products covered under the 19.19% shows that its mostly agricultural products that have been excluded. This is despite the fact that agriculture constitutes 70% of Madagascar's exports and contributes to more than a fourth of Madagascar's GDP.[56]

The table herein below shows the percentage of goods excluded by ESA countries under the EPA.[57]

ESA Country	**Total value of imports excluded[58]**	**Total value of imports from EU**	**Share of Excluded Goods/Total Imports**
Madagascar	68 079 532	354 823 374	19.19 %
Seychelles	5 563 129.1	214 038 602.2	2.60 %
Zimbabwe	25 884 003	129 147 523	20 %
Comoros	6 142 153.47	31 783 748.37	19.32 %
Mauritius	37 886 576	865 330 331,5	4.4%

[55] European Commission, Fact Sheet on the EU ACP EPAs (2018)
[56] International Trade Centre, Madagascar Country Profile, http://www.intracen.org/exporters/organic-/country-focus/Country-Profile-Madagascar/ accessed on 20th May 2020.
[57] Annex 2, ESA-EU EPA
[58] Value in US Dollars

A close look at the Harmonized Commodity Description and Coding System for the goods excluded reveals the following goods within the following chapters as excluded by the ESA countries;

ESA COUNTRY	GOODS EXCLUDED
Madagascar	Meat, milk and cheese, fisheries, vegetables, cereals, oils and fats, edible preparations, sugar, cocoa, beverages, tobacco, chemicals, plastic and paper articles, textiles, metal articles, furniture
Mauritius	Live animals and meat, edible products of animal origin, fats, edible preparations and beverages, chemicals, plastics and rubber articles of leather and fur skins, iron & steel and consumer electronic goods
Seychelles	Meat, fisheries, beverages, tobacco, leather articles, glass and ceramics products and vehicles
Zimbabwe	Products of animal origin, cereals, beverages paper, plastics and rubber, textiles and clothing, footwear, glass and ceramics, consumer electronic and vehicles

As has been seen above, most of the products excluded by ACP states are agricultural products. Dieter notes that Member countries frequently violate the principle of substantially all trade by for example excluding agricultural products more or less completely from liberalization under the PTAs. This implies that the whole sector does not have to be excluded provided there is a significant exclusion then the requirement of substantially all trade would not have been complied with. [59]

[59] H Dieter 'The Multilateral Trading System and Preferential Trade Agreements: Can the Negative Effects be minimized?' (2009) 15(3) *Global Governance* https://www.jstor.org/stable/27800766?seq=1&cid=pdf-reference#references_tab_contents (accessed 16 December 2019).

In this context therefore, as per the analysis given above, the EU-ACP EPAs could be said to fall short of the qualitative aspect of substantially all trade as envisioned under Article XXIV: 8 given that there is significant exclusion of certain sectors especially the agricultural sector. Based on this analysis one could conclude that the EPAs have failed to meet the qualitative aspect of the substantially all trade requirement.

6. The period of implementation of the EPAs

According to article 24(5c) of the GATT, any interim agreement for the formation of a customs union or a free trade area shall include a plan and schedule for the formation of such a CU or FTA within a reasonable length of time[60]. The concept of 'a reasonable length of time' has been understood and interpreted by the members of the WTO as not more than 10 years without a full explanation of why a longer period of time.[61] The current EPAs between EU and ACP states have however provided for longer period of realisation of the free trade area by provisions providing that the ACP states get to liberalise their markets over periods ranging from 15 to 25 years[62] which is more than the 10 years stipulated as a reasonable length of time[63]. The full impact of the EPAs will only be felt once those periods of liberalisation elapse.

Examples include the stepping stone EPA between Ghana and the EU stipulates that Ghana will gradually open up its markets over a period of 15 year[64]. Under the EU-Central African EPA, Cameroon is also supposed to gradually open up its markets to EU products over a period of 15 years[65]. It follows therefore that in terms of the period of liberalisation envisioned as per article XXIV: 8 of the GATT, the EPAs fall short of this.

