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Addressing the Implementation of Prefential Trade Agreements

The Law and Pratice of the European Union-MJS

David Luff

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1. Introduction

Like most industrialized countries, the European Union (EU) has concluded trade agreements with selected countries with a view to liberalize trade among those countries. In most cases, the objectives of these agreements are rather ambitious. Objectives may be the establishment of an all-inclusive custom union, such as the one with Turkey, or a full association that facilitates accession to the European Union, such as the one with the Balkan countries. Other objectives include the establishment of a comprehensive economic partnership with developing countries in order to foster their sustainable economic development, such as the case of the African, Caribbean, and Pacific (ACP) Group of States. In Latin America association and partnership agreements have been concluded with Mexico[1] and Chile.[2] A Free Trade Agreement was recently concluded with Colombia and Peru.[3] Negotiations for an Association Agreement were concluded with Central American countries[4] and were revived with the Mercosur countries during the last EU-Latin America Summit in Madrid in May 2010.[5]

Trade agreements imply preferential trade treatment among the parties. As such, they must in principle meet the conditions of Articles XXIV of GATT and V of GATS. This means that an agreement must provide for reciprocal trade benefits for substantially all trade in goods between the parties, and it must have substantial sectoral coverage in relation to services. It can apply to selected countries as opposed to others. Trade preferences are also possible under the Enabling Clause.[6] While in this case reciprocal trade benefits are not required, the preferences

[1] EU-Mexico partnership agreement, 28/10/2000.

[2] EU-Chile Association Agreement, 30/12/2002. For an update of all trade agreement concluded by the EU, see http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_111588.pdf

[3] EU-Peru and Colombia Free Trade Agreement, officially signed on 20/05/2010. The original idea was to conclude negotiations with Andean countries as a group. In 2009, negotiations took place with Columbia, Ecuador and Peru. In July 2009, Ecuador suspended its participation. See http://www.sice.oas.org/TPD/AND_EU/negotiations/VIII_round_s.pdf

[4] The countries involved are Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama.

[5] 19 May 2010. These negotiations have been de facto suspended in 2008, pending the outcome of the Doha Development Round (see http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/mercosur/).

[6] WTO, Differential And More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979, L409/3.

must be granted to developing countries only, and no discretionary selection of them is possible otherwise than through objective criteria.[7]

It is the policy of the EU to only negotiate reciprocal trade agreements that match the requirements of Articles XXIV of GATT and V of GATS. Under the Enabling Clause, the EU only maintains a unilateral scheme of generalized tariff preferences.[8] The time when the EU would conclude trade agreements with chosen countries, thereby granting them unilateral trade preferences, is over since this would clearly violate the GATT, the GATS, and the Enabling Clause.

For instance, the trade chapter of the Cotonou Agreement, which reserved important unilateral preferences to the ACP states, was authorized until it was covered by a special WTO waiver.[9] However, the latter expired on 1 January 2008. Therefore the Cotonou trade preferences had to be reciprocated to the EU for "substantially all trade" in order to be maintained. The expected expiration of the waiver entailed the 2002 launch of a new round of negotiations with the ACP states in order to determine the pace of their own trade liberalization towards the EU.[10] The process is laborious and is still ongoing. The only comprehensive Economic Partnership Agreement (EPA) that has been concluded is that with the CARICOM countries and the Dominican Republic (the EU-CARIFORUM EPA).[11] For the rest, the EU has concluded interim

[7] See Report of the Appellate Body, "European Communities – Conditions for the granting of tariff preferences to developing countries", WT/DS246/AB/R, 7 April 2004.

[8] Council Regulation (EC) No 732/2008 Applying a scheme of generalized tariff preferences for the period from 1 January 2009 to 31December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007, OJ.E.U., L211/1, 6 August 2008. Under that scheme, unilateral trade benefits vary according to the countries' level of development and vulnerability and depending on whether or not they are parties to designated international agreements pursuing sustainable development, fundamental rights, and good governance (See Articles 7 and following, and Annex III of Council Regulation (EC) No 732/2008).

[9] WTO, Decision of the Ministerial Conference, Doha, "European Communities — the ACP-EC Partnership Agreement", WT/MIN(01)/15, 14 Novembre 2001.

[10] This was provided in the Cotonou Agreement itself, see Article 36.

[11] See O.J.E.U., L289/3, 30/10/2008.

economic partnership agreements (Interim EPAs) with certain individual ACP states, while pursuing negotiations for comprehensive EPAs at sub-regional levels.[12]

The EU's reciprocal trade agreements generally encompass two aspects, in addition to a commitment to institutionalize and intensify political dialogue. The first aspect concerns the trade arrangements between the parties and tends to be very mercantilist in nature. The purpose of the agreement is to maintain the negotiated balance of tariff rights and concessions between the parties and the services commitments, when they exist. The second aspect concerns the provisions that are meant to proactively contribute to the economic development of the EU's partners and in certain cases, facilitate their accession to the EU. These provisions relate to the EU's neighborhood or development policy towards non-EU countries. In this context, the trade preferences constitute merely one part of a larger political objective, and care must be taken to ensure that the agreements themselves do not undermine that objective.

For instance, the stated objective of the Stabilisation and Association Agreements with the Balkan countries are (1) to "*ensure peace and stability in the region by providing support for the strengthening of democracy and the rule of law and the development of a market economy;*" (2) to encourage reforms with a view to accession to the EU; and (3) to foster trade relations at regional level in the Balkans and with the EU. This type of Agreement entails a progressive alignment of the legislation of the countries concerned with that of the Community.[13]

The stated objectives of the ACP EPAs are (1) to reduce and eventually eradicate poverty; (2) to promote regional economic integration and cooperation; (3) to strengthen the country/region's integration in the world economy; (4) to improve the country/region's capacities in terms of trade policy and trade-related issues; (5) to establish and implement an effective, predictable, and transparent regulatory framework for trade and investment in the region; (6) to improve the role of the private-sector; and (7) to reinforce relations between the

[12] All existing Agreements on the table with the ACP states provide for immediate duty free, quota free access of products originating in the ACP states in the EU, except sugar and rice, which are considered in the EU as sensitive products and for which a longer period for the phasing out of tariffs is provided. The agreements also require the signatory ACP states to gradually eliminate customs duties on their exports and imports, in various phases, which differ from region to region. The ACP states, may, however, exclude from the liberalisation commitments so-called sensitive products up to 20 percent of the value of their imports, thus liberalising their trade with the EU for at least 80 % of it. Considering the EU is liberalising 100 percent, it believes the 80 percent threshold imposed on ACP states is sufficient to meet the requirements of Article XXIV of the GATT.

