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The ESA-EU EPA NEGOTIATIONS: TECHNICAL ISSUES IN THE 6 NEGOTIATING CLUSTERS

A guide for ESA countries

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List of Abbreviations:	

ACP	Africa Caribbean Pacific
AU	Africa Union
CBD	Convention on Biological Diversity
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
EBA	Everything But Arms
EC	European Commission
EDF	European Development Fund
EEC	European Economic Community
EPA	Economic Partnership Agreement
ESA	Eastern and Southern Africa
EU	European Union
EUREP	Euro – Retailer Produce Working Group
GAP	Good Agricultural Practices
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade and Tariffs
GDP	Gross Domestic Product
GSP	Generalised System of Preferences
ICT	Information and Communication Technology
IMF	International Monetary Fund
ILO	International Labour Organisation
LDC	Least Developed Country
MFN	Most Favoured Nation
NDTPF	National Development Trade Policy Forum
OAU	Organisation for African Unity
ODA	Overseas Development Assistance
PMA	Plan for Modernisation of Agriculture
RTAs	Regional Trade Agreements
SACU	Southern Africa Customs Union
SAPs	Structural Adjustment Programmes
S&DT	Special and Differential Treatment
SPS	Sanitary and Phyto Sanitary
TRIMS	Trade Related Intellectual Measures
TRIPS	Trade Related Intellectual Property Rights
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Commission on Trade and Development
UPOV	International Convention for the Protection of New Varieties of Plants
USA	United States of America
WB	World Bank
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

Preface:

This study covers the technical issues in the 6 negotiating clusters under the ESA-EU EPA negotiations. The EPA negotiations are complex and the issues for negotiation under each cluster have not as yet been concretised although as per the ESA negotiating Road Map, an outline EPA is supposed to be in place by December 2005.

Although the study draws heavily from examples in Uganda, it can be used as a reference by all ESA countries

SEATINI – Uganda
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CHAPTER 1

INTRODUCTION – POVERTY IN UGANDA

The Cotonou Agreement sets poverty eradication as the core objective that the ACP-EC relation must achieve. The Agreement provides that¹:

The central objective of ACP-EC cooperation is poverty reduction and ultimately its eradication; and progressive integration of the ACP countries into the world economy.

Uganda remains a least developed country with high levels of poverty. Least developed countries as a group account for only 0.6 per cent of world trade. Africa's share of world trade has dropped to about 2.0 percent down from 4.0 per cent in the 1960s.

The EU is the largest export market for Uganda, accounting for 46.6% of total exports. Uganda has been running a trade deficit on average of over USD 550 million for several years. Its budget is grossly donor supported, by about 48% on current expenditure, and up to 90% on development expenditure. Grant aid accounts for over 30% of government expenditure. And, government revenue amounts to just about 12% of the GDP. The dependence on the EU for export markets and on donors for major funding makes Uganda a vulnerable economy, and though economic growth rates have been around 5% its economic development can hardly be considered sustainable in these circumstances.

This would suggest that in international economic relations, Uganda does not enjoy the economic or trade capacity to wield clout alone as a country, and that it belongs to groups of the weakest economic players and shares common trade interests with these groups. The same could be said of other African and least developed countries.

At least 40 per cent of the population of Uganda live in absolute poverty. The figure has been rising since 1999; it had fallen to 38 per cent. The incidence of absolute poverty is much higher in most regions of the country. Over 67 per cent of the population in the North live in absolute poverty, and continue to suffer conditions of conflict. Poverty eradication should therefore be a matter of critical importance for Uganda.

Poverty eradication requires action to address conditions that create or perpetuate poverty. Poverty may be created or perpetuated by among other factors, what poor people themselves do or fail to do (for instance failure to acquire necessary skills and take up available opportunities), by their administrations or governments (for instance through policies that do not support appropriate income distribution or that do not improve the competitiveness of the country or that do not facilitate the utilisation of regional and global market access opportunities), and by third actors such as development partners (for instance by pursuing policies that diminish opportunities of

¹ Article 19.1. The second paragraph of Article 1 is similarly to that effect.

poor countries for increased trade and technological development). Action will be needed within the country, and outside the country.

CHAPTER 2

2.1 BACKGROUND TO THE EPA NEGOTIATIONS

Following the end of the Second World War, the then French Foreign Minister, Robert Schuman, made a proposal on 9 May 1950 for European cooperation to end wars and promote peace and prosperity. The Schuman Declaration, as it came to be known, is considered the seed of the European Economic Community and its date, 9 May, is marked annually as Europe Day. The Treaty of Rome was concluded in 1957. It provided for the formation of a customs union within 12 years and generally for ever closer integration. Other arrangements were for cooperation in the areas of coal and steel, and atomic energy. These were subsequently consolidated into the European Communities with common organs.

Right from the start, the EEC envisaged cooperation arrangements with colonies. Article 131 of the treaty provided that:

The Member States agree to associate with the Community the non-European countries and territories which have special relations with Belgium, Denmark, France, Italy, the Netherlands and the United Kingdom,

and that:

The purpose of the association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole.

The first formal generation of association arrangements started in 1963 under the two Yaoundé conventions covering mainly French speaking African countries. After the UK had joined the EEC in 1973, 46 African Caribbean and Pacific countries formally formed the association of ACP Group of States under the Georgetown Agreement of 1975. That very year, the first Lome Convention was concluded to embody the cooperation mechanism between the EEC on one hand and the ACP Group of States on the other.

2.2 The Lome conventions

There were five Lome Conventions in all, each running for a five-year period:

- Lome I – 1975 to 1980
- Lome II – 1980 to 1985
- Lome III – 1985 to 1990
- Lome IV – 1990 to 1995
- Lome IV *bis* – 1995 to 2000

These conventions were formally recognised under the rules of the General Agreement on Tariffs and Trade, the predecessor to the World Trade Organisation. They were recognised under Article 24 of GATT read in conjunction with Part IV of that agreement, to allow one-way free trade areas, or under a waiver of the GATT non-discrimination obligation, which was available under both the Enabling Clause and Article 25 of GATT.

However, there were legal challenges to the arrangements under the conventions, on the basis that they favoured ACP States but not other developing countries; the argument being that preferences to developing countries should be accorded to all developing countries rather than a group of developing countries. Also, by the late 1990s when the second Lome IV was expiring, development thinking in the EU and other developed countries favoured a departure from preferences to more open trade and economic liberalisation. It was felt also that the Lome conventions had not effectively addressed key constraints in ACP States. According to the EC, therefore, the successor to the second Lome IV was to address economic development in what would be considered a wholesome manner and be compatible with WTO rules.

After negotiations, the Cotonou Agreement was concluded on 23 June 2000 in the town called Cotonou, to be in force for 20 years and contains a clause allowing it to be revised every 5 years. The agreement provided for subsequent negotiation of WTO compatible economic partnership agreements to embody the trade relations between the EC and the ACP States, pending which a further waiver would be sought from the WTO for the continuation of the preference regime under the second Lome IV. The waiver was granted on 14 November 2001 at the Doha Ministerial Conference, to run until 31 December 2007. According to the road map for EPA negotiations, the EPAs are to succeed this waiver and to enter into force in January 2008.

Performance under the Lome conventions

The performance under the Lome conventions was on the whole unsatisfactory:

- The share of world trade for Africa fell from 4% in 1970 to 2% in 1990s
- The share of ACP exports to the EU fell for example by more than a half, from 8% in 1975 to 2.8% in 2000
- Africa was the only region where poverty increased, while it was falling in other regions
- Supply side constraints and demand side constraints led to low utilisation of preferences, estimated at only 7% of exports
- Intra-Africa trade remained low, under 10% of total trade.
- However, Mauritius used the Sugar quota and guaranteed prices quite successfully, and Swaziland as well.

2.3 The EPA Negotiations

The EPA negotiations were formally launched in September 2002. Negotiations were to be carried out in 2 phases; Phase I: at the pan- ACP-EU level to agree on principles and approaches to be adopted, the structure and the modalities for the negotiation and cross cutting issues of common interest for the ACP; and Phase II from September 2003 negotiations on specific regional EPAs dealing with tariff negotiations and specific sectoral issues at both national and regional level.

2.4 The ESA-EU EPA Negotiations

On 7th February 2004 the ESA countries comprising of Burundi, Comoros, DR Congo, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Uganda, Zambia and Zimbabwe agreed to launch the 2nd phase of the EPA negotiations with the EU.

In preparation for the negotiations, the ESA Group came up with a Roadmap² to guide the negotiations. The Roadmap includes issues regarding the preparations for the negotiations, the negotiating structures, coordination of the negotiations and indicative schedule for the negotiations.

Preparation for the negotiations:

In preparation for the ESA-EU EPA negotiations, it was agreed that three main sets of activities be undertaken, these being:

- a. At the national level, national impact assessment studies and the establishment of National Development and Trade Policy Forums (NDTPF), with work programmes and agenda.
- b. At the regional level, a series of regional studies upon which the negotiating briefs for the negotiating teams will be based, and the establishment of the Regional Negotiating Forum (RNF); and
- c. At the regional level, capacity building and training in trade negotiations.

The ESA schedule for the negotiations:

Phase 1: Setting of priorities and negotiating procedures (March – August 2004): This was supposed to be the preparatory period for the negotiations as provided for by the Cotonou Agreement Chapter 2, article 37(3).

Phase II: Substantive negotiations (September 2004 – December 2005): Substantive negotiations in the six clusters (Development issues, Market Access, Agriculture, Fisheries, Trade in Services and Trade-related Issues) were to take place. It was envisaged that by the end of this period, an outline EPA would have been agreed on.

Phase III: Continuation and finalisation (January 2006–December 2007): Substantive negotiations would continue if necessary and areas of disagreement would be revisited and compromises reached. The EPA agreement is expected to be finalised, ratified and any necessary legislation enacted in order to allow the EPA to be in place on 1st January 2008 at the latest.

2.5 The Challenges to the ESA countries in Negotiating EPAs

Assessing the impact of EPAs is a challenging task. Although it is possible to use traditional trade models to assess the impact of the liberalisation that will be required as the EPAs are implemented, this will not capture significant aspects of the social

² Eastern and Southern African Region : ROADMAP FOR EPA NEGOTIATIONS , 5th February 2004

economic restructuring, including labour market effects and industrial restructuring, that will result. An example is the Impact Assessment Study of the EPAs on Uganda. It failed to critically look at the extent of the liberalisation the EPAs will have on the economy on a sector by sector basis.

The ESA countries in general and Uganda in particular face enormous negotiating challenges as they are members of various international and regional institutions where trade negotiations are taking place and will not be finalised in the immediate term. For Uganda these include:

- World Trade Organisation,
- World Intellectual Property Organisation
- Multilateral Environmental Agreements such as the Convention on Biological Diversity
- East African Community,
- Common Market for Eastern and Southern Africa,
- African Union, and
- ACP-EU Cotonou Agreement.

Uganda has in addition bilateral agreements with developed countries and several advanced developing countries. The challenges therefore include:

- Effectively participating in all these simultaneous negotiations from an informed perspective in order to achieve results that support the rapid economic development of the country; and
- Harmonising or co-ordinating positions in the various negotiations, so that the instruments agreed or concluded equally reflect the same priorities and positions of Uganda.

In particular Uganda and other ESA countries will have to contend with the challenge of forum shifting by the EC. Issues are introduced into EPA negotiations that have been rejected in other negotiating forums. For instance, the four Singapore issues (i.e. Investment, Competition Policy, Transparency in Government Procurement and Trade Facilitation) were largely rejected in the WTO negotiations (though agreement has been reached to negotiate trade facilitation in the WTO), where the EC and other countries failed to compel the launching of negotiations on these issues. Now the EC is keen to see that they are negotiated in the EPAs. It will be important that common positions are maintained across all trade negotiations, where there are good reasons for adopting those positions.

Most ESA countries also have inadequate human and technical resources/capacities to effectively engage in the EPA negotiations. The numerous number of trade negotiations going on at the same time at the multilateral (WTO), regional and bilateral levels adds further strain on these already constrained resources. Most ESA countries reduced extensively their civil service under the Structural Adjustment Programmes (SAPs) leading to a thin staff on the ground.

The EPA negotiations require funds, both at the national and ESA level to carry out studies, raise awareness, and organise meetings among other things. The ESA Group has been highlighting the need for additional resources from the EDF envelope to finance the negotiations. The ESA members also highlighted the bureaucratic and cumbersome procedures of accessing European Development Fund (EDF) funds and

requested that more flexible procedures to accessing the already allocated funds be put in place. The European Trade negotiators on the other hand have refused categorically to include the negotiation of an additional aid package in the EPAs.