Consequently, from the above discussion, it is clear that in the EPAs fall short of certain provisions of the WTO hence making them non-compliant. This is because despite having been

---

GATT 1947

[61] Simon Lester, Bryan Mercurio and Arwel Davies, 'World Trade Law: Texts, Materials and Commentaries', (2012) 2ed Hart Publishing

[62] Ionel Zamfir, 'An overview of the EU-ACP countries 'economic partnership agreements: Building a new trade relationship', European Parliamentary Research Service 2018

[63] Simon Lester, Bryan Mercurio and Arwel Davies, 'World Trade Law: Texts, Materials and Commentaries', (2012) 2ed Hart Publishing

[64] European Commission, ' Interim Economic Partnership Agreement between Ghana and the European Union- Factsheet', 2017

[65] European Commission, *Factsheet on the Economic Partnership Agreement; EU-Central Africa* (2017).

notified under article XXIV, they do not comply with the requirement of substantially all trade neither do they comply with the liberalisation period envisioned.

7. Legal avenues for exiting the EPAs

There are various ways of exiting a treaty provided for under the VCLT. There are those that apply exclusively for treaties under provisional application and those that apply for treaties that have already entered into force.

7.1.Termination of treaties under provisional application

Most of the existing EPAs are under provisional application. Provisional application of treaties is provided for under article 25 of the Vienna Convention of the Law of Treaties. The article stipulates that a treaty or part of a treaty can be applied provisionally where the treaty provides or where the negotiating states have agreed so. Equally, the EPAs themselves provide for provisional application for example the SADC EPA which provides for the same under article 113(3).

Provisional application of treaties draws from the need to give effect to the obligations of under the treaty pending a state's formal ratification or accession[66]. The EPAs under provisional application for example the SADC EPA despite having been ratified by the SADC member states are still pending ratification from all EU member states.[67] The nature of legal obligations that arise from a treaty that has entered into force provisionally is similar to those that have already entered into force.[68] The difference here is that in the former, the formal criteria for entry into force have not been met[69].

Article 25 of the VCLT provides that a treaty being applied provisionally can be terminated if a state notifies another state of its intent not to become party to the treaty.[70] In the context of legally exiting the EPAs under provisional application, this avenue is only available to the states

[66] ILC Draft Articles on the Law of Treaties with Commentaries 1966 https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf
[67] European Commission, 'Overview of Economic Partnership Agreements' (2019) https://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf
[68] UNESCO, 'Provisional Application' http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/provisional-application
[69] http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/provisional-application/
[70] Art 25 VCLT

that are provisionally applying the EPAs and have not yet ratified them. In this context given that for all EPAs under provisional application the ACP member states have already ratified and ratification is pending from some EU member states, this avenue is not available to the ACP member states that have already ratified.

7.2.Termination of treaties that have already entered into force

Article 42 stipulates that termination, denunciation or withdrawal from a treaty may only take place as a result of either the application of the treaty in question or the VCLT. The various ways of termination contemplated under the VCLT are[71] termination by consent, implication and by material breach. Termination by consent is provided for under article 54(b) of the VCLT which stipulates that a treaty may be terminated at any time with the consent of all parties after consultation with the other contracting states[72]. Implied termination is stipulated under article 59 where parties enter into another agreement based on a similar subject matter

A party can also terminate on grounds of a material breach by another party to the treaty as provided for under article 60(1) of the VCLT. A material breach in this context deals with the violation by a party of an essential provision to the accomplishment of the object and purposes of the treaty. The main methods of termination under consideration are;

7.2.1. Termination in accordance with the terms of the treaty

This is provided for under article 54(a) of the VCLT. When it comes to the EU-ACP EPAs, there is possibility of termination by virtue of the provisions of the treaty[73];

a) ECOWAS EPA which provides under article 109(2) that a party may terminate the treaty and the same shall take effect six months after the notice of termination.
b) The SADC EPA provides for denunciation by a party which shall also take effect 6 months after the notification of the same.
c) The ESA EPA provides for denunciation under article 62(7). This is to be done by a written notice. The same shall take effect one month after the notification
d) The EAC EPA stipulates under article 14 that a party may give a written notice to denounce the treaty which shall take effect one year after notification.