[13] See http://europa.eu/scadplus/glossary/stabilisation_association_process_en.htm. See for instance Articles 1 to 4 of the EU-Croatia Stabilization and Association Agreement.

Parties (the ACP countries involved and the EU member states) on the basis of solidarity and mutual interest.[14]

These multiple objectives tend to be present in most of the trade and cooperation agreements between the EU and third countries.[15]

In all EU-negotiated trade agreements, the implementation challenge of the EU itself is seldom dramatic, since the EU hardly ever commits to amending its *acquis communautaire*[16] beyond mere trade concessions.[17] The same cannot be said for developing countries. Indeed, their participation in reciprocal trade agreements inevitably leads to a major transformation of their economies and legal structures. Such participation entails challenges and opportunities which must be managed efficiently and which are inherently linked to the negotiated package.[18] Developing countries must adapt the conditions of production and of competition in their territories in order to increase supply and to make it competitive in local and international markets.[19] It is generally admitted that increased competitiveness and the alleviation of supply-

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[14] See for instance Articles 1 to 4 of the EU-CARIFORUM Economic Partnership Agreement.

[15] See for instance Articles 1 and 2 of the EU-Chile Association Agreement; Articles 1 and 2 of the EU-Egypt Association Agreement; Articles 1 and 2 of the EU-South Africa Trade Development and Cooperation Agreement. The EU-Mexico partnership agreement appears less ambitious in this respect since it only addresses the objective *"to strengthen existing relations between the Parties on the basis of reciprocity and mutual interest. To this end, the Agreement shall institutionalise political dialogue, strengthen commercial and economic relations by means of the liberalization of trade in conformity with the rules of the WTO and shall reinforce and broaden cooperation"* (Article 2).

[16] This is the expression used in the EU to designate the current status of the EU's normative system.

[17] This is roughly the same case for the other industrialized countries which are parties to agreements in which the mercantilist component is dominating. Trade frictions among developed countries are possible of course, but as in the WTO, they mainly concern the protection of the expected trade benefits accruing from the agreement. They concern, for instance, the use of trade remedies or the existence of non-tariff barriers to trade, such as technical regulations, standards, and sanitary and phytosanitary measures. The classical methods of resolution of trade disputes can then be used.

[18] The progressive dismantling of tariff and non-tariff barriers for the products and services originating in the European Union may result, in the short term, in an increase of imports in their markets in most sectors and in a loss of customs revenue from them. It may however also lead to a possible increase of foreign direct investment. Furthermore, duty-free, quota-free market access rights in the European markets is guaranteed, thus enabling long-term marketing strategies and the associated investments required. Nevertheless, non-tariff barriers to trade will likely remain strong in the EU and affect their exports. Additionally, the multiplication of free trade agreements of the EU and the possible conclusion of the Doha Round is expected to lead to a progressive erosion of preferences in the EU market. In this situation, the developing countries involved in these agreements are confronted with the challenge of becoming more competitive.

[19] This requires among others the definition of a proactive development policy and of a suitable industrial strategy. It also requires the establishment of a business enabling environment and the streamlining of trade policy into Government policies.

side bottlenecks are necessary for a developing country to reap the benefits of free trade agreements. Furthermore several developing countries have engaged in processes of regional integration and must therefore combine these with the effects of their trade agreements with the EU. The implementation of the reciprocal trade agreements in developing States is thereby very complex, and is actually as difficult, if not more so, as the negotiation of the agreements themselves.

It is the purpose of this document to highlight how the European Union addresses the implementation challenges arising from its international trade agreements. This document addresses the EU's perspective and interest in having the agreements fully implemented in its own territory and in that of its trade partners. This paper was commissioned by the Inter-American Development Bank in the context of a larger project on implementation of preferential trade agreements. The overall idea of the project is "*to investigate the political, legal and economic incentives and mechanisms used by the US, the EC and Japan to promote implementation of the preferential trade agreements they have negotiated with Latin American and Caribbean countries.*"[20]

There would be also a need to address the implementation challenges from the perspective of the EU's trade partners. A separate paper could highlight implementation techniques, including adequate implementation and monitoring mechanisms that trade partners could adopt to ensure that the agreements remain focused on their ultimate development objectives and identify the adequate remedies in case they are not met. While this document will provide preliminary indications on the content and scope of such mechanism, and the support that can be provided by the EU, it cannot describe the entire mechanism and the indicators.

Because the EU must address implementation challenges from the outset of negotiations, the sections below deal with all phases of an agreement's life: its negotiation (section II), its entry into force, including the issue of the legal effect of its provisions (section III) and, finally, its actual implementation (section IV). Although the crux of this document is to examine incentives for implementation of trade agreements, challenges abound in the negotiation phase. Indeed, adequate negotiating processes are key to successful implementation. The fact that

[20] Note by the project's manager, Anabel Gonzales.

substantial negotiations are still ongoing between the EU and Mercosur, underscores the need to address this issue.

It will be noted that, notwithstanding the positive language adopted by the EU towards its trade partners (particularly developing countries) certain shortcomings can be observed at all levels. This document highlights them with a view to possible improvement and to ensuring that the EU's trade agreements are indeed conducive to economic development and regional integration, in accordance with its stated political objectives.

2. The Negotiation of the EU's International Trade Agreements

A. Assumptions

Because the EU's trade agreements should have another dimension in addition to an exclusively mercantilist purpose, negotiations cannot simply rely on the skills of the negotiators themselves. In negotiations of traditional trade agreements, each party is supposed to define, by itself, its defensive and offensive trade interests and then bargain to try to reach them as much as possible. Negotiations are thereby meant to attain an optimal balance for all the parties, so that the agreement is mutually advantageous for them (win-win). Theories abound as to how to handle this type of negotiations according to the parties' identified interests in given sectors of their economy. Optimisation is possible. The Ricardo theory is based on the idea that reciprocal trade concessions are mutually beneficial when they enable the full exploitation of the parties' comparative advantage.

However, this approach to trade negotiations is based on several assumptions: (1) all parties have identified strategies based on adequate[21] competitive advantage,[22] (2) trade interests

[21] Factors such as wealth redistribution, poverty alleviation, and generational equity must be taken into account in this context.

are well identified by the parties,[23] and (3) negotiators are sufficiently well prepared, skilled, and representatives of their countries' real economic interests.[24] In truth, none of these assumptions are fully met in negotiations with developing countries, making it vital to address each assumption individually. Indeed, poorly negotiated agreements or those that are not perceived to match the real interests of the parties are unlikely to be properly implemented.