THE NEGOTIATING CLUSTERS

The ESA region opted to negotiate in (6) six clusters i.e. Development Issues, Market access, Agriculture, Fisheries, Trade in Services, and Trade –related Issues

CHAPTER 3

3.1 DEVELOPMENT

3.1.1 Sustainable Development in the EPAs

“We are aware that sustainable development can, in the long run, only take place when trade improves to a level that allows a country to live on its own resources.”

Sigurd Illing, EU Ambassador to Uganda, interview in the New Vision Newspaper of 9 May 2005.

Meaning of sustainable development

Sustainable development since the 1992 Rio Summit has been understood to mean “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.

The Johannesburg World Summit on Sustainable Development of 2002 endorsed a broader and coherent meaning of sustainable development, specifically including the direct and actual eradication of poverty as a key component of sustainable development. In this regard, strategies for poverty eradication, including the role that trade can play, are required to contribute towards sustainable development.

Sustainable development in the context of economic cooperation and trade arrangements involving developing and developed countries should address the imperative need, for developing countries to achieve and maintain in the long term appropriately high rates of economic growth that transform and modernise their economies, and for the benefits of that economic growth to translate into continually improving living standards for all sections of society particularly the economically marginalised and the socially and politically weak sectors of the population. Sustainable development would therefore require an engagement between developing and developed countries that takes fully on board the whole array of conditions for social, economic and human development, and the varying levels of development between the two parties.

Sustainable development in the Cotonou Agreement

The Cotonou Agreement includes sustainable development among the core objectives and principles of the development strategies to be followed, indicating how that could be operationalised. Article 19.1 states that:

“The central objective of ACP-EC cooperation is poverty reduction and ultimately its eradication; sustainable development; and progressive integration of the ACP countries into the world economy. In this context, cooperation framework and orientations shall be tailored to the individual circumstances of each country, shall promote local ownership of economic and social reforms and the integration of the private sector and civil society actors into the development process.”

In Articles 21 to 33, the Cotonou Agreement sets out the following areas of development cooperation:

Economic development

- Investment and private sector development
- Macroeconomic and structural reforms
- Economic sector development
- Tourism

Social and human development

- Social sector development
- Youth issues
- Cultural development

Supporting regional economic integration and cooperation

Thematic and cross-cutting issues

- Gender
- Environment and natural resources
- Institutional development and capacity building.

Part Four of the Cotonou Agreement then specifically deals with development finance cooperation, apparently to underpin the cooperation programmes including the EPAs.

It should be appropriate however to put a specific face or identity to sustainable development notwithstanding that it has cross-cutting aspects. The idea that present generations should maintain an attitude of responsibility for the world's exhaustible resources and of respectful enjoyment of whatever is on offer, always bearing in mind that future generations too will need earth as their home; is distinct, with various international instruments including within the framework of the United Nations. Within the WTO framework, negotiations under the Doha Round include the reconciliation of the WTO Agreement with multilateral environmental agreements³ in order to detail and ensure sustainable resource use in multilateral trade rules.

The Convention on Biological Diversity protects the idea that biological diversity should not be destroyed; it should be preserved and enhanced. The convention specifically contains the requirement that local communities have a right to mutually benefit from the use of their traditional knowledge.⁴ The International Treaty on Plant Genetic Resources for Food and Agriculture specifically underlines, among other things, the indispensability of mechanisms to ensure food security for humankind; and underscores the contribution of past generations and present local communities to the variety of earth's agricultural resources.

A singularly important dimension of sustainable development in this context is to specifically include in the EPA, and provide for the implementation of, programmes to address rural poverty and to assist local communities to fully benefit from resources under their care or custody. The aims should be to ensure, that rural or local communities mutually benefit from the use of resources for purposes of trade, and that

³ Paragraphs 31 and 32 of the Doha Ministerial Declaration

⁴ Article 15

they have the capacity and utilisable opportunities to gainfully engage in economic globalisation, so that the communities are not exploited or left marginalised from economic development.

The EPA negotiations should then go on to positively address these issues:

- Prioritising export products from currently rural areas – especially high value added non-traditional exports in line with diversification programmes,
- Addressing supply side and demand side constraints to facilitate market access for those products, including through the provision of skills and the required resources and the immediate elimination of trade barriers in the EU;
- Encouraging maximum linkages into the economy, including the possibility of reasonable performance requirements particularly in the areas of services and intellectual property exports⁵;
- Allowing adequate periods of adjustment for ACP States in cases of trade arrangements (such as free trade areas or the equivalents) that ease EU imports into ACP States; and
- Provide adequate resources for all adjustment programmes.

3.1.2 Key tests for sustainable development in the EPA

Notwithstanding the fairly extensive provisions for sustainable development in the Cotonou Agreement, it is crucial that the actual negotiations for the EPA do not detract from those provisions. As sustainable development is important for ACP countries, the EPA should be a further instrument to promote it.

To maintain sustainable development high on the negotiating agenda for the EPA, key tests should always be applied to proposed positions in order to determine whether durable and tangible gains would accrue to ESA countries:

- Has the fullest possible market access been ensured for all key exports in the goods, services, intellectual property and any other sectors under consideration?
- Has the EU put in place measures in the immediate term to ensure that the market access agreed is not undermined or negated, for instance through non-tariff barriers and other disguised restrictions or through subsidies?
- Has adequate policy space been secured for implementing development programmes, in particular to address supply side constraints and to promote stable long-term investment having maximum linkages (downstream, upstream, vertical, horizontal) into the economy?
- Have the required resources, including the technical and financial, been secured or duly mobilised, to effectively support the achievement of the goals and aspirations agreed, and to effectively implement the programmes agreed?
- Has agreement been reached to ensure that relevant multilateral environmental agreements will govern or apply to the economic cooperation and trade arrangements, including the Convention on Biological Diversity and the International Treaty on Plant Genetic Resources for Food and Agriculture?

⁵ In the sector of goods (not services and intellectual property) the WTO TRIMs Agreement prohibits the use of certain incentives – rewarding the use of domestic inputs and export performance.

Progress in each of the negotiating areas should always be specifically and regularly examined to determine whether sustainable development has been fully taken into account.

3.2 ENHANCING THE COMPETITIVENESS OF ESA COUNTRIES

If enterprises in the ESA countries are to effectively compete in the market envisaged after the EPA negotiations, then their products have to be of good quality, are priced well, and are delivered in a timely manner and in the required quantities so as to ensure predictability or reliability.

Thus the issue of enhancing the competitiveness of the ESA economies, in general, becomes very important.

For enterprises to be this competitive, the countries in which they undertake production or supply from should have in place conditions of production that minimise production costs and in all other respects promote efficiency. Such conditions include, a suitable macroeconomic environment, well functioning public institutions, supportive technological innovation and dissemination within the economy, and good infrastructure in terms for instance of low cost and reliable utilities, good transport system, and a prevalence of information and communications technologies.

Developing and strengthening the competitiveness of ACP States is a cornerstone of the Partnership. The cooperation for enhancing competitiveness of ACP States was, according to the Cotonou Agreement, to be addressed generally the long term as well as specifically in the preparatory period.

Regarding the long term, Article 21.1 provides that:

Cooperation shall support the necessary economic and institutional reforms and policies at national and/ or regional level, aiming at creating a favourable environment for private investment, and the development of a dynamic, viable and competitive private sector.

Under Article 30, cooperation covers “functional and thematic fields which specifically address common problems and take advantage of scale economies”. The fields include infrastructure (transport and communications, and information and communication technologies); environment; health, education and training; research and technological development, disaster preparedness; conflict; institutional development; etc – all of which are key components of programmes for enhancing competitiveness.

The principles of economic and trade cooperation include the following, in Article 35.1:

Economic and trade cooperation shall be based on a true, strengthened and strategic partnership. It shall further be based on a comprehensive approach which builds on the strengths and achievements of the previous ACP-EC Conventions, using all means available to achieve the objectives set out above by addressing supply and demand side constraints. In this context, particular regard shall be had to trade development measures as a means of enhancing ACP States’ competitiveness. Appropriate weight shall therefore be given to trade development within the ACP States’ development strategies, which the Community shall support.

Regarding the preparatory period, Article 37.3 provides that:

The preparatory period shall also be used for capacity building in the public and private sectors of ACP countries, including measures to enhance competitiveness, for strengthening of regional organisations and for support to regional trade integration initiatives, where appropriate with assistance to budgetary adjustment and fiscal reform, as well as infrastructure upgrading and development, and for investment promotion.

However, so far during the preparatory period which is to end in December 2007 at the latest⁶, there do not seem to have been any commitment by the EC to enhance the competitiveness of ACP States. ACP States on the whole remain very uncompetitive and have insufficient capacity to address global challenges including those that will arise from implementing the EPAs if concluded.

How to address uncompetitiveness

Enhancing the competitiveness of ESA countries in general and Uganda in particular requires addressing supply side constraints associated with production in the country and demand side constraints associated with access to the EC market.

Supply side constraints include the following:

- High cost of credit and an inadequate range of financial services, which does not adequately avail producers and exporters with the required resources;
- High cost of utilities translating into high and uncompetitive production costs;
- Inadequate infrastructure, including transportation by road rail and air, inadequate spread of information and communication technologies, and low level of high skills;
- Lack of market information relating to opportunities and market trends in export markets;
- Limited supply of necessary technological products and technological innovation and diffusion within the country;
- Limited management skills;
- Poor quality of public institutions, including, unstable and inappropriate legal and regulatory framework, and corruption;
- Low linkages between exporting entities and domestic productive entities, or limited use of domestic components in export production, limiting the potential multiplier effects such as job creation;
- Low labour productivity and structural limitations such as poor educational and health service systems;
- Generally economic growth rates that are below the required rate of 7 per cent and low savings pools below 15 percent of GDP, otherwise necessary for economic transformation.

Demand side constraints include the following:

⁶ Article 37.1

- Health and technical standards that keep changing or that are technologically and financially difficult to meet;
- Tariff peaks and escalation that raise the price of exports on the export market;
- Subsidies that render exports uncompetitive on export markets,
- Complicated and unsupportive rules of origin that have narrowed the base for inputs for qualifying imports into the EU,
- Complicated customs procedures for exporters to comply with and inadequacy of information and support for compliance.

The negotiations need to squarely address these constraints through including provisions in the EPA on resolving them.⁷

Government programmes for enhancing competitiveness: The Ugandan case.

The Government of Uganda has adopted various programmes to improve competitiveness. The Medium Term Competitiveness Strategy aims to reduce barriers to doing business. The Strategic Exports Programmes aims to assist the growth of production of traditional and non-traditional exports. The Plan for Modernisation of Agriculture, the Energy for Rural Transformation Programme, and the Poverty Action Fund, aim to improve productivity in the agricultural/ rural sectors.

Some progress has been made on these programmes but it has been slow and a lot of improvement is required. Cooperation between government and donors including the EU will remain important, as the programmes provide the scheme for key interventions.

In addition to these programmes, government should establish and effectively operationalise a mechanism for acquisition of needed technology by domestic enterprises and its dissemination within the country. The programme will need the close cooperation of major technology innovating countries including those of the EU. The programme could well provide a domestic mechanism for utilisation of the flexibility in the WTO's TRIPS Agreement as well as the Declaration on the TRIPS Agreement and Public Health including the Decision on manufacturing capacity within the pharmaceutical sector.

In addressing the demand side constraints domestic efforts to improve quality and to comply with health, technical, and other standards will be important. In this regard, technical cooperation can be useful.

The other key component of addressing demand side constraints in order to improve competitiveness is to effectively negotiate suitable terms of market access. Tariff peaks and tariff escalation should be eliminated (tariffs above 12 per cent). Export subsidies and domestic support should be eliminated over a fairly short period of time. Equally important is the absolute need to check the use of standards that are disguised restrictions to trade. Genuine concerns about food safety in developed countries and the EU in particular should be balanced with the absolute importance of eradicating poverty in Africa through trade.

⁷ please see the brief on market access.

It is appropriate to note that the Cotonou Agreement contains provisions that reflect a broad agenda for enhancing competitiveness in ACP States. The cooperation strategies in Part 3, the development finance cooperation in Part 4, and the provisions in Part 5 on least developed, land-locked and island countries demonstrate the recognition on the part of the EC of the need for positive interventions to assist the enhancement of competitiveness in ACP States. Regrettably though, the EC has already clearly demonstrated a reluctance to provide adequate resources to follow up on these provisions and sentiments in the Agreement.