[71] Vienna Convention on the Law of Treaties, 1969
[72] Vienna Convention on the Law of Treaties, 1969
[73] Vienna Convention on the Law of Treaties, 1969

e) The Central Africa EPA provides for denunciation under article 99(3) which shall take place 6 months after notification.

Denunciation speaks to the unilateral act by which a state that is currently a party to a treaty ends its membership. In bilateral arrangements, denunciation results into termination of the treaty for both parties.[74] This is the most direct of the African states to exit the EPAs in force.

7.2.2. Fundamental change of circumstances

The VCLT under article 62 also provides for termination by a party as a result of fundamental change of circumstances. The VCLT stipulates that a fundamental change of circumstances from those existing as at the conclusion of the treaty which were unforeseen by the parties can be invoked as a ground for termination[75]. This is based on the doctrine of *rebus sic stantibus* (things remaining as they are). Some authors argue that every treaty has an implied provision that it shall remain in force so long as the circumstances remain the same[76].

A party can only use this ground where the circumstances in question constituted an essential basis of the consent of the party to be bound and the effect of the change is radically to transform the extent of obligations to be performed by the party. Moreover, in order for a party to use material change of circumstances as a basis for termination it is imperative that they invoke the same within a reasonable period of time after it was first perceived[77].

In the instance case, it would not be appropriate to invoke BREXIT as a fundamental change of circumstances on the grounds that the same was not unforeseen. This is because Britain's referendum to exit the EU was conducted on 23rd June 2016[78] hence cannot be invoked as an unforeseen circumstance warranting termination of the EPAs based on fundamental change of circumstances because the change was existing at the time of the conclusion of the EPAs most of which came into effect in 2016.

[74] ILC Draft Articles on the Law of Treaties with Commentaries 1966 https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf
[75] Vienna Convention on the Law of Treaties, 1969
[76] Alina Kaczorowska, *Public International Law* 4th ed Routledge (2010)
[77] Art 62 Vienna Convention on the Law of Treaties, 1969
[78] BBC: Brexit: All you need to know about the UK leaving the EU https://www.bbc.com/news/uk-politics-32810887

7.2.3. Impossibility of performance

Further, under article 61, a party can opt to terminate on grounds of impossibility of performance[79]. This is where there is a permanent disappearance or destruction of an object indispensable for the execution of a treaty hence it becomes impossible for a party to perform its obligations under the treaty. However, the ground of impossibility cannot be invoked if it is as a result of a breach by the party invoking it.

Under the EPAs, it would not be advisable to invoke impossibility of performance as a ground for exiting the same on the grounds that there is no permanent disappearance or destruction of an object essential to the performance of the treaty. Moreover, the argument on exclusion of the trade pillar as resulting into impossibility of performance will not suffice given that the trade pillar has already been implemented through the current EPAs. Consequently, the exclusion of the trade pillar in the CPA will not affect the trade arrangements between ACP states and the EU because the EPAs despite being based on the trade pillar are treaties by themselves.

Based on the above analysis, there are clearly various mechanisms that can be invoked to legally exit the EPAs by the African states. For the EPAs already in force, the most direct method of exit available to them is through the exit clauses available under the EPAs.

7.3.The alternative in the event of exiting the EPAs

In the event African states proceed to exit the EPAs, there is need to examine the available mechanisms under WTO that will preserve the trade relations between the EU and African states. The most feasible mechanism examined herein below, is through seeking a waiver which will give African states sufficient time to organize themselves into one trade bloc for purposes of renegotiating the EPAs while at the same time maintain the trade relations with EU. For this reason, it is imperative to examine the Waiver system under WTO, how AGOA has taken advantage of the same and whether future EU-AU trade relations can be modelled in the same way.