It is, in principle, the promise of the European Union to conclude trade agreements that mirror its partners' development strategies and that create an optimal balance between openness

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[22] Economic theory suggests that the parties to a free trade agreement need not have equal strength in order to take advantage of it. Benefits can also be observed for developing countries concluding an agreement with a developed party such as the EU. Trade liberalization can indeed have positive implications for well-prepared producers. Tariff reductions on inputs, such as parts and machinery, will reduce the price of finished products destined for export, and increase the competitiveness of domestic producers. Attracting investments in "infrastructural" services in the financial, telecommunications, transport, and auditing sectors can improve the delivery of those services and have positive implications for the competitiveness of exporting companies. Opening trade may thus contribute to improving the overall economic efficiency of a country for the benefit of its economic operators. In certain sectors, however, especially those where producers are insufficiently prepared or informed, free trade may result in an unsustainable competition from more efficient companies and loss of jobs. Should that be too generalized, the final objectives of a trade agreement seeking an increase in domestic production and poverty alleviation may go unmet, at least in the short term. That would certainly result in implementation difficulties. It is therefore essential that developing countries build on their comparative advantages and elaborate a proper industrial policy in the medium- to long-term, based on sectors with strong commercial potential or for which efforts and investments must be made in order to ensure social stability. Any developing country seeking to draw benefits from trade should pursue a well-identified growth and social strategy. This entails investments in physical infrastructures and human capital; the creation of a business enabling environment; optimizing access to inputs; and informing and preparing producers in all regions, with a view to upgrading their production and increasing their exports. Developing countries obviously require assistance in this respect.

[23] Trade policy must build on an identified growth strategy. Framing such requires a careful assessment of both national and individual sectoral interests. While certain sectors would benefit from openness, others may still need protection until they become competitive. The post-war experience of the European countries themselves indicates that in countries that have started proactive development policies, a phase-in of tariff reductions and services commitments in certain sectors can be advantageous. In other sectors, additional market access in non-EU countries may be profitable and enable indispensable economies of scale. The identification of a country's trade interests is not an easy task. It requires serious economic and statistical analysis, as well as a deep understanding of the global markets in sectors of interest. Since both the benefits and burdens of trade liberalisation fall on the private sector, the latter should also be consulted and be prepared to evaluate its ability to succeed in an international environment. Here again, most developing countries lack the capacity to handle all these tasks without assistance.

[24] Reaching a development-oriented trade agreement requires negotiators that are not only skilled in terms of tactics, but also well informed and representative of their country's collective interests. That implies that they have access to all statistical data and economic analyses they need. They must also be fully aware of their country's chosen industrial and trade policies and capable of translating them into negotiated agreements. Ideally, in the context of the preparations for the negotiations, negotiators should have participated in the identification of the trade policy as well as in consultations with key stakeholders, particularly the private sector. If trade negotiators are not well informed of their country's realities and policies or if they are conditioned by protectionist reflexes, aloof from the business interests of their domestic industries, they might obtain inadequate trade deals, thus possibly generating implementation tensions.

and temporary protection, while offering full market access rights to the EU market. The European Union repeatedly indicates that trade agreements with developing countries and transition economies must be focused on their economic growth, as well as based on the main pillars of regional integration and economic and institutional cooperation. Therefore, a trade agreement that would be consistent with the EU's policy would require that each of the three assumptions above be dealt with before the conclusion of negotiations. In that case, there could be legitimate expectations that the agreement would indeed contribute to the economic development of EU trade partners and entail mutually profitable commercial relations. Based on such legitimization, it can be expected then that all parties will make all efforts to ensure the agreement's implementation.

B. Realities

A full investigation would be required to expose with certainty the experience of the EU and of its trade partners in relation to all trade agreements. This cannot be done in the context of this document. Yet one may observe that while many shortcomings still exist in the negotiations phase, the practice of the EU has been improving. The European institutions, the European Commission in particular, are becoming aware at least of the need for developing countries to better prepare for negotiations with a view to ensuring that trade agreements produce development benefits. This has also been explicitly recognized in the Cotonou Agreement with the ACP states, which mandated the current rounds of negotiations for economic partnership agreements.[25] The EU usually agrees to commit important financial resources and to organize technical assistance programmes to this end (see Section IV. Implementation).

Nevertheless, the results are not yet entirely satisfactory, not the least because developing countries continuously express frustration with both the agreements themselves and the processes leading to them. This study cannot assess the impact of the negotiated agreements on participating countries' economic development, which would actually be the final and most valid gauge of the success of the agreements. Nevertheless, based on this author's experience and conversations with key stakeholders, certain criticisms can be made of all parties in relation to the negotiations. An assessment of each of the three assumptions follows:

[25] See Articles 36.2 and 37.3 of the EU-ACP Cotonou Agreement regarding the negotiations of the new WTO-compatible trade arrangements.

Firstly, while trade agreements presuppose that proactive development strategies and industrial policies are defined and initiated before the start of the negotiations; developing countries have not always done so. In several countries, poverty reduction strategies may have been prepared, with the help of the international community, and national growth objectives identified. However, the necessary investments have not been made in relevant sectors of economic activity. The available capital, often drawn from the exploitation of natural resources, is not invested in the country and enterprises remain noncompetitive. The business environment remains deficient and key infrastructures are missing. Enterprises do not upgrade their production, nor are they encouraged or informed of the need to do so.