3.3 SPECIAL AND DIFFERENTIAL TREATMENT (S&DT) IN EPA NEGOTIATIONS

Meaning of S&DT

Development and the Special and Differential Treatment (S&DT) are closely linked. Special and differential treatment means measures adopted or, designed to specifically address the special circumstances of developing and least developed countries. The special circumstances include resource shortfalls to implement and comply with obligations and to beneficially participate in the multilateral, regional or even bilateral trading systems; vulnerability in dealing with economically powerful partners; as well as difficulties, including the structural, of breaking out of vicious cycles of poverty and embarking upon sustainable development.

Special and Differential treatment, also called Differential and more Favourable treatment, is a core principle for the rules of the World Trade Organisation, and all the various agreements contain provisions for giving S&DT to developing and least developed countries. In the second recital in the preamble of the Marrakesh Agreement establishing the World Trade Organisation, members recognised that:

... there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development (emphasis added).

In the WTO, special and differential treatment is given to developing and least developed countries. All ESA countries fall in this category, most of them being least developed countries. 33 of the 45 African countries negotiating EPAs with the EC are least developed countries. According to the proposal of the Africa Group to the WTO Special Session of the Committee on Trade and Development⁸, to assist in the review of S&DT provisions:

15. Special and differential treatment as long recognised in GATT and the WTO, is a right for developing and least developed country Members. Developed country Members and the WTO as an institution, by itself or in collaboration with other organisations, are to accord special and differential treatment to developing and least developed country Members in view of their development needs and resource constraints.

⁸ WTO document TN/CTD/W/3/Rev.2

16. The development needs of developing and least-developed country Members require special domestic policies, measures and laws as well as direct assistance for enhanced access to global and regional markets, domestic implementation of obligations, administrative and continuous compliance with obligations, and enforcement of their rights under the agreements. Resource constraints in the form of human, financial, and institutional shortfalls require technical, financial and various types of assistance to supplement domestic resources and establish or strengthen domestic institutions.

S&DT should not be seriously questioned as a development strategy for developing countries. An uneven playing field calls for special measures to attempt to level it. What needs careful consideration is the appropriate form it should take.

Forms of S&DT

Special and differential treatment may take various forms:

- Extended transition periods before obligations become binding or enter force
- Technical including financial assistance
- Statement in the principles and objectives of instruments as a fundamental basis
- Possibility of waiver of certain obligations
- Flexible or expedited procedures, for instance in dispute settlement or resort to subsidies
- Preserving policy space to implement development programmes, and
- Creation of binding obligation in favour of developing and least developed countries to address critical issues.

All these forms of S&DT should be available and should be explored in the EPA negotiations. It will be important for ESA countries to know their priorities and interests they wish to defend, goals to achieve, in order to go for appropriate S&DT.

The relevance and application of S&DT

One area of relevance relates to compatibility with the WTO Agreement. It seems to be the position of the EU that the arrangements between the EU and groups of ACP States should be free trade areas that conform to the stringent rules of Article 24 of GATT 1994. That Article has been interpreted in GATT/ WTO jurisprudence to require, among other things, reciprocity and elimination of duties and other restrictive regulations of commerce to substantially all the trade among the parties. Though the exact percentage of trade on which duties are to be eliminated, has not been definitively determined, some WTO members have indicated that it should be up to 90 percent of the trade. This however has never been agreed by all WTO members and therefore it does not amount to a WTO rule or requirement.

S&DT in relation to WTO rules

The requirement in Article 36.1 of the Cotonou Agreement that the arrangements between the ACP States and the EU should be compatible with the WTO Agreement,

should be read together with Article 34.4, which specifically states that the compatibility should include compatibility with S&DT provisions. Even without Article 43.4, compatibility with the WTO Agreement would mean compatibility with the relevant provisions, which include SDT provisions.

In this regard, various S&DT provisions would apply, other than the full range of the stringent requirements in Article 24 of GATT 1994:

- The Enabling Clause, which contains in Footnote 2 provisions allowing and accommodating regional trade arrangements between developing and developed countries though they do not comply with other provisions of the WTO Agreement. The USA has used this Footnote to obtain waivers for its similar arrangements for the Caribbean and Andean countries⁹;
- Part IV of GATT 1994 which provides that there need not be reciprocity for concessions developed countries give to developing countries.¹⁰ Part IV was applied in the examination of various regional trade arrangements, resulting in a principle called one-way free trade areas. This principle in part is reflected in Footnote 2 of the Enabling Clause;
- Paragraph 10 of Article 24 of GATT 1994, which provides that regional trade arrangements not in full conformity with the rules of Article 24 may still be allowed if two-thirds of WTO members agree. Though the negotiating history of this provision indicates that it was meant to cater for regional trade agreements with non-GATT members, this suggested interpretation is possible, because laws take on autonomy of their own once in force. For avoidance of doubt, however, in the renegotiation of Article 24, members can consider making it explicit that paragraph 10 can be given this interpretation to allow for a waiver of the rules in the Article;
- Article 5 of GATS explicitly requires consideration of a wider process of economic liberalisation; and flexibility in applying the rules where developing countries are parties to the arrangement; and
- Article 9 of the WTO Agreement, which still allows waivers.

It should always be had in mind that under the current Doha Round of negotiations in the WTO, Article 24 of GATT 1994 is being renegotiated. The ACP Group of States at the WTO has submitted proposals on Article 24.¹¹ The proposals take the ACP-EU negotiations into account. The proposals call for flexibility in applying the rules of Article 24 to allow and provide for less than full compliance with the rules in their current state.

The ACP proposals include the following in paragraphs 10 and 11 of the communication:

10. In the light of the developmental aspects of RTAs, and on the recognition of a deficiency in the legal structure of WTO rules applying to RTAs, the ACP Group of States submits the following proposal:

⁹ 32S/ 21

¹⁰ Article 36.8. The explanatory note indicates that this principle covers all trade negotiations.

¹¹ WTO document TN/RL/W/155

Members agree that S&D treatment for developing countries be formally and explicitly made available to developing countries in meeting criteria set out in paragraphs 5 to 8 of GATT Article XXIV in the context of regional agreements entered into between developing and developed countries.

11. Without prejudice to the right of ACP Group of States to submit additional proposals and clarifications, special and differential treatment shall apply to the following procedural and substantive requirements of Article XXIV of GATT 1994:

(i) Article XXIV: 8(a)(i) and (b) ("substantially all the trade"):

- With regard to duties, appropriate flexibility shall be provided for developing countries in meeting the "substantially all the trade" requirement in respect of trade and product coverage, including in terms of the application of favourable methodology and/or lower threshold levels, if to be applied, in the measurement of trade and product coverage of developing country parties to an RTA;
- With regard to "other restrictive regulations of commerce", the term shall be interpreted in a flexible manner, so that the right of developing countries to apply contingency protection measures including safeguards and other non-tariff measures (e.g. rules of origin) on intra regional trade is not unduly impeded, and that legal security and predictability is guaranteed for special and differential treatment measures in terms of asymmetry in rights and obligations of developed and developing country member under an RTA in respect of such non-tariff measures;

(ii) Article XXIV: 5(c) and paragraph 3 of the 1994 Understanding ("reasonable period of time"):

- The legal standing of interim agreements during the transition period prior to effective application of provisions of Article XXIV of GATT 1994 should be clarified to the effect that the substantive and procedural requirements of GATT Article XXIV 5-8 becomes applicable to an RTA only after the transition period expires;
- The modality for determining "exceptional circumstances" should be clarified so that a transition period longer than 10 years will be made legitimately and more easily available to developing countries;
- The maximum length of the transition period permissible is to be established, the period should be determined in such a manner that is consistent with the trade, development and

financial situation of developing countries, but in any case not less than 18 years;

(iii) Article XXIV: 7 and paragraphs 7-10 of the 1994 Understanding (Notification, reporting and review in the Committee on Regional Trade Agreements):

- Due account shall be given to "developmental aspects" of RTAs involving developing countries in determining their conformity with Article XXIV.
- There shall be streamlined, efficient and less onerous transparency and examination procedures of RTAs involving developing countries, which shall take due account of limited administrative, human and financial capacities developing countries;

(iv) Paragraph 12 of the 1994 Understanding (dispute settlement):

- The relationship between the DSU and GATT Article XXIV, and jurisdictions of DSB and the CRTA, should be clarified, so that the jurisdiction of the CRTA to determine WTO-compatibility of RTAs is not unduly overridden by the dispute settlement procedures and rulings.

These proposals of the ACP Group of States made in the WTO Negotiating Group on Rules deserve the full support of the EU and should therefore fully inform negotiations for the EPA.

In Article 37.8 of the Cotonou Agreement, the EU and ACP States agreed as follows:

The Parties shall closely cooperate and collaborate in the WTO with a view to defending the arrangements reached, in particular with regard to the degree of flexibility available.

The sentiment in this provision is that the EU and ACP States will be partners in protecting and defending their cooperation arrangements, in the WTO rule making and interpretation. This partnership must be seen all the way, including at this stage of the WTO negotiations, for it will be pointless to defend flexibility under the EPA that new WTO rules will have rendered illegal or unavailable. Indeed under Article 39.1, the ACP States and the EC:

... agree(d) to cooperate closely in identifying and furthering their common interests in international economic and trade cooperation in particular in the WTO, including participation in setting and conducting the agenda in future multilateral trade negotiations.

A sensible position before the finalisation of negotiations in the WTO on Article 24 of GATT 1994 would be not to seek to comply with it if it is considered inappropriate. And it has been considered inappropriate for arrangements involving developed and developing countries, which is the reason why the Enabling Clause was adopted in 1979 as part of the results of the Tokyo Round of negotiations. In any case, determination of compliance with Article 24 has never been definitive in the past and has begun to give rise to cases under the Dispute Settlement Understanding of the

WTO, a possibility that should be avoided if possible by not using Article 24 in its current state.

S&DT in the EPA

Another area of relevance for S&DT is the unequal trade and economic power between the EU on the one hand and ACP States on the other.

The objectives of the economic and trade cooperation between the ACP States and the EU include the following, as stipulated in Article 34.4:

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

The principles of the economic and trade cooperation also specifically include S&DT, in Article 35.3:

Economic and trade cooperation shall take account of the different needs and levels of development of the ACP countries and regions. In this context, the Parties reaffirm their attachment to ensuring special and differential treatment for all ACP countries and to maintaining special treatment for ACP LDCs and to taking due account of the vulnerability of small, landlocked and island countries.

The procedures for the negotiations include the explicit requirement for flexibility, in Article 37.7:

... Negotiations will therefore be as flexible as possible in establishing the duration of a sufficient transitional period, the final product coverage, taking into account sensitive sectors, and the degree of asymmetry in terms of timetable for tariff dismantlement, while remaining in conformity with WTO rules then prevailing.

Another important procedural requirement in Article 37.7 is that:

On the Community side trade liberalisation shall build on the *acquis* and shall aim at improving current market access for the ACP countries through *inter alia*, a review of the rules of origin.

Given the imbalance between ACP States on one hand and the EC on the other, application of the principle of S&DT would mean that the ACP States get preferential or less demanding treatment, to appropriately reflect its resource constraints and development needs. The forms of S&DT indicated earlier¹² could then be used in

¹² Extended transition periods before obligations become binding or enter force
Technical including financial assistance;
Statement in the principles and objectives of instruments as a fundamental basis;
Possibility of waiver of certain obligations;
Flexible or expedited procedures, for instance in dispute settlement or resort to subsidies;
Preserving policy space to implement development programmes; and

formulating rights and obligations under an arrangement between the unequal parties, namely the EPA. Each negotiating area will additionally need to be specifically looked at and S&DT incorporated in the provisions dealing with that area.

Creation of binding obligation in favour of developing and least developed countries to address critical issues.

CHAPTER 4

4.1 MARKET ACCESS

In negotiating an economic partnership agreement with the EC, ESA countries will seek market access for their products, and to have adequate capacity through addressing supply and demand side constraints to effectively utilise that market access by following up the market openings. Their products include agricultural products in their primary form, processed and semi-processed products, and services, as well as manufactured products to some extent.

A study commissioned by the Private Sector Foundation of Uganda¹³, recommended priority products for aggressive marketing on the EU market, selected using the criteria of good export performance, importance to the economy, or the possibility of protection using geographical indications (please see the table below).

These will be key products for market access under the EPA. There is of course still the possibility of further diversification away from traditional exports. Diversification programmes will require extensive support from the EU and other partners. On the basis of these products, the key sectors are agriculture and services. There are key issues that should also be addressed because they are complementary to market access. These are reciprocity, non-tariff barriers (Sanitary and Phytosanitary measures), and preference erosion. This chapter will deal with these complimentary issues, and indicate key priorities in the agriculture and services negotiations.