7.3.1. Waivers under Article XXV: V of GATT

Africa Continental Free Trade Area (ACFTA) in all sense will increase the bargaining power in Trade negotiations since it brings about a consolidation of African economic integration process

[79] Vienna Convention on the Law of Treaties, 1969

through harmonization or coordination of FTAs.[80] It would as a mega-regional agreement, build up Africa's engagements in other parts of the world as well as Africa's engagement in trade negotiations at the global level. With this then Africa can bargain with EU with adoption of similar agreement that replicates AGOA. It is important to note that despite the AGOA being a piece of legislation, it can be regarded as a treaty considering its scope on an international level thus such a mechanism could be adopted with regards to relations with the EU and such an agreement would be covered under Article XXV:V of the GATT on waivers.[81]

In cases of a preference program or preferential trade agreement that falls outside the scope of the Enabling Clause or particular GATT articles, the country offering that may seek waivers from the Most Favoured Nation obligation under article I of the GATT and other GATT obligations under Article IX of the agreement establishing the World Trade Organization as well as article XXV:V of the GATT[82]. The agreement allows WTO members to waive obligations imposed on a WTO Member by WTO multilateral agreements, including GATT.

A request for such a waiver must first be submitted by the requesting member to the WTO Council for Trade in Goods, which, after considering the request, reports to the WTO General Council. The waiver becomes effective after the General Council agrees to the proposal.

For instance, the USA submitted a waiver request for African Growth and Opportunity Act (AGOA).[83] This is a cornerstone of U.S. trade policy toward sub-Saharan Africa since 2000, is a nonreciprocal U.S. trade preference program that provides duty-free access to the U.S. market for most exports from eligible sub-Saharan African countries. In addition to preferential market access, the Act also requires an annual forum, known as the AGOA Forum, held between U.S. and AGOA country officials to discuss trade-related issues. Additionally, AGOA provides direction to select U.S. government agencies regarding their trade and investment support activities in the region.

[80] Agreement Establishing the AFCTA
[81] Article XXV:V
[82] Article XXV:V
[83] See WTO documents G/C/W/508 (CBREA); G/C/W/509 (AGOA); and G/C/W/510 and G/C/W/510/Add.1 (ATPA).

AGOA lists 49 sub-Saharan African countries that are potential candidates for AGOA benefits. AGOA eligibility criteria address issues such as trade and investment policy, governance, worker rights, and human rights, among other issues, which countries must satisfy to be beneficiaries of the AGOA preferences. The President annually reviews and determines each country's AGOA eligibility. There are currently 39 AGOA-eligible countries. President Trump reinstated benefits for The Gambia and Swaziland on December 22, 2017 and removed AGOA benefits for Mauritania effective January 1, 2019.The request was approved by the WTO Council on Trade in Goods in March 2009[84] and by the WTO General Council in May 2019.[85]

ACP countries can similarly make such arrangements with the EU under different preference program other than the EPAs. Article 207(3) of the Treaty on the Functioning of the European Union provides for negation and conclusion of agreements with one or more third countries or international organizations and the procedure to negotiate such is provided for under Article 218. Given that the EU has the mandate to negotiate and conclude international trade agreements on behalf of its member states, it has the capacity to negotiate new trading arrangements such as those similar to the AGOA trading arrangement.This will limit the degree of reciprocity arising from EPAs and increase their preferential trade access to the EU market as much as possible.

7.3.2. Alternative to exiting the EPAs

The alternative to exiting the EPAs would be to renegotiate the terms of the EPAs under the revision clauses under the EPAs. A case example is the SADC EPA under article 116(3) which stipulates that the agreement may need to be reviewed in light of future developments in international economic developments and in light of the expiration of the Cotonou agreement. This is also provided for under the ECOWAS EPA under article 111. This speaks to the possibility of the ACP seeking a review on the terms of the EPAs on grounds of Brexit which speaks to international economic development. In this case therefore, the EU and ACP states will continue trading under the EPAs whose provisions have been reviewed to reflect the international economic development in question.

[84] WTO News Item, Goods Council agrees on 2009 chairs, waivers for U.S. trade-preference programmes (March 24, 2009), at http://www.wto.org/english/news_e/news09_e/good_24mar09_e.htm. See also Paraguay Agrees to Grant U.S. Waiver Request for AGOA, ATPDEA, CBERA, Inside U.S. Trade, March 20, 2009, at 4.
[85] WTO, General Council, Minutes of Meeting, May 26-27, 2009, at 50-54, WT/GC/M/120 (August 21, 2009).