A second source of difficulty is that in many developing countries, trade has not been streamlined in industrial policies and growth strategies. Optimal sectoral trade interests have not been sufficiently identified. However, when a free trade area is negotiated with the EU, the steps and optimal timing of trade liberalization towards it must be clearly identified. In addition, in several countries—particularly the ACP states—this must be combined with their progressive regional integration. Adequate engineering of a trade policy in this context is therefore essential. Unfortunately, it is too often missing. The private sector is not sufficiently consulted;[26] trade statistics are insufficient; relevant sectoral economic analysis is scarce (general analysis abounds

[26] In several cases, representatives of the private sector were included in delegations participating to negotiating rounds. This was the case for instance of the EU-Mexico negotiations and in many negotiating sessions between the EU and ACP states. However, experience indicates that this is not enough to ensure an adequate two-stream information flow. The enterprises too often remain ignorant of the negotiating issues, the potential impact of the agreement in their sector and the likely future trading environment affecting their operations. Some negotiating teams, however, are taking wider initiatives to inform and consult regularly with the civil society. This is the case, for instance, of the Central American negotiators in the context of the "cuarto adjunto" (see: http://www.aacue.go.cr/informacion/sociedad/avisos/default.htm). In the Caribbean, the Caribbean Regional Negotiating Machinery has also been quite active in this respect. For the EU-Mexico negotiating experience, see Cruz Miramontes, R., Las relaciones comerciales multilaterales de México y el Tratado de Libre Comercio con la Unión Europea (México, Universidad Iberoamericana y Universidad Nacional Autónoma de México, 2003), available in e-version in Google Books.

instead[27]), and there is still little understanding among technocrats and policymakers on the ground about the importance and relevance of trade policy.[28]

Although the EU realizes these shortcomings, it is itself confronted with an internal dichotomy between its trade negotiators—which still too often undertake negotiations using the tricks and procedures applicable to purely mercantilist agreements—and its development policies. Generally speaking, once the EU decides to engage in trade negotiations, an inevitable tension arises between the mandate given to its negotiators to bring the negotiations to a conclusion and the relevance of the negotiated terms of the agreement for the developing countries. Furthermore, the pace of negotiations may not grant sufficient time to the countries to carry out the necessary consultations and sound framing of their policies, given their capacity gaps.

Technical assistance programmes are organized to assist the countries to address these issues.[29] However, in the author's personal experience, the management units of these programmes are confronted with both the immensity of the tasks associated with the excessive burden of the EU procedures, and insufficiency of available staff. This makes concrete assistance too superficial and unlikely to have a profound impact. Furthermore, pressure is exerted on the programme managers to spend the money on time, in order to show that support is actually provided. This creates the temptation to multiply expensive workshops and events for these purposes. Furthermore, instructions are given to spend some of the available budget to finance

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[27] Several general impact assessments of the EPAs have been produced. See for instance http://ec.europa.eu/trade/wider-agenda/development/sustainability-impact-assessments/assessments/#study-1.

[28] One of the reasons that Association agreements facilitating progressive accession to the EU are generally considered as less problematic from this point of view is that they are more straightforward in defining a strategy towards the EU. The relationship entails, by definition, a substantial degree of regulatory and market convergence. Furthermore, the EU has acquired substantial experience of this type of process through recent accessions. The procedures and technical assistance mechanisms are, in general, well run and there is strong political will and trust on all sides to ensure success.

[29] For the EPA negotiations with the ACP states, for instance, a special Programme Management Unit was established, with a budget of 20 Million Euros over five years to deliver technical assistance. That programme, however, was terminated, given that the negotiations were supposed to be concluded by 2008. Since they were not, the TradeCom Facility, with a budget of 50 Million Euros, formally took over. That Facility had already been supporting an international Team of Trade Policy Analysts and Advisors throughout the ACP, jointly managed by the Commonwealth Secretariat and the Organisation internationale de la Francophonie (the Hubs & Spokes). These professionals have been posted within ministries of trade in order to provide backup analysis and support. The TradeCom Facility also finances a Programme Management Unit, which organizes targeted technical assistance activities in the ground.

the negotiations themselves, including the travel and subsistence costs of the negotiators. While this may indeed encourage the multiplication of negotiating and preparatory meetings, it is in not always a guarantee of quality.

The third challenge relates to the negotiators themselves. While intensive donor-funded training and education activities have contributed to the presence in several countries of teams of skilled negotiators, who are technically proficient on trade law and policy, they remain too few and loaded with too much work and intensive travelling. During heavy negotiating periods (which is, in fact, almost always), negotiators are seldom in their home country and do not carry out analytical work or consultations with stakeholders. Seldom are they backed by effective statistics and relevant economic analyses. The risk is that they thereby become too separated from their country's needs and realities to be adequately representative in the negotiations. Thus, the agreements they conclude may not be in line with the development objectives of their countries, and they may not receive the necessary political support at home.

It would be the EU's responsibility not to press for negotiations when these prerequisites are not met. Unfortunately this has not always happened. For instance, with respect to the ACP, the EU has clearly engaged into substantial and procedural pressures to accelerate the conclusion of the EPAs, notwithstanding an obvious lack of preparation and readiness. In the EU's defense, however, the WTO waiver authorizing the EU's unilateral preferences in favor of the ACP states was lapsing on 1st January 2008. In order to maintain the preferences, it was necessary to conclude new WTO-consistent agreements with the ACP states before the waiver's expiration. It now remains to be seen to what extent this WTO pressure was not overstated or inappropriate. In any event, the ACP states were not sufficiently prepared, even five years after the beginning of the EPA negotiations. The starting point was too low and the time pressure certainly did not play to their advantage. Therefore, in most of the cases, substantial adjustment work remains to be done at the implementation phase.

C. Negotiating Procedures

The realities noted in the previous section indicate that developing countries require plenty of time to negotiate a trade agreement. If the negotiated agreements are to support and accompany economic adjustment, the negotiations themselves must take into account the natural slowness of the countries at the beginning of their transition phase. Artificially accelerating the speed of

negotiations may be counterproductive, radicalize the conservative forces in these countries, and impair the expected development outcome, one of the objectives of implementation.

The Cotonou Agreement already contained language in this respect. Article 37 recognized the need for flexibility and a preparatory period for the negotiations of the new trading arrangements with the ACP states:

- *The Parties will regularly review the progress of the preparations and negotiations and, will […] carry out a formal and comprehensive review of the arrangements planned for all countries to ensure that no further time is needed for preparations or negotiations*. (paragraph 4);
- **Negotiations** *of the economic partnership agreements* **will be undertaken with ACP countries which consider themselves in a position to do so, at the level they consider appropriate** *and in accordance with the procedures agreed by the ACP Group, taking into account regional integration process within the ACP*. (paragraph 5) (emphasis added);
- **Negotiations shall take account of the level of development and the socio-economic impact of trade measures on ACP countries, and their capacity to adapt and adjust their economies to the liberalization process**. *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.* (excerpt of paragraph 7) (emphasis added).