¹³ Uganda's Potential Benefits under the EU's Everything-but-Arms Initiative, June 2004, chapter 12.

Table: Ugandan Products for Aggressive Marketing on the EU Market

Products	Criteria
Coffee	Good export performance, importance to country, geographical indications
Fish	Good export performance, importance to country, geographical indications
Tobacco	Good export performance, importance to country
Tea	Good export performance, importance to country, geographical indications
Cut flowers and flower buds	Good export performance, importance to country, geographical indications
Plants, cuttings and slips	Good export performance, importance to country, geographical indications
Vanilla	Good export performance, importance to country, geographical indications
Raw hides and skins of bovine/ equine animals	Good export performance, importance to country
Bananas (bogoya, ndizzi, plantain)	Good export performance, importance to country, geographical indications
Cotton	Good export performance, importance to country, geographical indications
Fruits and vegetables	Importance to country, geographical indications
Honey (under the commercial insects programme)	Importance to the economy
Cultural products (art, crafts, etc)	Importance to country, geographical indications
Tourism (EU tourists to Uganda)	Importance to country, geographical indications
Services (movement of workers to the EU)	Good export performance, importance to country
Uganda Waragi (to be included on the export agenda)	Geographical indications
<ol style="list-style-type: none"> 1. A domestic law recognising and protecting geographical indications should be enacted if Uganda's products are to benefit from the protection, in the EU and other world markets, which is provided under the WTO's Agreement on Trade Related Intellectual Property Rights. 2. The products should be exported at the highest possible level of processing, for Uganda to benefit from the value added. 	

4.2 RECIPROCITY AND PRODUCT COVERAGE

The relevance of reciprocity arises from the possibility that the EPA could take the form of a free trade area among the EC and ESA countries. Under WTO rules, such an arrangement would require that ESA countries eliminate their customs duties on imports from the EC, and the EC on its part also eliminate duties on imports from ESA countries. The elimination of duties would have to be done to substantially all the trade among the parties. The parties would also have to demonstrate that the

regulations of commerce that apply to their trade are not more restrictive under the EPA.

Meaning of reciprocity and non-reciprocity

Reciprocity in trade negotiations and trade agreements is the principle that a party makes concessions in exchange for equivalent concessions. Non-reciprocity would then be the principle that a party does not have to make equivalent concessions.

A plain or straightforward meaning would have omitted “equivalent”, to mean that reciprocity requires an exchange of some concessions, whereas non-reciprocity means that one party does not have to make any concessions at all in response to those that negotiating partners make. This plain meaning of reciprocity and non-reciprocity is what would make sense in plurilateral or multilateral negotiations where concessions benefit all parties to the trade agreement (under the MFN principle or its limited equivalent in regional trade agreements) and not only the one to whom the concession is made.

Article 36.8 of GATT 1994 provides that:

The developed members do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed members.

Then the addendum to that paragraph has the following explanation:

It is understood that the phrase “do not expect reciprocity” means, in accordance with the objectives set for in this Article, that less-developed members should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments.

This provision disallows the expecting or requiring of developing countries to make concessions that are inconsistent with their development, financial and trade needs; but it does not contain an explicit requirement that developing countries should not make any concessions.

However Paragraph 7 of the Enabling Clause (adopted in 1979) has been understood, mainly by developed countries, to require that developing countries should assume more obligations as they develop. This principle of graduation, as it is called, has been invoked to in effect counter the principle of non-reciprocity. Paragraph 7 provides that:

The concessions and contributions made and the obligations assumed by developed and less-developed members under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed members expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and

they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

From the point of view of most developing countries, and in particular African and least developed countries, their “capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement” has hardly improved; rather their share of world trade has fallen and their economic strength declined.

Still, in Rounds of trade negotiations under GATT, including those before 1979 when paragraph 7 of the Enabling Clause was adopted, developing countries were increasingly put under pressure to make some concessions in return for those made by developed countries, under what could be considered tenuous interpretations of the principle of non-reciprocity. The Doha Ministerial Declaration has instead of the expression “non-reciprocity” used “less than full reciprocity”¹⁴ to reflect and maintain the pressure developing countries have faced. Under the Doha Round of negotiations, developing countries are required to make some concessions in line with that language used.¹⁵

Reciprocity in the EPA

The language used particularly in Articles 36 and 37 of the Cotonou Agreement – “progressive removal of trade barriers among the parties taking into account the development level of ACP States” – may be considered to reflect the approach in the addendum to Article 36.8 of GATT 1994 and Paragraph 7 of the Enabling Clause as interpreted by developed countries to be consistent with requiring developing countries to make concessions.

While the word “reciprocity” may not be used there, reference to compatibility with WTO rules may imply that there will be reciprocity, if the EPA is to take the form of a free trade area that is consistent with Article 24 of GATT 1994. If the EPA is not to be based on Article 24 of GATT 1994, but on the Enabling Clause or provisions of Part IV of GATT 1994, reciprocity (less than full reciprocity in this case) could apply on the basis that developing countries are expected to make concessions consistently with their development levels, going by the interpretation put to these provisions mainly by developed countries.¹⁶

Non-reciprocity in the EPA

If Article 24 of GATT 1994 does not apply to the EPA, non-reciprocity could be consistent and compatible with WTO rules on the basis that Article 36.8 of GATT 1994 explicitly states that developed countries should not expect reciprocity from

¹⁴ Paragraph 16 of the Doha Ministerial Declaration

¹⁵ The EU made overtures to ACP countries in the negotiations leading to the July package/ 1 August 2004 General Council Decision, that they would not be required to undertake tariff cuts; that they would receive similar treatment to LDCs. In return, ACP countries supported the launching of negotiations on the Singapore issue of trade facilitation. It is yet to be seen whether that overture will amount to much.

¹⁶ As pointed out already, that interpretation of Paragraph 7 is subject to the social economic performance and should not be generalised.

developing countries for concessions made including in re-negotiations; and that in accordance with paragraph 7 of the Enabling Clause the capacity of ESA countries to give concessions is lacking in light of their falling share in world trade and structural difficulties that have weakened their economies.

If Article 24 applies, non-reciprocity could still be compatible with WTO rules if the requirements in that Article are modified under the Doha Round of negotiations in accordance with the proposal¹⁷ of the ACP Group of States in the WTO Negotiating Group on Rules to contain flexibility for arrangements involving developing countries, so as not to require reciprocity or so as to require less than full reciprocity.

In its current state, non-reciprocity under Article 24 of GATT 1994 could be available during the transition period of up to 10 years, and beyond that period where exceptional circumstances obtain and a full explanation is given to the Council for Trade in Goods.¹⁸ A case for a period of non-reciprocity exceeding 10 years could be made on the basis that ESA countries face huge structural difficulties that will take more than 10 years to adequately address. In this regard, even a 12-year period would be inadequate.¹⁹ Going by the development experience of the newly industrialised countries of Asia, as well as the time frames for the millennium development goals, a minimum of 25 years would be a possible working time frame if at the same time the entire range of development programmes is fully and timely implemented.

However, a plan and schedule would be required demonstrating how duties are to be eliminated over the transition period on substantially all the trade among the parties to the free trade area or customs union.²⁰

In terms of product coverage, non-reciprocity would mean that ESA countries do not have to reduce or eliminate customs duties on imports from the EU or relax their regulations of commerce against the imports.

Elements of reciprocity

Reciprocity in the EPA that takes the form of a free trade area would cover “duties and other restrictive regulations of commerce”, which it is a requirement under WTO rules to eliminate on substantially all trade among the parties forming the free trade area and not to make more restrictive.²¹

The meaning in the WTO of the expression “other restrictive regulations of commerce” has been unclear including under GATT 1947. Going by views of members over the years, until clear rules emerge, the expression could be extended to cover:

¹⁷ WTO document TN/RL/W/155

¹⁸ Paragraph 3 of the Understanding on the Interpretation of Article 24 of GATT 1994

¹⁹ The Trade and Development Cooperation Agreement between South Africa and the EU provides for South Africa a 12-year transition period for reduction of duties.

²⁰ Article 24.5(c) of GATT 1994 and paragraph 10 of the Understanding on the Interpretation of Article 24 of GATT 1994

²¹ Article 24.5 and 24.8 of GATT 1994. Paragraph 5 says “other regulations of commerce”.

- Measures referred to in Articles 1 and 3 of GATT on MFN and national treatment – charges of any kind, method of levying duties, importation rules and formalities, internal taxes, and laws and regulations affecting sale;
- Charges on imports other than customs duties;
- Quantitative restrictions; and
- Rules of origin.

The reciprocal requirement to eliminate customs duties and not to make other restrictive regulations of commerce more restrictive, including the requirement that they should not be higher or more restrictive at the commencement of a transition period to form a free trade area, has a wide scope, which has not been definitively settled or demarcated in WTO jurisprudence. Compatibility with WTO rules in this regard need not mean that the EPA must satisfy every whim and wish of individual WTO members that have expressed views on the scope of the requirement.

Impact of reciprocity on the Ugandan economy

Assessing what impact reciprocity in the EPA could have on the economy of Uganda and the livelihood of its people should be undertaken within the broad scope of the entire scheme of the EPA as proposed. The EU wants EPAs to be mechanisms for embodying and locking in market liberalism in their economic and trade relations with ACP States, at even higher levels than contained in the WTO Agreement. The EU wants all the EPAs to be fairly uniform. The aim is so that a huge economic territory results with a common liberal economic policy environment and with direct links with the EU.

The Impact Assessment Study for Uganda has been undertaken.²² It is useful reference in attempting an assessment of how the EPA could impact upon Uganda's economy and the livelihood of its people.

Reciprocity would mean that Uganda eliminates or reduces trade barriers to EU imports. According to the Impact Assessment Study, the impact this would have on the economy includes:

- Revenue loss estimated at Uganda Shillings: 40 billion per annum;
- De-industrialisation in sensitive sectors that will be out-competed by imports from the EU, such as, vegetables and fruits, cereals, iron and steel, and furniture – this would have the knock-on effects of unemployment, shrunk tax base, and economic dependence;
- Trade diversion in favour of cheap EU imports away from low cost producers such as those from developing countries – while consumers might not be adversely affected, this is considered undesirable because efficient producers are replaced by inefficient producers only on account of removing the customs duties and relaxing other regulations of commerce.

Reciprocity would mean also that the EC eliminates or reduces trade barriers to imports from Uganda and other ESA countries. The impact this should have on the economy would largely be in terms of increased exports from Uganda into the EU.

²² Study of the Impact and Sustainability of Economic Partnership Agreement for the Economy of Uganda, April 2004, by TRADES.

However, this is subject to the same factors that have so far caused the low utilisation of preferences, such as the supply and demand side constraints. Besides, as a least developed country, Uganda already had duty-free and quota-free access to the EU for its leading exports, which under the WTO negotiations could become part of the schedules of commitments of the EC.

If this is the case, it could be argued that the trade component should not be an important reason for the EPA on the basis that Uganda has little to benefit from the reciprocity.

It could be appropriate to think about the fact that the internationally acclaimed liberalisation programmes Uganda has undertaken over the past 20 years (1986-2005) still coexist with rising poverty levels in the country as a whole. Poverty is rampant in most rural areas and upcountry towns.

A relevant consideration in estimating the impact of the EPA is the experience in the South African Customs Union (SACU) countries of the Trade and Development Cooperation Agreement between South Africa and the EU. That agreement gives the EU a transition period of 10 years within which to reduce duties from the average of 2.7 to 1.5 percent on up to 95 percent of imports from South Africa. South Africa on its part has 12 years to reduce the average duty from 10 to 4.3 percent on up to 86 percent of imports from the EU. It has been widely reported that the agreement has had adverse impact on key industries in SACU, resulting from cheap subsidised agricultural imports from the EU. Viewed in light of the fact that SACU economies, except perhaps Lesotho, which is also a least developed country, are stronger economies than Uganda, this experience could be cause for significant caution in selecting the scope, depth, and length of the transition period, for elimination of duties and other restrictive regulations of commerce.

Edward Buffie's study of experiences in several countries²³ with economic liberalisation, including Uganda, suggests that adverse impact can result in terms of:

- job losses and unemployment,
- closure of industries,
- lower capacity utilisation,
- lower wages,
- increasing expenditure of scarce foreign exchange on imports,
- surges in imports of consumer goods leading to less availability of foreign exchange for other expenditures,
- de-industrialisation or contraction, and
- lower rates of economic growth.

This study is part of a wide body of literature now available cautioning against thoughtlessly opening up of economies.