8. The Future of the Trade Pillar

The Cotonou Partnership Agreement (CPA) is divided into three pillars: development cooperation, political dimensions and trade. The CPA was to strengthen the relations between the EU and ACP states and the parties were to lay the groundwork for the future partnership through a future agreement since the CPA was to expire in February 2020.[86]

The CPA from Article 34-52 exclusively deals with the trade relations between the EU and ACP states; this is referred to as the trade pillar. Article 34 of the CPA provides the objective of the trade negotiations which is to ensure economic and trade cooperation with the aim of fostering the smooth and gradual integration of ACP states into the world economy with due regard for their political choices and the development priorities, thereby promoting their sustainable development and contributing to poverty eradication in the ACP counties.[87]

The trade is also to be based on a true, strengthened and strategic partnership and shall take into account the needs and levels of development of ACP countries.[88]The parties are to further ensure that special and differential treatment is accorded to all ACP Least Developed Countries and to take account of the vulnerability of small, landlocked and island countries.

The aim of the trade pillar is to ensure that the negotiations are as flexible as possible in establishing the duration of a sufficient transitional period, the final product coverage, taking into account sensitive sectors, and the degree of asymmetry in terms of timetable for tariff dismantlement, while remaining in conformity with WTO rules then prevailing.[89]

The trade pillar was to be implemented by the conclusion of new WTO compatible EPAs removing progressively barriers to trade between them and enhancing co-operation in all areas relevant to trade.[90] The negotiations were to take into account the level of development, the socio-economic impact of trade measures on ACP countries and their capabilities to adapt and adjust their economies to the liberalization process. In light of this, the EU and ACP states began

[86] Cotonou Partnership agreement, art 95(1)
[87] Cotonou Partnership Agreement, art 34(1)
[88] Cotonou Partnership Agreement, art 35
[89] Cotonou Partnership Agreement, art 37(4)
[90] Cotonou Partnership Agreement, art 36

negotiations of a series of EPAs aimed at creating a shared trade and development partnership. This resulted into various EPAs some of which are under provisional application.

It is important to point out that the existence of the current EPAs implies that the trade pillar of the CPA has already been implemented. Article 36(1) of the CPA connotes that the EPAs are to remove barriers to trade and enhance cooperation between EU and ACP states which are also the objectives of the trade pillar.

Despite the trade pillar having several positive aspects, its aim of enhancing cooperation in all areas of trade may become detrimental for all ACP states because this might open up areas such as agriculture which might disadvantage producers in ACP states.

The best argument for excluding the trade pillar from the 2020 negotiation would be that article 36(1) of the CPA provides for the removal of barriers to trade without a caveat for protecting sensitive industries.[91] However, an alternative to the total exclusion of the trade pillar would be renegotiation the provisions of article 36(1) of the CPA to provide protection for sensitive industries in the ACP states through providing a limitation to the removal of trade barriers.[92] This will be made WTO compliant through requesting for a waiver under article XXV: 5 of the GATT seeking derogation from the obligation of reciprocal trade liberalisation in substantially all trade by excluding the sensitive sectors which is what the current EPAs have been aiming for.

9. The importance of the United Kingdom in the EU-ACP EPAs

The UK formulating its own trade policy following Brexit is likely to have implications for the existing Economic Partnership Agreements (EPAs) between the European Union (EU) and some African, Caribbean and Pacific (ACP) countries, and the UK's future trading arrangements with the ACP. This will be determined by the nature of the UK's trade deal with the EU post Brexit and the trading regime it sets up with those ACP countries that have an EPA. ACP countries receive duty-free and quota-free (DFQF) market access into the EU for all goods (except arms and ammunition) under the EPAs, while the same treatment is offered by the EU to least-developed countries through the Everything-but-Arms (EBA) scheme. In the absence of

[91] Cotonou Partnership Agreement, art 36(1)
[92] Cotonou Partnership Agreement, art 36(1)

equivalent market access, these countries may face higher most-favoured nation (MFN) tariffs in the UK market.