Furthermore, the parties agreed upon comprehensive roadmaps for the negotiations at the early stages of the negotiations, covering the development priorities of the ACP regions and the support measures required to sustain the negotiating challenges.[30] However, despite the positive language and inherent quality of the roadmaps, in the practice of the negotiations themselves there was some degree of rigidity and hastiness. For this reason, notwithstanding the fact that the agreements themselves offer in substance important phase-in periods in relation to the trade commitments towards the EU, there are regular reports of statements by ACP political leaders

[30] For an overview of the roadmaps and the several negotiating documents produced, see http://ec.europa.eu/trade/wider-agenda/development/economic-partnerships/negotiations/

and civil society doubting as to their level of benefits and relevance for the sustainable development of the countries.[31] That may create political complications in the implementation of the agreements and could justify the need to renegotiate some of their terms. It is hoped that at that stage that the negotiators will be more attentive to the assumptions previously discussed.

It might be useful in the future to better define milestones in negotiating processes, which would assess the countries' real readiness to pursue the negotiations, in technical terms and according to clearly defined criteria. All efforts should then be made to seek alleviation of all identified bottlenecks and ensure political trust and commitment to move ahead. Lessons should also be drawn from past technical assistance programmes in order to improve their relevance, effectiveness, and efficiency. All these efforts would then contribute to a full implementation of the agreements.

D. Pre-Implementation Efforts

In contrast with the United States, there is no systematic practice in the European Union that would allow the entry into force of a trade agreement through changes in laws, regulations, and practices before the end of the negotiations or by the date of an agreement's entry into force.

However, it is the general practice of the EU to proactively encourage its trade partners to adjust its regulatory framework to the new expected agreement. The European Commission mandates several studies and reports on the countries involved to identify loopholes and areas where the greatest implementation efforts are expected. Although technical assistance activities are in principle demand-driven, the European Commission, through its central operations in Brussels and its Delegations on the ground, strongly recommends specific activities to the relevant stakeholders and decision makers in the country to proceed with legislative reviews, draft proposals, and extensive training and capacity building with a view to facilitate the amendments or the adoption of the new rules. In the case of an expected accession of a country to the EU, the position is even more voluntary of course since the acceding country must adopt the full "*acquis communautaire*" from the day of accession. Typically, the implementation of a prior association agreement, which provides for important phase-in periods, offers a good first step in this regard.

[31] For instance one could refer to the many declarations of President Jagdeo of Guyana after the signature of the EPA. A simple Internet search will reveal an impressive amount of statements in this sense throughout the ACP states.

Generally speaking, as in WTO accessions, the parties should feel encouraged to streamline their domestic legislation and institutions during the negotiations in order to improve the business environment, attract investments, and get ready to quickly reap the expected benefits of the agreement. This is part of the need to define an all-encompassing proactive industrial and growth strategy, as indicated above.

3. Entry into Force of the EU's International Trade Agreements

Once negotiations are completed, an agreement must be officially signed by the parties. It may then enter into force provisionally, pending ratification and formal entry into force. Ratification is usually done according to the constitutional regime of each party. In the EU, the procedure for the ratification of an international agreement is provided in Article 218 of the EU Treaty.[32] The question then arises as to the status of the agreement in the domestic legal order of the parties and as to its direct enforceability by private parties (the issue of direct effect). All these issues will be discussed in this section.

The Developments below concern all bilateral or plurilateral international trade and cooperation agreements concluded by the EU, whether they provide for a free trade area, an Economic Partnership, a Customs Union or an Association.

A. Signature and Provisional Application

Once the parties agree on the terms of the agreement, the chief negotiators initial the negotiated text, which must then be officially signed by the state. In principle, this signature has no other legal effect than to officially conclude the negotiations. In the EU, pursuant to Article 218 of the EU Treaty, the negotiations and conclusion of the agreement are carried out by the European Commission, under the express authorization of the European Council. The text of Article 218 is self-explanatory in this regard:

1. *Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organizations shall be negotiated and concluded in accordance with the following procedure;*

[32] Treaty on European Union and the Treaty establishing the European Community, as last amended by the Treaty of Lisbon, signed on 13 December 2007 and entered into force on 1st December 2009.

2. *The* **Council shall** *authorize the opening of negotiations, adopt negotiating directives,* **authorize the signing of agreements** *and conclude them;*
3. **The Commission**, *or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy,* **shall submit recommendations to the Council**, *which shall adopt a decision authorizing the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team*;
4. **The Council may address directives to the negotiator** *and designate a special committee in consultation with which the negotiations must be conducted*;
5. **The Council, on a proposal by the negotiator, shall adopt a decision authorizing the signing of the agreement and, if necessary, its provisional application before entry into force**. *(emphasis added);*

Article 207 of the EU Treaty, which deals with the Common Commercial Policy of the European Union, furthermore provides that:

3. ***The Commission shall conduct these negotiations*** *[note: of trade agreements with third countries or international organizations]* ***in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it***. *The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations;*
4. *For the negotiation and conclusion of the [*trade agreements with third countries or international organizations*], **the Council shall act by a qualified majority**.*

For the negotiation and conclusion of agreements ***in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.***

The ***Council shall also act unanimously*** *for the negotiation and conclusion of agreements:*

(a) *In the field* ***of trade in cultural and audiovisual services****, where these agreements risk prejudicing the Union's cultural and linguistic diversity;*

(b) *In the field of* ***trade in social, education and health services****, where these agreements risk seriously disturbing the national organization of such services and prejudicing the responsibility of member states to deliver them. (Emphasis added).*[33]

Briefly stated, while the European Commission has the authority to negotiate and sign a trade agreement on behalf of the member states of the European Union, such authority is conferred by the Council, which is the political body representing the interests of all EU member states. The Council also exercises supervision of the European Commission, relying on the preparatory work of a special Committee composed of senior national representatives of the member states known as Committee 208 (formerly Committee 133). Therefore, no signing of a trade agreement can take place in the European Union, unless it has been expressly authorized by the Council under the majority rules provided in Article 208.4 of the Treaty. This clearly leaves some room of maneuver in favor or against the agreement in the early stage of the signature process.

There is no provision in EU-negotiated agreements indicating any signature process requirement for the other parties to the agreement. This process depends on their domestic rules. Therefore, there is no guarantee that the ruling majority in these countries will support an initialled agreement. In fact, several of the ACP states that have initialled an Interim EPA with the EU (East African Community, Comoros, Zambia, and Ghana, for instance) are currently faced with this situation.

This being said, only ratification of the agreement enables it to officially enter into force. In case of plurilateral trade agreements, entry into force may be conditioned by ratifications made by a minimum number of parties. This means, however, that ratification is not guaranteed, especially not when the agreement entails trade liberalization commitments by a developing country. Indeed, public opinion and politicians of that country may remain unconvinced of the positive development effects of the agreement, which is especially likely when negotiations are not carried out in a "documented" or "representative" way. Therefore, when no prior agreement exists that would be replaced by the new agreement; the European Union requires the insertion of a clause providing for the provisional application of the new agreement. It then reserves the

[33] A special provision is included in Article 207.5 of the Treaty of Lisbon in relation to international agreements in the field of transport.

right to suspend the benefits accruing from that provisional application should ratification not be made within a "reasonable" period of time (see Subsection B. Ratification).