The other major implication could be the loss of government revenue through elimination or reduction of customs duties. To address this, the adjustment programmes should have adequate and readily disburseable funds for meeting shortfalls.

²³ Trade Policy in Developing Countries, Cambridge University Press, pp.190-1

It is appropriate that the Cotonou Agreement already contains a good basis for treating reciprocity with significant caution. The provisions on transition periods, and the need for supported adjustment, as well as capacity building and enhancement of competitiveness, should be fully reflected in the EPA.

It is plausible to argue that least developed countries should have little interest in reciprocity, because they already have under the Everything-but-Arms Initiative duty free and quota free access to the EU market; they do not have to seek any further reduction of customs duties from the EU and there is therefore nothing more the EU will offer for which least developed countries would be required to reciprocate. Reciprocity would then be relevant to non-least developed countries that could seek duty free quota and free treatment like least developed countries. On the basis of such an argument, the principle of reciprocity would not apply to least developed countries like Uganda.

4.3 SANITARY AND PHYTOSANITARY MEASURES (SPS)

Meaning of SPS measures

Sanitary and Phytosanitary (SPS) Measures are laws, regulations or administrative action taken by a country to protect human, animal or plant life or health. In the context of international trade, the measures usually entail the ban or restriction of importation of certain goods on the basis that they pose a health problem if imported into the country. The health problem could arise from consumption or proximity.

SPS measures are thus important as they can either impede or facilitate entry into a given market.

Uganda's leading exports to the EU are primary products that may be subject to SPS measures. The table below shows the leading exports.

Table: Uganda's Leading Exports to EU facing SPS and Technical Measures

Edibles	Plant and animal products
Coffee	Cut flowers
Fish	Raw hides and skins
Tea	Cotton
Vanilla	Animal products
Cocoa	Fruits and vegetables
Honey	

Rules under the SPS Agreement

In Article 48 of the Cotonou Agreement, the ACP States and the EC:

- Recognised the right to take measures to protect life or health of people, animals, or plants,
- Undertook to strengthen consultation and coordination when new standards are to be adopted,

- Reaffirmed their commitments under the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), and
- Agreed on prior consultation, and coordination of positions, in international standard setting bodies

The SPS Agreement requires that members use international standards in protecting their human, animal or plant life or health; and that where international standards are not to be used, they should be notified and consultations undertaken, with the opportunity for countries that would be affected to make comments and to have a period to adjust to the standards before they enter force.²⁴ Provisional measures can be taken. The Agreement requires that measures be taken on the basis of scientific knowledge, and must not be taken in order to impose a disguised restriction to trade. The Agreement further provides for technical cooperation between developed and developing countries to assist the developing countries to have capacity to meet SPS measures.

4.3.1 Abuse of SPS measures

Notwithstanding these rules, abuse has been common in using SPS measures. Uganda's products face measures in international trade, in many cases not reported by exporters and the matters not taken up by relevant government departments. This would suggest the need for a comprehensive inventory of SPS measures Uganda's exports face on the EU market and other markets. However, the exporters and other interested parties would have to know what SPS measures are.

A well known example of SPS measures taken against Uganda's exports to the EU is that of the fish bans in 1999. The EU banned the importation of fish from the region around Lake Victoria, including Uganda, on the basis that a cholera outbreak in that region meant that fish imported from that region could introduce cholera in the EU, though it was well known that fish could not carry cholera.²⁵ Uganda at that time did not have the ready capacity to challenge the bans under the WTO dispute settlement system, and by the time the bans were finally lifted the economy had suffered a loss estimated at USD 80 million, as well as job losses and closure of fish factories.

However, it will be recalled that on its part Uganda had not quickly acted upon the practice of poisoning fishing waters in order to enhance the catches. Though this is a separate matter, it is sometimes raised to justify the EU bans.

The imposition of bans without scientific justification, contravening the WTO SPS Agreement, would suggest the importance of having legal and institutional capacity to defend Uganda's rights under the SPS Agreement, in trade relations with the EU. It can be pointed out that the EU has provided technical cooperation to Uganda; but there are always new developments and a lot still needs to be done in terms of maintaining that technical cooperation in order for Uganda's exporters to maintain market access to the EU. Moreover, retailers in the EU impose their own sets of

²⁴ Similar requirements apply under the WTO Agreement on Technical Barriers to Trade, and could form the broad approach in the EPA negotiations.

²⁵ it is useful to remember that EU scientists and others have time and again made major errors. For instance, when mad cow disease struck, there was for a while a body of scientists and policy makers insisting that it was not got from eating beef from sick cows.

standards in response to consumer sensitivities, which are enforceable against imports from third markets such as Uganda.

As a means of regulating standards within the EU, a number of measures have been introduced as illustrated below:

4.4 EUREP GAP protocols

In response to food scares associated with genetic modification of food products (genetically modified organisms) and pesticide use, and outbreaks such as the mad cow disease, the foot and mouth disease, the Euro-Retailer Produce Working Group (EUREP) in 1997 initiated certification processes for Good Agricultural Practices (GAP). The certification takes the form of requiring conformity with standards and processes adopted and set out in protocols.

There are protocols on:

- Fruit and vegetables;
- Flower and ornamentals;
- Integrated farm assurance; and
- Integrated aquaculture assurance.

Work on further protocols continues.

The protocols cover:

- Traceability of products to registered farms;
- Record keeping;
- Seeding details;
- Pre-harvest information relating to farming methods;
- Post-harvest information relating to treatments, etc;
- Waste and pollution management;
- Environmental enhancement;
- Workers' health, safety and welfare; and
- Internal audits.

It is demanding to meet the conditions or requirements under the protocols, or having met them to be maintained on the list of approved exporters to the EU. For instance, the EU has approved its importation of Uganda's honey²⁶ after more than a year's work of putting in place mechanisms to meet the EU's requirements including the Residue Monitoring Plan, which is a plan setting out national mechanisms for ensuring the products exported are safe and meet EU health standards. But a Residue Monitoring Plan must be submitted to the EU authorities annually for Uganda to maintain its status as approved exporter.

While the importance of human safety shouldn't be disputable and therefore appropriate measures to ensure it are necessary, it is the case that standards can be used as disguised restrictions to trade; and can be adopted in the full knowledge that they will pose huge difficulties for certain exporting countries seeking to satisfy them.

²⁶ May 2005

It is a sensitive matter, to be addressed with the full participation of all stakeholders so that solutions found take on board all the interests at stake. The EPA negotiations should reflect this need for full participation of all stakeholders, including exporters and government officials from ESA countries. If the EPA is considered a development instrument for ESA countries, the EU should ensure that ESA countries always have the capacity to meet standards put in place.

Market and consumer trends also determine utilisation of market openings

While it is common to expect that market access openings under WTO rules or preferential arrangements such as the EU's EBA Initiative under which imports from least developed countries enter duty free and without quota restrictions, actual utilisation of market openings depends, among other things, on the capacity to continuously comply with requirements made by retailers, bearing in mind that a few huge retail chains dominate the markets of developed countries.

The actual utilisation depends also on the capacity to monitor and keep pace with consumer tastes and demands, which are usually readily taken on by retailers. Additional requirements may be put in place, including for instance packaging and labelling of products, with cost implications for exporters.

To break into those markets and to maintain those markets can therefore be difficult and the promised market openings illusory.

The EPA should bear these realities in mind and address them through concrete mechanisms that facilitate production for exportation to utilise market access provided under the EPA. It is important for Ugandan retailers to be established in the EU market, or for the controlling power of EU retailers to be brought in line with the market access aspirations of ESA countries.

4.5 RULES OF ORIGIN

Preferential market access provided will not be effectively utilised if the rules of origin make it difficult for exports to qualify. It has been widely pointed out that EC rules of origin governing GSP schemes, including the EBA Initiative, are restrictive. And, the rules of origin under the EBA Initiative are more restrictive than those under the Cotonou Agreement. It will be important in the EPA negotiations to avoid restrictive or complicated rules of origin.

Also, in terms of prioritisation, restrictive rules of origin detrimentally affect market access in conjunction with supply and demand side constraints including non-tariff barriers.

Favourable rules of origin could confer origin based on the following approach:

- Change in tariff classification
- Simple value addition of 25%
- Full cumulation for developing countries and the EU, and
- Tolerance of up to 25%.

4.6 PREFERENCE EROSION AND MARKET ACCESS

Meaning of preference erosion

Preference in the context of customs duties is the difference between the duty normally charged, the MFN duty for WTO members, and the lower duty charged under a special arrangement that favours certain designated exporters. That difference is expected to give the beneficiaries of the special or preferential rates some advantage, for they do not pay the higher MFN rate and incur that expense.

The other major element of preferences is the provision for import quotas in sectoral areas, regulated by specific protocols, particularly sugar. The sugar quota system is vigorously defended by beneficiaries on grounds that it guarantees them a quota and minimum prices paid to the exporters as negotiated annually. The sugar regime has unlimited duration and it is argued that it provides predictability in planning. Preference erosion in this regard would refer to reforms that eliminate or prejudice the quota system, or the minimum price system.

Also, the EU reforms of the Common Agricultural Policy entail shifting from price support to direct payment to EU farmers. The result of this shift has been to lower prices on the EU market, towards world levels. ACP exporters that benefited from high prices on the EU market have suffered or face the prospects of huge losses due to the lower prices.

Special arrangements between the EU and ACP States are the Lome Conventions and now the Cotonou Agreement which, under a waiver granted at the 4th Ministerial Conference in Doha to last until 31 December 2007, provides for imports from ACP States at lower duties than the MFN rates. Another special arrangement is the EBA Initiative of the EU under which imports from least developed countries are not charged customs duties and do not face quota restrictions (they get duty and quota free treatment).

As MFN rates fall, under negotiations such as the current Doha Round of negotiations at the WTO, the difference reduces between the MFN rates and the lower special or preferential rates. And as the difference reduces, the competitive advantage the beneficiaries are expected to have also diminishes. This reduction of difference has been called preference erosion and it is feared that this will contribute to loss of competitive advantage by preference beneficiaries. When a system of preferential quotas is stopped, it is feared that the beneficiaries under the quota system would lose market share to new competitors.

Implication of elimination of preferences:

Some WTO members wish to see the elimination of preferences, rallied around the school of economic liberalisation by the World Bank and the IMF. They include major economies such as the QUAD countries and the advanced developing countries that aggressively seek larger market shares on world markets. In arguing their case, apart from the gains of economic liberalisation – particularly better resource use

resulting from competition, they point to the low utilisation of preferences generally; only about 7 percent of imports into the EU have been under preferential regimes.

The argument is that since the utilisation of preferences has been low, there will not be serious implications for preference beneficiaries when the preferences are eliminated. There is an answer to this argument: if the utilisation is low and therefore there should be no serious implications in terms of distortion of international trade, then why be bothered by such a minor issue that the giving of preferences should be?

An appropriate response to the position that utilisation has been low, should be to leave the preferences in place, for they have no serious adverse consequences for international trade in terms of distortion of trade and for domestic resource allocation. But if there is some benefit that can accrue from better utilisation of preferences, then an appropriate response should be to fully address the causes of the low utilisation.

In this context, it could be pointed out that cooperation under the Cotonou Agreement aims among other things to enhance the competitiveness of ACP States and their enterprises. That competitiveness would be more useful if preferential arrangements were maintained to give a further competitive edge to ACP exporters as they become strong competitors on world markets. *The preference regimes could have built in mechanisms for termination when countries register given levels of international competitiveness.*

Preference beneficiaries want the erosion addressed

Preference erosion could have far reaching consequences for countries that have been benefiting from the preferences²⁷, in terms of loss of market share in the export markets and lost earnings as the competitive edge attributed to lower duties and other preferential treatment disappears. The erosion could have consequences for countries that could have started benefiting from them as well, in terms of foreclosed opportunities that would have been utilised.

Social economic consequences from lost export opportunities include

- balance of payments problems,
- profit losses for exporters,
- unemployment and job losses,
- underutilisation of capacity,
- diminishing tax base and lower revenues,
- low investment or withdrawal of resources from the sectors, etc.

The rounds of trade negotiations under GATT saw a quite dramatic reduction in overall levels of tariffs or customs duties. The Doha Round is likely to result in yet further reductions of MFN rates. Preference erosion will therefore continue to happen. The other source of preference erosion, which is more far reaching, is the EPA negotiations under the Cotonou Agreement. Preferences accorded under the current

²⁷ It is common to cite isolated success stories of preference utilisation, such as Mauritius. But this does not seem to bode comfortably with the bonanza attending the USA's preference scheme under the African Growth and Opportunity Act. Preferences do not work only for certain countries and for certain sectors; they could work when appropriate conditions are in place.

waiver are to end on 31 December 2007. It is expected that at that time, the system of preferences given to ACP States by the EU will end or be substantially altered.