The EU and its ACP partners have negotiated seven regional EPAs that are at different stages of finalization or implementation. During the withdrawal negotiations, once the UK has triggered Article 50 of Lisbon Treaty, the UK will continue to implement the EU's common commercial policy and all bilateral and regional trade agreements, such as the EPAs until the expiration of the transition period between the UK and the EU which will end at 23.00 GMT on 31st December 2020.

Once the UK has formally exited the EU, however, all rights and obligations under these various agreements will cease to apply and the UK will devise its own trade policy depending on the deal that they are able to broker with the EU to facilitate BREXIT.

Since EPAs provide 'better than the Most Favoured Nation' market access, the immediate impact could be that the ACP exporters face MFN conditions in the UK Market. UK is an important export destination for some ACP countries, especially where exports are concentrated in such products as sugar, bananas, vegetables, rum etc. However, it must be noted that UK is not a dominant EU importer in most cases. While the overall effect on the proportion of ACP export being impacted by Brexit could be small, there will be significant and disproportionate consequence for certain sectors that are heavily reliant on the UK.

United Kingdom remains a major trade, investment and development cooperation partner for many sub-Saharan African countries. These countries almost doubled their merchandise exports to the UK over the period 2000-2015, from US$6.5 billion to about US$12 billion, while overall exports from sub-Saharan Africa to the EU have grown from just over US$30 billion to US$71 billion.

Despite its relatively low market share compared with the overall EU market, the UK is an important export destination for several sub-Saharan African countries. More than 40 per cent of

exports from Botswana and Seychelles to the EU are destined for the UK, while another five countries send more than 20 per cent of their EU exports to the UK:[93]

The Gambia (32.5 per cent), Equatorial Guinea (32.4 per cent), Mauritius (29.3 per cent), Kenya (28.7 per cent) and South Africa (26.3 per cent).11 Several countries also depend heavily on the UK market for exports of particular products to the EU, such as tea (Kenya and Malawi), fresh vegetables (Kenya), processed fish products (Ghana, Mauritius and Seychelles), fresh or frozen beef (Botswana and Namibia), gold products (South Africa) and diamonds (Botswana and Zambia). Southern African citrus producers sell about 10 per cent of their overall exports to the UK.

This means that the outcome of BREXIT will have an implication on the ACP countries. The future of trade between UK, EU and ACP countries remain uncertain. The debate that is ensuing is premised on the fact that there is no guarantee as to the terms of trade between ACP countries and UK.As things stand, it's clear that once the UK leaves EU, it will have no legal basis to discriminate in favor of the ACP countries unless they come up with distinct and new trade agreements.[94] Failure to conclude an agreement, ACP countries will be faced with trade barriers especially in the UK. This poses a new challenge to the existing EPAs owing to the fact that most of them were concluded before the BREXIT debate and as such, there is need to revise the terms as the market in UK is no longer guaranteed.

10. Conclusion

From the above analysis, it is clear that the United Kingdom leaving the European Union is undoubtedly going to affect the ACP states therefore there is an urgent need for the renegotiation of the EPAs. Moreover, there are a number of avenues available for the ACP states apart from review of the agreements which include a possible exit under the provisions of the EPAs or other provisions of the Vienna Convention on the Law of Treaties. Moreover, if some of the ACP states decide to exit for example the African states, some would still enjoy access to the EU

[93] Based on average EU imports between 2013 and 2015. However, the share of the EU market may be influenced by exports of just a few high value products over this period

[94] This can be done by UK introducing preferences in favour of the developing countries under the United Nations' Generalized System of Preferences (GSP)

markets by virtue of being LDCs in which case African states can proceed to negotiate a waiver under the WTO in order to preserve trade relations with the EU.

Moreover, another crucial aspect that has been discussed is on the compatibility of the EPAs with Article XXIV GATT where the current EPAs as they stand can be deemed to be illegal because they do not satisfy the requirement of eliminating restrictive regulations on substantially all trade between the constituent territories in products originating in such territories. The current EPAs have significantly excluded some sectors such as agriculture which then brings to question the qualitative analysis of the concept of substantially all trade.