An example of a clause providing for provisional application is Article 105 of the Interim Agreement between the EU and the South African Development Community (SADC):

1. **Pending entry into force of the Agreement**, *the European Community, the EC Party and the SADC EPA States* **agree to apply the provisions of this Agreement which fall within their respective *competences*** *("provisional application"). This may be effected either by provisional application where possible or by ratification of the Agreement;"*
2. **Provisional application shall be notified to the depositary**. *The Agreement shall be applied provisionally 10 days after the latter of the receipt of notification of provisional application from the European Community or of ratification or provisional application from all the SADC EPA States*;
3. *Notwithstanding paragraph 3, the European Community, the EC Party and SADC EPA States may unilaterally take steps to apply the agreement, before provisional application, to the extent feasible* (emphasis added).

This wording is used in all recent EU trade agreements. Not only does it enable the parties to immediately reap the trade benefits of the Agreement, but it also avoids the possible negative effects of any undue delay in the ratification process. It is also designed to facilitate ratification since the parties are already used to the terms of the agreement. This is especially helpful in those cases where no gradual phase-in is provided in the agreements for full market access in the EU.

It should be noted that in the case of the EU-Korea Free Trade Agreement, given its expected negative impact on the automotive and textile industries in the EU, both sensitive European sectors, the European Council agreed not to authorize provisional application of the agreement until the European Parliament has given its consent.[34] It remains to be seen whether this prefigures an emerging practice of the EU towards industrialized countries which would be different from the one that has prevailed so far with developing ones.

[34] See Press Release of the European Council, September 16, 2010, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/116545.pdf

Finally, in the context of the EPAs, a practice has developed to first sign an interim agreement, covering trade in goods only, in respect of the 2008 deadline required by the WTO rules, and then to continue with the negotiations for a comprehensive EPA. Therefore, notwithstanding the 2008 deadline, negotiations are still ongoing in all ACP regions, except in the Caribbean, which have already concluded a final EPA.[35]

B. Ratification

Ratification formalizes the acceptance by a state of the binding legal effects of the agreement. After ratification, an agreement may formally enter into force. Ratification takes place according to the constitutional system of each party. In the EU, Article 218 of the EU Treaty provides a self-explanatory, yet sophisticated, procedure. The relevant paragraphs state the following:

(6) ***The Council**, on a proposal by the negotiator, **shall adopt a decision concluding the agreement**.* Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) ***After obtaining the consent of the European Parliament** in the following cases:*

(i) ***Association agreements**;*

(ii) *....;*

(iii)***Agreements establishing a specific institutional framework** by organising cooperation procedures [note of the author: relevant in Economic Partnership Agreements];*

(iv)***Agreements with important budgetary implications** for the Union [note of the author: relevant in trade agreements concluded with developing countries];*

(v) A*greements covering fields [of domestic regulation requiring] consent by the European Parliament.*

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

(b) ***After consulting the European Parliament** in other cases* [note of the author: this concerns "classical" trade agreements covering tariff concessions in goods only]. *The European Parliament shall deliver its opinion within a time-limit which the Council may*

[35] See European Commission, "EU-ACP Economic Partnership Agreements: State of Play at June 2010", Doc. D2 D(2010), 15 June 2010, http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146263.pdf

set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

(7) *…;*

(8) *The Council shall act by a qualified majority throughout the procedure;*

However, ***it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession****. […]*

(9) **...**

(10)...

(11)*A Member State, the European Parliament, the Council or the Commission* ***may obtain the opinion of the Court of Justice*** *as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised*. (Emphasis added)

In summary, in the EU, the Council ratifies all trade agreements after the European Parliament gives its consent. The Parliament's consent is not required when the trade agreement only deals with tariff concessions, non-discrimination, and the trade rules giving effect to these commitments. This is seldom the case, since virtually all EU-negotiated trade agreements provide, at a minimum, for a specific institutional framework organizing cooperation procedures, important budgetary commitments, or provisions pertaining to trade in services. All these issues require the Parliament's consent. As to the Council's ratification decision itself, the above-mentioned majority rules provided in Article 207 applicable to the Common Commercial Policy apply. Finally, as indicated in paragraph 11 of Article 218 and consistent with pre-Lisbon practice,[36] all the EU's institutional stakeholders may request the opinion of the European Court of Justice in relation to the compatibility of the Agreement with the EU Treaties.

Ratification, therefore, is not a straightforward matter, not even in the EU. It implies an attentive overview of the agreement by the Parliament and the member states and a possible

[36] This refers to the practice existing before the entry into force of the Treaty of Lisbon amending the Treaty of the European Union.

intervention by the European Court of Justice. Furthermore, in relation to the subjects for which member states maintain their national competences, the agreement must be ratified in each of them according to their own national constitution. This is a time-consuming process that entails a political debate, the outcome of which is not 100 percent certain. Nevertheless, in principle, if an agreement has been signed and negotiated within the original mandate given by the Council, ratification in the EU should not pose major problems.

The same cannot be said with respect to the other parties to the agreement. While the European Commission's concerns revolve around their potential refusal or delay of ratification, there are several signs of discontent within the ACP countries with respect to the interim agreements that may have been hastily signed. Some negotiators have also indicated that late ratification, if not refusal, could be used as a bargaining tool to immediately revise some of the clauses of their agreement, without waiting for the revision opportunities built into the agreements.[37] Nevertheless, late ratification may delay reforms that are mandated in the agreement and may make any temporary trade preference granted by the EU to signatory ACP states WTO-inconsistent. Although the provisional application of the agreement by both parties may temporarily discourage WTO partners from challenging the preferences, only ratification can provide the required stable and predictable legal framework for the agreement to take effect.