The EPA could require the EU to eliminate customs duties and other restrictive regulations of commerce on exports from ESA countries. This could be equivalent to according preferences to ESA countries in terms of lower or zero customs duties and simplified regulations. Even under such a regime, preference erosion would happen through the reduction of MFN rates that other exporters to the EU have to face.

Responding to preference erosion

Preference beneficiaries have faced certain constraints that have accounted for low utilisation. The constraints have resulted in low competitiveness of ACP States and enterprises. It is important that EPA negotiations continue to address these constraints.

The constraints have been, broadly:

- Supply and demand side constraints that have meant minimal or no exportable products to take up market access opportunities, including non-tariff barriers, such as health and technical standards,
- The bad record of providing and disbursing EU development funding, in terms of insufficient political will and complicated lengthy access procedures, which has in effect meant insufficiency of actually disbursed resources to address problems identified and to implement development programmes.

Supply side constraints as already mentioned earlier should be addressed by building and strengthening the competitiveness of ESA countries and their enterprises. The competitiveness programmes in Uganda are good frameworks for interventions, but they need to be regularly reviewed and improved upon. On its part the EU should regularly review the effectiveness of its support for the programmes, including the adequacy of resources provided.

The EU should specifically address the question of technology transfer to ESA countries, in terms of facilitating the actual acquisition of required technologies by specific enterprises in ESA countries.

Demand side constraints as already mentioned earlier need to be addressed by ensuring fairly uninhibited access to the EU market for exports from ESA countries. This could be facilitated by:

- The EU assisting ESA exporters acquire adequate and maintainable capacity to meet the health and technical standards of the EU; and by the EU ensuring that its standards are necessary and not disguised restrictions to trade. On the part of ESA countries, they will need to ensure that they have in place legal and institutional capacity to challenge unjustified measures that restrict their exports to the EU, for instance through establishing a collective pool of legal experts for the purpose;
- Tariff peaks and escalations should be eliminated by reducing level of tariffs to zero, and by removing any quota restrictions;

- Subsidies in the EU that adversely affect ESA exports and domestic industries should be phased out in the immediate to short term – a 10-year period would be far too long;
- Rules of origin should be flexible even if they are detailed, and they should allow full cumulation within the regional economic communities of Africa; and
- EU customs procedures should be simplified for exports from ESA countries.

The social economic consequences of preference erosion will need to be continually addressed under an adjustment programme that has adequate and readily disbursable funds, and that has other required technical resources.

On their part, ESA countries will need to have in place rapid and functioning mechanisms for identifying difficulties and adverse developments, which are then speedily followed up with development partners – the EU and others.

Additional important approaches to preference erosion should include direct payments for losses and more concrete support for diversification programmes.

CHAPTER 5

5.1 AGRICULTURE

WTO negotiations in the agriculture sector can give useful pointers about what the EPA negotiations in this sector should reflect.

Descriptions of the state of play of WTO negotiations in agriculture have a way of becoming quickly outdated as they become overtaken by developments under the rapidly unfolding negotiations.

On 1 August 2004, the WTO General Council adopted a Decision setting out a framework agreement on how negotiations under the Doha work programme would proceed. Uganda, together with other African and least developed countries, has actively participated in the negotiations, and the framework agreement reflected some of the priorities. Key gains for Africa in the framework agreement included:

- Agreement that export subsidies will be eliminated, though a date has yet to be set when that should happen;
- The possibility that African countries will be able to designate special products for appropriate programmes to promote food security and the social economic development of rural areas
- The possibility that African countries will have the chance of using a special safeguard mechanism to protect their economies against surges of imports
- There should be substantial reductions in domestic support in developed countries

Least developed countries will not be required to make tariff reductions in the negotiations, and the possibility that they may receive commitments for duty free and quota free access to markets of developed and advanced developing countries.

Since the adoption of the framework agreement, negotiations have continued in the Special Session of the Committee on Agriculture. It is expected that by July 2005, there will be results when a major WTO meeting will be held to assess progress (the approximation meeting as it is called) in light of the forthcoming Sixth Session of the Ministerial Conference to be held in Hong Kong in December 2005.

5.1.1 Special and differential treatment in the Agricultural negotiations.

Paragraphs 22 to 45 in Annex A of the Framework Agreement set out key provisions on SDT, in addition to others under the specific pillars of the agriculture negotiations.

It will be seen that food security was addressed. However, the exact criteria for designating special products are still to be negotiated. And, it is also to be determined what type of flexibilities the special products will enjoy. These are important matters, which are yet to be dealt with, and which could be reasons supporting suggestions that the framework agreement was more of a public relations exercise that did not address the substantive and the thorny issues that constitute the crux of the negotiations.

It will be important that the criteria and the flexibilities are not restrictive and that they reflect the intention behind the idea of special products. As originally proposed by the Africa Group, special products were meant to be products that would enjoy special and differential treatment among other things, in terms of not being subject to undue restrictions on domestic support for them:

- to promote food security for instance for being key staples, and
- to improve rural livelihoods through for instance being successful export products, or having important linkages in the economy.

Criteria for selection of special products should include significance in the GDP and the development programmes of the country in terms of:

- Export performance and foreign exchange earnings
- Possibility of processing and high value added opportunities
- Linkages into the economy
- Contribution to employment particularly rural employment
- Role in addressing gender issues such as products mostly grown by village women or traded by women, and
- Importance as a staple food, taking into account nutritional value and extent of dependence on it.

The flexibility to which special products could be entitled could include financial and technical support from local and foreign sources throughout the production, storage, transportation and marketing chain. The special and differential treatment currently available already addresses many of these possibilities. What could be further required is to remove undue restrictions and caps.

Similarly, the clause on the special safeguard mechanism lacks any specificities or details. As proposed by the Africa Group, the special safeguard mechanism was intended to give developing countries the equivalent or better of the special safeguard provisions currently available in the Agriculture Agreement but which most developing countries are not eligible to use. The special safeguard mechanism should be modelled along the current provision in the Agreement, but with flexible triggers.

The special and differential treatment that has been included in the framework agreement, and that will form part of the substantive negotiations in the agriculture sector in the WTO, should be similarly included in the EPA, especially given that the EU is a major trading partner of the ESA countries.

Reform of the Common Agricultural Policy

Reforming the common agricultural policy of the EU raises issues for ACP States, particularly in the sectoral areas of sugar, beef, and cereals (maize, wheat, barley). Several ESA countries have interests in these sectors, particularly Mauritius. Uganda's leading exports to the EU are unlikely to be directly affected by the adverse results of the reforms in the sectoral areas.

The reforms are essentially in terms of shifting away from price support to direct payments to EU farmers. The effect of this is that agricultural prices on the EU market that were kept high are falling towards the levels of world prices. Exports to the EU

market from ACP States that benefited from the high prices are now fetching less, resulting in the collapse of export sectors affected in ACP States.

It is expected that exporters to the EU markets will lose only in the short term, and gain in the long term, for as the EU stops flooding world markets with subsidised exports, world prices will rise and exporters to world markets will gain overall.

This may be a complicated argument in the sense that farmers that are supported by direct payments could still out-compete other exporters on the basis of the direct payments. The possibility of gaining from world markets outside the EU still depends on the ready capacity to utilise export opportunities, in terms for instance of successfully addressing supply side and demand side constraints.

Nevertheless, Uganda has joined the general positions of the Africa Group and the LDC Group at the WTO, calling for substantial cuts in the domestic support and the prohibition of export subsidy programmes of the EU with the expectation that the reforms would be beneficial. Apparently, a more politically feasible method of agricultural reform in developed countries has historically been a shift to direct payments to farmers.

The EU still spends 44 billion Euros annually on subsidies, which looks morally indefensible in light of poverty in ACP States and other developing countries. The reforms should result in the re-allocation of such vast resources to development programmes in developing countries.

CHAPTER 6

6.1 FISHERIES

Paragraph 28 of the Doha Ministerial Declaration initiated negotiations on clarifying and improving “disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries”.²⁸

The Cotonou Agreement on its part provides for negotiations on “fishery agreements aimed at guaranteeing sustainable and mutually satisfactory conditions for fishing activities in ACP States”, in which “the ACP States shall not discriminate against the Community or among the Member States ... nor shall the Community discriminate against ACP States”.²⁹

WTO negotiations on fisheries subsidies aim to curtail the subsidies, with a view among other things to preserving fish stocks on a sustainable basis. The EPA negotiations in this sector primarily envisage agreements on access to fishing waters of ACP States, and the EC is keen to see that it is not denied access by ACP States in any such agreements. The EC would also not discriminate against ACP States, but this would be relevant where ACP States have meaningful fishing capacity to compete on EC waters.

Fish and fish products are among Uganda’s leading exports to the EU. Reduction of fisheries subsidies and probably then the reduction of fish supplies from the EC to the EC market could create extra room on the EC market for fish imports. The performance of Uganda’s fish exports to the EC market has been good, though it registered a huge fall when the fish bans were in place. This would indicate that Uganda has a key interest in elimination or reduction of fisheries subsidies in the EC, but also in the setting and implementation of health standards that could affect exports to the EC.

In terms of the impact of the growing fish exports to the EU, it is regrettable that fishermen on the whole earn about USD 1 a day, bearing in mind that fishing for small scale fishers is demanding and time consuming work. At the fish processing level, there are still only a few factories, but more investment would be appropriate with growing exports. However, the poor state and neglect of landing sites, as well as the lack of credible support for small scale fishers would suggest investment in the sector has yet to rank highly among government priorities.

Fish is an important food component in Uganda and among the key staples of many communities. It is important therefore that export trade does not deplete fish stocks in an unsustainable manner. In addition, there are considerations of preserving biological diversity and maintaining the integrity or stability of water life. Therefore there is need to have in place and to effectively implement programmes that prevent over-fishing. The East African Community’s Lake Victoria Development Programme should be helpful in this regard, together with national initiatives.

²⁸ In the WTO, fish is not included among agricultural products, according to the Agriculture Agreement

²⁹ Article 53 of the Cotonou Agreement.

CHAPTER 7

7.1 TRADE IN SERVICES**Liberalisation in Uganda and WTO negotiations**

The services sector is still small in Uganda in terms of its contribution to the GDP. But it is registering strong growth rates and is considered to have huge potential, particularly in the tourism sub-sector.

According to statistics from the Bank of Uganda (See table below), Uganda’s leading source of foreign exchange has for several years now been remittances by Ugandans working abroad, including the semi-skilled and the unskilled. The table below shows the dramatic increase in the remittances. Thus Uganda’s request to Japan in WTO negotiations on services includes for Japan to allow Ugandans work in Japan as “garbage collectors and street sweepers”; one could think this an inappropriate reflection on Uganda.

Table: Remittances from Ugandans working abroad

Year	Amount in USD millions
2000/01	50.61
2001/02	219.49
2002/03	235.09
2003/04	395.12

Uganda’s export of services constituted 28 percent of foreign exchange earnings in 1997, rising to 60 percent in 2004/05. Remittances in neighbouring Kenya are over USD 600 annually. The global figure for remittances is estimated at USD 93 billion annually, which is twice the total amount of ODA; other estimates put the figure at over USD 120 billion. Another side of the story is that money transfer companies and banks take over 35 percent as charges. This would suggest that movement of natural persons in services negotiations is a key priority for Africa and other developing countries.

The WTO’s General Agreement on Trade in Services (GATS) is based on a positive-list approach. This means that unlike trade in goods under GATT where all products are subject to WTO rules unless explicitly excluded, in the services area a country selects the sectors where it chooses to liberalise and to undertake to allow other WTO members to participate, in accordance with commitments it makes in its WTO schedule. However, the basic MFN rules of non-discrimination and transparency apply across the board. This was a major victory for developing countries in the Uruguay Round of negotiations for this agreement.

Capacity and technical assistance for services sectors

Article 4 of GATS provides that developed countries should assist developing countries, especially least developed countries,

- to strengthen the capacity of their services sectors for instance through access to technology,
- to improve their access to distribution channels and information networks, and
- to liberalise market access in sectors of export interest to them.

The Cotonou Agreement provides that the EC is to support the strengthening of the capacity of ACP services sectors, particularly those related to, “labour, business, distribution, finance, tourism, culture, and construction and related engineering with a view to enhancing their competitiveness and thereby increasing the value and the volume of their goods and services”.³⁰

This is a useful list of methods of building the strength of services sectors in developing countries. However, developing countries have continued to point out that not much has been done to implement the provision. It could be useful if developing countries now insist that developed countries make offers to include in their schedules of commitments containing specific measures they will take in implementing the provision.