In conclusion, considering the possibilities available in law with regards to the EPAs, it is important that the ACP States focus on renegotiating the EPAs because the consequences that accompany withdrawal are very grave and despite many African countries being LDCs and therefore entitled to other tariff preferences such as the GSP, GSP+ and EBA, the reliance on these preferences may be dangerous due to the unpredictability involved such as the various compliances required by the issuing state. Although these schemes are meant to help countries access markets of a developed country for example the US through AGOA, the advantages do not really translate to their desired potential due to the inevitable lifting of preferences. In order to curb this, African countries should focus on the adoption of the AfCFTA to pen up markets as a way of dealing with the vacuum left by the expiry of the preference schemes.

11. Recommendations

1. As regards exiting the EPAs, in the event African states decide to do so, the recommended approach to maintain the trade relations between African states and the EU would be negotiation of a waiver under the WTO rules that would allow preferential access to EU markets.
2. In the event African states choose not to exit the EPAs, the alternative would be renegotiating the terms of the various EPAs under the revision clauses discussed herein above in order to protect sensitive ACP domestic industries.

BIBLIOGRAPHY

ARTICLES

'The most favoured nation provision in the EC-EAC EPA and its implications' (2009) Geneva Resource Centre

'Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade' (1994) https://www.wto.or/english/docs_e/legal_e/10-24_e.htm (accessed 16 December 2019)

Arts, K 'Lome/Cotonou Conventions' (2018) Max Planck Encyclopaedia of International Law

Dieter, H 'The Multilateral Trading System and Preferential Trade Agreements: Can the Negative Effects be minimized?' (2009) 15(3) Global Governance https://www.jstor.org/stable/27800766?seq=1&cid=pdf-reference#references_tab_contents (accessed 16 December 2019)

Flint, E 'The End of a ''special relationship" The new EU-ACP Economic Partnership Agreements' (2009) Review of African Political Economy

Grynberg, R 'The WTO incompatibility of the Lome Convention trade provision' (1998) Asia Pacific School of Economics and Management

International Centre for Trade and Sustainable Development 'EPA: West Africa and the EU conclude a deal' (2014) https://www.ictsd.org/bridges-news/bridges-africa/news/epa-west-africa-and-the-eu-conclude-a-deal (accessed 18 November 2019)

Keijzer, N & Bartels L 'Assessing the Legal and Political Implications of the Post-Cotonou Negotiations for the Economic Partnership Agreements' (2017) German Institute of Development

Kelsey, J 'Legal Analysis of Services and Investment in the CARIFORUM-EC EPA: Lessons for Developing Countries' (2010) South Centre International

Roy, S 'African Development and ACP-EU Partnership' (2005) 40(6) Economic and Political 521-523 http://www.jstor.org/stable/4416164 (accessed 18 November 2018)

United Nations Committee for Development Policy https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf (accessed 18 November 2019)

WTO Trade and Development Committee, 'Special and Differential treatment Provisions' https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (accessed 15 December 2019)

Zamfir, I 'An overview of the EU-ACP countries 'economic partnership agreements: Building a new trade relationship' (2018) European Parliamentary Research Service

BOOKS

Bossche, PVD (2008) The Law and Policy of the World Trade Organization: Text, Cases and Materials 2nd ed: Cambridge University Press

Kaczorowska, Alina (2010) Public International Law 4th ed: Routledge

Lester, Simon et al (2012) World Trade Law: Texts, Materials and Commentaries 2nd ed: Hart Publishing

INTERNATIONAL INSTRUMENTS

Cotonou Partnership Agreement.

General Agreement on Tariffs and Trade 1994

Subsidies and Countervailing Measures Agreement

Vienna Convention on the Law of Treaties 1969

CASES

Canada-Aircraft case

Castro Pius Shirirma v The Attorney General (Burundi, Kenya, Rwanda, South Sudan, Tanzania, Uganda) & Secretary General of the East African Community Application No. 11 of 2016

EC-Aircraft case

Kenya Small Scale Farmers Forum & 6 others v Republic & 2 others (2013) eKLR.

Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)

Turkey Textiles case