Therefore, the European Union is exercising pressure to ensure that ratification is obtained in a reasonable time after signature. For instance, it inserted the following clause in its Council Regulation, applying the preferential trade arrangements with the ACP states that have signed an EPA or an Intermediary EPA:

[An ACP] region or state will remain on the list in Annex I [note: listing the beneficiaries of the preferential treatment], *unless the Council, acting by qualified majority upon a proposal from the Commission, amends Annex I to* ***remove a region or state*** *from that Annex, in particular where:*

[37] ACP leaders regularly make such statements at ACP Ministerial meetings or in the press. For instance, found in *Caribbean Net News, 22 June 2010* : "Guyana participated at the African Caribbean Pacific (ACP) Council of Ministers Meeting held in Ouagadougou, Africa on June 17 to 19 where member states echoed the concerns first raised by Guyana about unresolved issues including Most Favoured Nations (MFNs), Rules of Origin, market access and export taxes."

a) *The region or state indicates that it* ***intends not to ratify***[38] *an agreement which has permitted it to be included in Annex I;*

b) ***Ratification*** *of an agreement which has permitted a region or state to be included in Annex I* ***has not taken place within a reasonable period of time such that the entry into force of the agreement is unduly delayed****; or*

c) *The agreement is terminated, or the region or state concerned terminates its rights and obligations under the agreement but the agreement otherwise remains in force*.[39] (Emphasis added)

There is no regulatory indication as to what a "reasonable period of time for the entry into force of the agreement" means, and there remains in this regard an unfortunate level of uncertainty. In practice, should there be delays in ratification or problems with provisional implementation, these issues are to be solved politically rather than on a regulatory basis. The above-mentioned regulation only provides ammunition to the EU in this context.[40]

C. Incorporation in Domestic Law

Once an Agreement is ratified and enters into force, it is legally binding for the parties according to international law. In domestic law, its status varies according to the institutional system of the parties. In monist systems, the agreement is incorporated into domestic law by virtue of its ratification and entry into force. In dualist systems, a domestic law is required to incorporate the agreement in the domestic legal system of the country.

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[38] One commentator believes that if a State provisionally applies the agreement and then suspends such application, this might be considered by the Council as a refusal to ratify. He thus recommended ACP states not to enter into provisional application. We believe instead that this is not necessary and furthermore it may anyway lead to the suspension of the preferences granted by the EU. (see L. Bartels, "The legal status of the initialed EPAs and legal constraints on renegotiations", Commonwealth Secretariat, www.thecommonwealth.org/files/177361/FileName/EPAsin2008.pdf)

[39] Article 2(3) of Council Regulation (EC) No 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements, O.J.E.U, L348/1, 31 December 2007.

[40] On 6 September 2010, in a letter addressed to the EU Trade Ministers, EU Commissioner for Development, Mr. Andris Pielbags, and the EU Commissioner for Trade, Mr. Karel De Gucht, expressed some frustration towards delay in all phases of implementation of the initialed EPAs, including ratification of the signed agreements.

In the EU, the European Court of Justice repeatedly confirmed the monist approach.[41] Therefore, all trade agreements concluded by the EU, including the WTO Agreement itself, form an integral part of European Community Law. The European Court of Justice may refer to them to interpret any norm of the European Community, whichever are its addressees.[42] This does not mean of course that the court may, at the request of private persons, grant them personal rights or assess the validity of other European Community norms in light of these agreements. This latter issue, direct effect, is addressed in the next section.

Whether or not a trade agreement concluded with the EU forms part of the legal order of the other parties to the agreement is a matter pertaining to these other parties' domestic legislation. There is no indication in the agreements themselves regarding this issue other than the need to bring all domestic laws, regulations, decisions, and practice into conformity with the agreement. In public international Law, what matters is that the agreement is not violated by any inconsistent measure of the state. The European Commission of course monitors overall compliance with the agreement and carries out assessments of the compatibility of its trade partners' domestic legislation with the terms of the agreement. Section IV addresses the means it employs to address the problems identified in this respect.

D. The Issue of Direct Effect

The notion of direct effect in community law encompasses both the possibility for an individual to apply an international agreement in order to discard a national or community norm and the capacity of that individual to draw subjective rights from that agreement. In the first situation, an individual (or member state) invokes international law in the same way as a domestic one—as a relevant source of law—in order to avoid the application of an inconsistent national or Community norm. In the community, this may occur in actions for annulment before the

[41] See V. Judgment of the E.C.J, HAEGEMAN, 30/4/1974, Case 181/73, paragraph 2 to 6; Judgment of the E.C.J, KUBFERBERG & Co, 26/10/1982, Case 104/81, paragraph 11, 13; Judgment of the E.C.J, SPI and SAMI, 16/3/1983, joint cases 267/81, 268/81 and 269/81, paragraph 18; Judgment of the Court of First Instance, BANANA TRADING GmbH, 12/07/2001, T-3/99, paragraphs 67-75.

[42] Judgment of the E.C.J, INTEERFOOD GmbH, 26/4/1972, Case 92/71, paragraph 6; Judgment of the E.C.J, BROWN BOVERI & Co AG, 18/4/1991, Case C-79/89, paragraphs 15 to 19; Judgment of the E.C.J, POULSEN et DIVA NAVIGATION CORP., 24/11/1992, Case C-286/90, paragraph 9; Judgment of the E.C.J, WERNER, 17/10/95, Case C-70/94, p. I-3189, paragraph 23; Judgment of the E.C.J, LEIFER et al., 17/10/95, Case C-83/94, paragraph 24; Judgment of the E.C.J, COMMISSION vs. R.F.A., 10/9/1996, Case 61/94, p. I-3989, paragraph 52.

European Court of Justice or as a defense before domestic courts against the inconsistent norm. For example, an individual might seek the non-applicability of a sanitary and phytosanitary measure of the EU that would be inconsistent with the agreement. In the second situation, an individual intends to draw a personal right from the international norm. It may be, for example, a claim for reimbursement, an indemnity, or even a personal claim to benefit from a non-discriminatory treatment under the international agreement, in a dispute before any European jurisdiction.

The recognition of the direct effect of an international trade agreement therefore bears important practical consequences for the economic operators, since it would give them the right to seek its implementation before the parties' domestic courts.

The issue of the direct effect of international agreements in the community legal order gave rise to an important case law. The European Court of Justice consistently ruled that in order for the provisions of an international agreement to have direct effect, it must examine whether the agreement in general is of a nature to confer rights to individuals.[43] Indeed, according to the court, international treaties being instruments of public international law, it is important to assess, and not assume, whether the parties intended to confer a direct effect, and whether it would result from their text, their nature, and economy that the parties did not object to individuals to invoking their provisions.[44] Decisions pertaining to direct effect are made on a case-by-case basis. Therefore, unless the parties explicitly agreed on the issue of direct effect in the agreement itself, there remains uncertainty until the court has ruled.