The Government of Uganda is in the process of putting in place mechanisms to strengthen the services sectors. The President’s Office has set up a desk to facilitate the recruitment of Ugandans for work abroad. The Uganda Export Promotion Board together and the Uganda Service Exporters’ Association have spear-headed the drafting of a national policy on services exports. These programmes will be useful material to draw upon in the WTO and EPA negotiations. But the programmes will need to be reviewed regularly in order to ensure their relevance and good functioning.

The unfinished business on subsidies and safeguards

The built in agenda of GATS, which is yet to be finalised, includes the negotiation of rules on subsidies and a safeguard mechanism. The need for rules in these fields was recognised during the negotiation of the GATS in the Uruguay Round. Subsidies would be helpful to support infant service providers and to bail out deserving cases that fall upon hard times.

Examples of service providers that could need assistance to export their services include entertainers, transporters, construction firms, professional firms, travel agencies and tour operators, etc. However, the rules would have to be careful not to legalise an additional venue for the extensive subsidies given in developed countries.

If further justification in our times is required for the case for an emergency safeguard mechanism, one only needs to remember the recent financial crises for example the Asian crisis, which resulted among other things from the extensive liberalisation of the banking industry without adequate safeguards. In Uganda, the moratorium on licensing new banks might be some indication that there can be need for a mechanism to take emergency measures to stop an influx of services that was not foreseen. This is a standard safeguard in trade agreements.

³⁰ Article 41.3

Investors licensed in Uganda have been found concentrating in specific areas, such as catering. This could illustrate that a commitment in this sector would have needed some limitations, in the absence of which emergency safeguard measures could then be taken.

7.2 WTO negotiations on services

Paragraph 15 of the Doha Ministerial Declaration provides for negotiations on services. However, since 2001 when the negotiations were initiated, only little progress has been made, as lamented in the 1 August 2004 Decision of the General Council on the framework agreement. Members have been urged to make more meaningful requests and offers so that the negotiations can gain momentum and be finalised.

The EU has made an offer³¹, and Uganda is preparing a request to the EC; which should mean that there should be intense negotiations now between the EC and Uganda. The EC initial offer does not fully reflect the priorities of Uganda and other developing countries under mode 4 – movement of natural persons. In particular, the economic needs test, which tends to undermine any commitments made, is still maintained as a condition on the commitments. The response to the EC offer will be the demands from Uganda on the basis of the requests Uganda makes.

The negotiations are in accordance with Article 19 of GATS and the Negotiating Guidelines, which underline the flexibility developing countries have to select sectors of export interest to them in which to make commitments, and the need for developed countries to make commitments that are useful to developing countries.

However, in practice, requests so far made by developed countries to developing countries, including least developed countries like Uganda have been exceedingly exaggerated. They cover all imaginable sectors and they require the elimination of all restrictions. This approach is of course out of proportion with the negotiating guidelines, and should be rejected.

It should of course be borne in mind that while developed countries have tended to use theoretical models for economic liberalism and selective success stories to argue that services liberalisation has a positive impact on economic development, the assessments as required under GATS have never been formally done. The formal assessments were to be the basis for further negotiations and liberalisation of trade in services.

A communication to the WTO Special Session of the Council for Trade in Services where negotiations are taking place, from a group of developing countries that included Kenya and Zambia, both of them being ESA countries, set out certain conclusions reached in UNCTAD and World Bank studies on gains from services liberalisation.³² The conclusions suggest that developing countries have not gained as much as is usually portrayed:

³¹ WTO document TN/S/O/EEC series

³² WTO document TN/S/W/3

- The overall objective in the GATS preamble – to achieve an overall balance of rights and obligations for all WTO members – has not been attained;
- Developing countries’ share of world services exports has increased by only a small percentage;
- For some developing countries, growth in imports has been larger than growth in exports and many of them face a deficit in trade in services in most sectors;
- The specific objectives of Article 4 of GATS have not been achieved – critical barriers developing countries face include, prohibition of access to services markets through nationality and residency or visa requirements, price-based measures such as fees and tariffs, subsidies granted in developed countries for instance in high-technology sectors, technical standards and licensing requirements, and lack of transparency in government procurement;
- It is not automatic that there will be benefits from privatisation and liberalisation, without appropriate preconditions and policies to encourage and enhance technological capacity and diffusion as well as complementary policies to help improve access to essential services for the poor;
- Liberalisation of services entails adjustment costs.³³

There is no basis for the extensive requests developed countries are making. Prudence would require that developing countries make assessments themselves before determining which sectors to open up and what conditions to attach, and before determining the sequencing of the opening.

7.3 EPA negotiations on services

Under the EPA, services negotiations should take place on the basis of the provisions of Article 41 of the Cotonou Agreement. That provision commits the ACP States and the EC to be interested in the WTO services negotiations and to the architecture of GATS.

But regarding the negotiation of services in the EPA, it states that³⁴:

The Parties further agree on the objective of extending under the economic partnership agreements, and *after they have acquired some experience in applying the Most Favoured Nation (MFN) treatment under GATS*, their partnership to encompass the liberalisation of services in accordance with the provisions of GATS and particularly those relating to the participation of developing countries in liberalisation agreements (emphasis added).³⁵

The provisions of Article 41.4 of the Cotonou Agreement mean that:

- the architecture of GATS should still apply to EPA negotiations, namely the positive list approach – a party determines which selected services sectors to open up,
- the negotiations are not to begin immediately, but only after ACP States have got “some experience” – a vague expression which ACP States should be able to interpret in accordance with their priorities,

³³ while closely following the language of the communication, a few editorial changes have been made.

³⁴ Article 41.4

³⁵ This is reference to Article 5 of GATS on regional trade agreements that cover services.

- the provisions of GATS in Article 5 will apply to the EPA negotiations on services – paragraph 3 of that Article requires the exercise of “flexibility” in applying the requirements under its provisions, such as the requirement that there should be “substantial sectoral coverage”, but particularly the requirement of “absence or elimination of substantially all discrimination”.

7.4 STATUS OF LIBERALISATION IN THE SERVICES SECTORS IN UGANDA

Uganda has made WTO commitments in two sectors:

- Tourism and travel related services, and
- Telecommunications.

In the tourism and travel related services sector, Uganda has made wide commitments for hotels and restaurants, and for travel agencies and tour operators, the only requirements being for obtaining the applicable licences.

In the communications sector, Uganda has so far licensed three mobile telephone operators, who are allowed to provide specified and quite circumscribed related telecommunication services.

Tourism

A major concern for many developing countries has been that tourism is increasingly conducted on the basis of full package holidays, where tourists make one-off payments to travel agencies based in their countries of origin, to cover all their major expenditures in the tourist destinations; the result being that the tourists hardly spend in countries that are promoting tourism as part of their economic development strategies.

It could be helpful for this practice to be controlled. The Cape Town Declaration on Responsible Tourism, states that responsible tourism generates greater economic benefits for local people and enhances the well-being of local communities. This fairly detailed declaration could be helpful in efforts to improve the performance of the sector.

Also, requests Uganda makes to the EU and other developed countries should include commitments for establishment of commercial presence in the sub-sector of travel agencies and tour operators, so that firms from East Africa could be based in the countries of origin of the tourists.

Telecommunications

In this information age, information and telecommunications technologies are increasingly considered key drivers of economic development. Uganda has a programme on improving the state of ICTs in the country, including the provision of

internet access at District level throughout the country. Little progress has so far been made. The UN World Summit on the Information Society has earmarked Africa as a priority target for programmes to improve the global use of ICTs. Uganda should position itself to maximally gain from the programmes.

A key role for ICTs is to promote electronic commerce and can be helpful also in the provision of services online, in the education, medical, tourist, entertainment and cultural areas, among others.

It shouldn't be seriously disputable that there is far more access to telephone services in Uganda since the commencement of liberalisation in this sector. Competition between the operators has significantly improved the pricing of services and facilities compared to the position before the operators were licensed.

However, the services have been concentrated in the provision of mobile telephone, with a much heavier concentration in town areas and a few other areas with electricity, which is about 10 percent of the entire population. Government programmes have as yet to yield the more important results of access to a wide range of ICTs in the rural areas particularly to promote electronic commerce and other online provision of services, though the policy aspirations may be in place.

Other service areas

Outside the WTO commitments, under the economic liberalisation and privatisation programmes, Uganda has widely opened up several other sectors:

- ***Financial services***
 - Banking
 - Insurance – privatisation is still on-going in this sub-sector

The banking and insurance sub-sectors have been opened up, in terms of providing for the possibility of establishment of private and foreign banks and insurers in Uganda, subject of course to minimum capital requirements, licensing, and other prudential requirements. There is however currently³⁶ a temporary moratorium on licensing new banks in order to prevent an over supply of banks for the economy, according to the Bank of Uganda. But banks offering new products can still be licensed.

The cost of money is very high in Uganda. This has starved even deserving business of credit. The range of products provided by banks is still narrow. In particular, banks are not offering long term or development loans, and have only started providing leasing and mortgage facilities. Support for international sales is still limited; in particular, farmers still lack credit to facilitate acquisition of inputs and farming technology and trade with international purchasers. The proposal for farmers' banks has not been approved yet.

³⁶ 2004, 2005

With the liberalisation of the current and capital accounts, without a strong regulatory authority in place (Bank of Uganda is considered still weak), there is fear that the economy can be rapidly disrupted, more or less along the lines of the Asia financial crisis and other financial crises in Latin America.

It is important that a pro-development regulatory environment is put in place in the immediate term. This should address key concerns such as the inadequacy of banking services in many areas of the country, and the detrimental or unsupportive lending policies of commercial banks.

- ***Transport services***
 - Air transport
 - Internal waterways

There is provision for licensing the operation of air transport services and supportive services, as well as the operation of passenger, freight and other services on internal waterways.

Adequate air transport services in and out of the country, and internally within the country, should support economic development programmes in facilitating travel and trade. Trade with Europe would be particularly helped by regular air transport, especially given that leading exports are perishable or otherwise require fast delivery, such as fish, flowers, and fresh fruits and vegetables.

Within the East African Community, water transport, mainly on Lake Victoria would likewise be helpful.

However, air transport services to Europe and other export markets remain inadequate and the inadequacy has been a constraint on the growth of this trade. It affects also the growth of the tourism sector.

- ***Professional services include:***
 - Accounting, auditing and book keeping
 - Architectural services
 - Engineering services
 - Medical and dental practitioners
 - Veterinary services
 - Midwives, nurses, physiotherapists, para-medics

The sector of professional services is largely opened up, though there are in place the normal requirements of recognised foreign qualifications and local registration with the national administrative body established under the relevant laws. There are several foreign private enterprises in all these sectors. Any positive impact though is yet to be strongly felt.

- ***Energy services***
 - Electricity
 - Forests management
 - Use, protection and management of water resources

There is provision for licensing private operators in the provision of energy services, including electricity, forests management, and water resources.

In the area of electricity, there is provision for, generation, transmission, and distribution licences. Foreign companies have been licensed. The impact has on the whole been hugely adverse. April-May 2005 already witnessed the hiking of rates on electricity by a new private investor³⁷, which manufacturers vigorously protested, mostly unsuccessfully. The unreliability and high cost of utilities have been fatal constraints on improving the competitiveness of the country and enterprises.

Strong regulation is required to ensure that utilities are reliable and affordable for commercial purposes, as well as enabling a decent living for ordinary people.

Technical assistance in services liberalisation

In order for any benefits to accrue on a sustainable basis and to be widely distributed, incentives and other support mechanisms should be in place to ensure that services are introduced in rural areas, especially infrastructure services like telecommunications and transport.

Services liberalisation has effects that require studies in order to be properly discerned and ways forward charted. The EU should provide technical and financial assistance for such studies both before the liberalisation and after as the case may be.

Liberalisation of services sectors requires a strong regulatory framework. The regulators should be strengthened in order to perform their functions effectively. This is especially important in the areas of education, energy and water, and other public utilities. However, under the positive list approach, it should be borne in mind that a country selects the sectors to open up.

Movement of natural persons

Developing countries have been unanimous that they want developed countries to make WTO commitments allowing natural persons to move from developing countries and take up work in developed countries. Under mode 4 of the WTO General Agreement on Trade in Services (GATS), such work would only have to be temporary, and not permanent.

However, in light of offers so far from developed countries, and the vocal anti-immigration policies of politicians in developed countries, as well as the excuse provided by the perceived threat of terrorism; prospects for meaningful commitments by developed countries maybe negligible.

Uganda is preparing to make fairly broad ranging requests to a few developed and developing countries.³⁸ The unlikelihood of meaningful commitments by developed countries should not deter developing countries from pursuing their priorities under

³⁷ A company called Umeme.

³⁸ May 2005. Draft requests have been prepared for China, South Africa, EU, USA, and Japan. Additional countries may be considered.

mode 4 of GATS. However, the selection of requests to make should be guided by some key criteria:

- Likelihood of skills acquisition and transfer, including useful technology, and management and marketing skills
- High income earning prospects,
- The feasibility of combining requests under mode 4 with mode 3, so that establishment of commercial presence by natural persons moving to developed countries can be possible, and
- Promotion of the good image of the country.

CHAPTER 8

8.1 TRADE RELATED AREAS

Articles 44 to 51 of the Cotonou Agreement provide for negotiations in the areas of competition policy, intellectual property rights, standardisation and certification or technical standards, sanitary and phytosanitary measures or health standards³⁹, trade and environment, trade and labour standards, and consumer policy. These are called trade-related areas.

This is the scope of the negotiations on trade-related areas. It will be noted that the areas do not include investment and government procurement, which the EU now seeks to include in the negotiations. After the developed countries failed to introduce these issues in the WTO⁴⁰, the EC is now unduly prevailing upon ACP States to negotiate these same areas in the EPAs. The appropriate response by ACP States is to now take the successful fight in the WTO to the EPAs.

The Honourable Dr Juma Ngasongwa, the Trade Minister of Tanzania, at a meeting of the East African Parliamentary Liaison Committee on 12 May 2005, said in his opening speech:

... there is the problem of inconsistency in the WTO and EPA trade negotiations. In the WTO the three Singapore issues of Investment, Competition and Transparency in Government Procurement have been dropped from the Doha work programme, while in the EPAs, these are still on the agenda. It seems to be that the EU, who are the major proponents of these Singapore issues, are trying to reintroduce these issues through the back door.

It does not mean that negotiations in these areas or any other areas for that matter must result in legal instruments or commitments under the EPAs; the negotiations in certain areas can fail where suitable positions are not reached or where it is felt that meaningful negotiations cannot be concluded.

8.1.1 COMPETITION, INVESTMENT, GOVERNMENT PROCUREMENT AND LABOUR

The position of developing countries at the WTO on these issues, including ACP States, is well known. Debate on these issues started way back in the build up to the 1986 Singapore Ministerial Conference and continued until July 2004, at the time of adopting the General Council Decision on the framework agreement for the Doha

³⁹ Please see the brief on SPS Measures

⁴⁰ Developing countries have been able to successfully prevent the inclusion of competition policy, investment and government procurement in the Doha Round of negotiations. Together with trade facilitation, these are commonly called the Singapore issues.

Round of negotiations, when it was definitively agreed that there shouldn't be trade negotiations in these areas.

At the 1986 Singapore conference, the WTO already agreed that the issue of labour standards falls squarely within the remit of the International Labour Organisation, and should be left out of the mandate of purely trade organisations such as the WTO. The EPA is similarly a trade arrangement that should not seek to regulate labour standards. They should continue to be regulated within the framework of ILO.

In the Singapore Ministerial Declaration⁴¹, WTO members agreed as follows:

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.

However, there is merit in governments ensuring that they enforce their labour laws and ensure good working conditions for their people, including levels of remuneration and appropriate social insurance. If regional cooperation is useful in this effort, the appropriate framework could be the African regional economic communities, such as the East African Community and the Common Market for Eastern and Southern Africa.

This is different from entering international obligations as between developing countries and developed countries that usually seek to require inappropriately high labour standards in line with their own domestic standards. In some instances, labour standards in developed countries reflect cultural traits that do not prevail in developing countries, such as views on family and motherhood, and management of family industries. Developed countries have sought also to undermine the comparative advantage of developing countries as low wage economies. The Singapore Ministerial Declaration indicated that this was unacceptable.

Regarding the other issues, a COMESA Brief for Officials for the Cancun Ministerial Conference, set out the following grounds against including them in trade negotiations, which equally apply to EPA negotiations:

The four issues are not appropriate for multilateral frameworks within the WTO. They should be considered in other forums where work on them has been ongoing for a long time and multilateral instruments or draft instruments already exist. Negotiations should not commence or proceed in the WTO on these issues for the following reasons:

⁴¹ Adopted on 13 December 1996. WTO document WT/MIN(96)/DEC

- Other international organisations are more appropriate forums for dealing with the issues, such as the United Nations and its agencies, the World Customs Organisation, and the World Bank.⁴² The WTO should continue with its core mandate of trade, and avoid straying into other areas even if they are trade-related, bearing in mind that practically everything is trade-related. Coherence and economy require that international organisations should not duplicate but complement each other.
- There are no agreed modalities or even agreed elements for modalities and therefore the Cancun conference does not have the competence to consider negotiations on the basis of the respective paragraphs in the Doha Declaration.
- The (WTO) study process has clearly shown that members do not share a common understanding on whether and how to negotiate these issues in the WTO and therefore there is no consensus on those two crucial factors that are pre-requisites for considering negotiations.
- The WTO lacks the institutional capacity to take on instruments in these areas. The small size of the WTO secretariat, the heavy work programme already underway, the small size of the delegations and the negotiating teams together with the resource constraints of Africa and other developing countries, are relevant factors to the institutional capacity of the WTO.
- The financial and institutional requirements for implementing and complying with instruments in any of the four areas are way beyond the means of developing countries. The financial and institutional costs would not be politically and socially justifiable given more pressing public policy priorities and limited resources.
- There are no prospects of mutuality of benefits among the members especially between developed and developing countries consequent upon multilateral frameworks on these issues in the WTO. Developing countries will suffer huge loss of resources in negotiations, implementation and compliance. Their development policy space and flexibility to regulate enterprises will be constrained by investment, competition, government procurement, and trade facilitation rules. Attraction of foreign direct investment and generation of domestic investment should not be held out as probable gains; because inflows depend on interplay of enterprise-specific and location-specific advantages and factors that fall outside the purview of WTO trade rules and negotiations on the Singapore issues.

However, should there have to be some instruments or provisions in the EPA on these issues, they should be kept to the barest minimum, by merely expressing the desirability of appropriate policy frameworks, without setting out hard rules and obligations for ACP States to implement. Secondly, financial, technical and other

⁴² The United Nations has adopted the Set of Guidelines for competition, and UNCTAD has prepared a draft Code on Transnational Corporations after negotiations. The World Customs Organisation deals with trade facilitation. Developing countries, on the whole, are required to comply with the World Bank Guidelines on Government Procurement for large contracts.

resources, in adequate amounts should be ear-marked, before conclusion of the negotiations, for fully addressing any implications of the provisions included in the EPA. This would mean also that there should be prior and completed costing of any implications for proposals made in the negotiations, before proceeding to a next stage in the negotiations, to assist in assessing the amounts of resources.

8.1.2 Intellectual Property Rights

Article 46 of the Cotonou Agreement states the agreement of the Parties to their commitments under the TRIPS Agreement. Any further mention of the TRIPS Agreement and intellectual property rights generally, must appropriately emphasize the issues of priority to Africa and other developing countries that they have put on the international agenda with some success.

Data Exclusivity⁴³

ESA countries and other ACP countries face a 'hidden' threat to their ability to access affordable medicines for a wide range of diseases like malaria and HIV/AIDS. Judging from recent EU attempts in the context of other bilateral trade discussions, and from the language in the intellectual property provisions in the Cotonou Agreement, the ACP countries could end up saddled with the EU's laws on 'data exclusivity'.

'Data exclusivity' refers to a peculiar type of 'intellectual property protection' by which EU member countries, like their US cousin, grant exclusive marketing rights to pharmaceutical companies even in relation to medicines that are not under patent protection, and sometimes even when there has been no new invention. The effect is to further disable generic competitors from supplying such drugs at more affordable prices, thereby enabling big pharmaceuticals companies to continue to charge monopoly prices. A new and even more stringent version of this is due to come into force throughout the European Union in November, this year.

This is not only beyond the provisions of the World Trade Organisation's TRIPS agreement. It also flies directly in the face of the flexibilities for developing countries contained in the Doha declaration on TRIPS and public health. Nevertheless, the US has already inserted such provisions in its bilateral free trade agreements with several countries, including Morocco. The EU is poised to do the same.

'Data exclusivity' arises in the following context. Before drug manufacturers are allowed to put a new drug on the market, they are required to submit test data on the drug's safety and efficacy to the regulatory authorities – data generated from extensive research and clinical trials. Such data is protected through separate legal instruments that differ from country to country. In most countries including African countries like Ghana and South Africa, the authorities protect the data against disclosure to a third party.

However, the authorities can rely on the data to give marketing approval to a similar

⁴³ See Third World Network Issue dated 24/3/2005

drug by a company other than the originator of the test data -- say a generic manufacturer -- provided that the later drug is proven to be similar in clinical function to the one already on the market.

'Data exclusivity' prevents this. Under current EU laws, once a company has submitted original test data, no competing manufacturer is allowed to rely on these data to request for marketing approval of its own drug for periods of 6 or 10 years (depending upon the EU member-country).

If such 'data exclusivity' provisions find their way into the EPAs, generic manufacturers would not be able to place versions of known drugs on an African market unless they compile their own test data. Such a process could take several years and may be prohibitively expensive. Thus, an African country which exercises its rights under the Doha declaration to issue a compulsory licence for the supply of cheaper drugs, may find that there is nobody to supply the drugs.

Data protection, as covered under Article 39.3 of the TRIPS agreement, is limited to precise conditions, and does not include 'data exclusivity'. However, under pressure from their big pharmaceutical companies, the EU and the US have been insisting that "data exclusivity" is mandated under the TRIPS. This has been rejected by developing countries, supported by many experts.

ESA countries together with other ACP countries and their negotiators should not allow themselves to be seduced by technical assistance or pressured into allowing in 'data exclusivity' through the EPAs. The language contained in the Cotonou Agreement is not a conclusive statement of a specific obligation by which the EU can hold ACP countries. These countries are within their legal and moral rights, both within the WTO and the Cotonou Agreement, to reject 'data exclusivity' in the EPAs.

There must therefore be explicit and unequivocal recognition that:

- The TRIPS Agreement and the protection of intellectual property rights should support social economic development
- Governments retain the right to take measures to protect social economic welfare, including the protection of public health and ensuring access to medicine in accordance with the Doha Declaration on the TRIPS Agreement and Public Health
- Protection of intellectual property rights should be undertaken in full compliance with the Convention on Biological Diversity and the UN International Treaty on Plant Genetic Resources for Food and Agriculture
- Protection of intellectual property rights should not result in denial of market access, especially in relation to geographical indications and bio piracy. Specifically, products from ESA countries should be denied access to the EU market on the basis of protecting geographical indications or patents and trademarks issued in the EU
- The EU should undertake to support the building of a sound technological base in ESA countries, through effect mechanisms for technology transfer including licensing and franchising.

In full view of the consistent opposition of Africa and other developing countries to the patenting of life forms, the Cotonou Agreement provides for negotiations on

patenting of “biotechnological inventions and plant varieties”.⁴⁴ The patenting of life forms should not be negotiated under EPAs. The protection of plant varieties should not be done by patents, nor should it be required that the protection should be in accordance with the UPOV system. Rather, there should be full recognition that each country has the right to adopt an appropriate Sui Generis system. In Africa, the protection of plant varieties should be in accordance with the OAU Model Law.

Consumer Protection

There is merit in protecting consumers in ESA countries against defective products. However, Article 51 of the Cotonou Agreement could well lead to consumer protection being a non-tariff barrier on access to the EU market. In this regard, the EUREPGAP protocols, and generally the health regulations of the EU, have on the whole had a restrictive effect on imports from Africa and other developing countries.⁴⁵

Some consumer standards are exaggerated and would appropriately not be required as consumer preferences could be met through the operation of market forces. This however is not to down play the importance of protecting consumers from unscrupulous dealers, or from products that are injurious to health or safety. This is adequately provided for under the Agreements on Technical Standards and Sanitary and Phytosanitary Measures.

An appropriate ESA response here is to seek the control of the formulation and implementation of consumer standards, in order to ensure that they do not act as non-tariff barriers to trade or disguised restrictions. Also, ESA countries will need the legal and institutional capacity to challenge the implementation of consumer standards that act as non-tariff barriers or disguised restrictions.

⁴⁴ Article 46

⁴⁵ Please see the brief on EUREPGAP