The court has nevertheless consistently rejected the direct effect of the multilateral trade rules of the WTO, and before them, those of the GATT. However, so far, it has always

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[43] See Opinion of the Court I/91, "Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area," 14/12/1991, paragraphs 13 to 29.

[44] Judgment of the E.C.J, INTERNATIONAL FRUIT COMPANY, 12/12/1972, Cases 21-24/72, paragraphs 19-20; Judgment of the E.C.J, CONCERIA DANIELE BRESCIANI, 5/2/1976, Cases 87/75, paragraph 16; Decision Judgment of the E.C.J, PABST & RICHARZ KG, 29/4/1982, Case 17/81, paragraph 27; Judgment of the E.C.J, KUBFERBERG & Cie, 26/10/1982, Case 104/81, paragraph 17; Judgment of the E.C.J, MERYEM DEMIREL, 30/9/1987, Case 12/86, paragraph 14; Judgment of the E.C.J, BAHIA KZIBER, 31/1/1991, Case C-18/90, paragraph 15; Judgment of the E.C.J, PORTUGAL c. CONSEIL, 23/11/1999, C-149/96, paragraphs 34 and foll.; etc. See Conclusions of Advocate General Darmon in Case MERYEM DEMIREL, paragraph 18; and H.T. Tagaras, "L'effet direct des accords internationaux de la Communauté", *Cah. Dr.eur.*, 1984, p. 19 et suiv.

recognized direct effect for Association Agreements, Customs Unions, and even bilateral trade and cooperation agreements of the EU (the European Economic Community before).

The Court has exposed the reasons behind its rejection of the direct effect of the WTO Agreements in its landmark Case Portugal vs. Council:

36 ... ***the system resulting from [In the WTO agreements] … accords considerable importance to negotiation between the parties***.

....

40 ... ***to require the judicial organs to refrain from applying the rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of the [****Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the WTO)] of* ***entering into negotiated arrangements even on a temporary basis***.

....

43 *It is common ground, moreover, that some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law.*

44 *Admittedly,* ***the fact that the courts of one of the parties consider that some of the provisions of the agreement concluded by the Community are of direct application whereas the courts of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement*** *(Kupferberg, paragraph 18).*

...

45 ... ***the lack of reciprocity in that regard*** *on the part of the Community's trading partners, in relation to the WTO agreements which are based on `reciprocal and mutually advantageous arrangements' […],* ***may lead to disuniform application of the WTO rules.***

46 *To accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature* ***would deprive the legislative or executive organs***

of the Community of the scope for maneuver enjoyed by their counterparts in the Community's trading partners[45].

In summary, the stated reasons behind the case law rejecting direct effect of the WTO are that:

1. The dispute settlement system of the WTO affords a margin of maneuver to the parties to the dispute to reach a negotiated settlement in case of non-compliance with a decision of the WTO dispute settlement body. Therefore granting direct effect would deprive the government of the parties the possibility to reach such a settlement; and
2. Other WTO Members reject direct effect. Thus if the EU grants it, this would create a lack of reciprocity in the implementation of the agreement and thus distort the negotiated balance between the Members' rights and obligations the WTO is supposed to protect.

It is not the purpose of this study to assess this case law from a critical perspective. This was done extensively by others, and by this author.[46] One can only note, as previously discussed, that the Court recognized the direct effect of several bilateral and plurilateral trade agreements and other instruments of public international law. For instance, direct effect was recognized in the following:

- The Yaoundé Convention establishing a association between the European Economic Community (EEC) and the African States and Madagascar;[47]
- The Association Agreement between the EEC and Greece (1961);[48]
- The Association Agreement between the EEC and Portugal;[49]
- The Cooperation Agreement between the EEC and Morocco;[50]
- The Cooperation Agreement between the EEC and Yugoslavia;[51]

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[45] Judgment of the E.C.J., PORTUGAL vs. CONCIL, 23/11/1999, Case 149/96. This case law has been repeatedly confirmed by the European Court of Justice. The last case where it did it is in Joined Cases C-120/06 P and C-121/06 P Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others vs. Council of the European Union and Commission of the European Communities, 9/9/2008.

[46] See D. Luff, "*Considérations sur l'effet des règles de l'OMC dans les ordres juridiques belges et communautaires*", Contribution to the 2002 Congress of the Academy of International Comparative Law, Brisbane, Australia, July 2002, published by Bruylant, Brussels, 2002, p. 671-770

[47] Judgment of the E.C.J., CONCERIA DANIELE BRESCIANI, 5/2/1976, Case 87/775, paragraphs 15 to 26.

[48] Judgment of the E.C.J., PABST & RICHARZ KG, 29/4/1982, Case 17/81, paragraphs 27 and 28.

[49] Judgment of the E.C.J., KUBFERBERG & Cie, 26/10/1982, Case 104/81, paragraphs 8 to 27.

[50] Judgment of the E.C.J., BAHIA KZIBER, 31/1/1991, Case C-18/90, paragraphs 15 to 23, in particular paragraph 19.

[51] Judgment of the E.C.J., RACKE, 16/06/1998, Case C-162/96, paragraphs 30-36, 42, 43.

- Decisions of the Association Council established pursuant to the Agreement providing for a Customs Union between the EEC and Turkey;[52]
- The International Convention on Biological Diversity;[53] and even
- The international Customs.[54]

Yet, each of these sources of international law provides for a dispute settlement mechanism that is legally less binding and often more based on negotiation and political compromise than the WTO Agreements. One can therefore draw the conclusion that the possibility, provided in the agreement, for the parties to reach a negotiated settlement cannot be considered as a determining factor to refuse to grant it direct effect.[55]

There remains the second reason given in relation to the WTO agreements: if one party grants direct effect and not the others that would jeopardize reciprocity in the implementation of the agreement. This however does not seem to apply to bilateral trade agreements concluded with developing countries. Indeed, although these countries must comply with Article XXIV of the GATT and Article V of the GATS, they still maintain elements of unreciprocated benefits in their favor. Therefore their "nature and economy" does not prevent some imbalance in their implementation.[56]

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[52] Judgment of the E.C.J., S.Z. SEVINCE, 20/9/1990, Case C-192/89, paragraphs 13 to 26; Judgment of the E.C.J., MEHMET BIRDEN, 26/11/1998, Case C-1/97, paragraph 19.

[53] Judgment of the E.C.J., THE NETHERLANDS vs. PARLIAMENT and COUNCIL (Biotechnological Inventions), Case C-377/98, paragraph 53.

[54] Judgment of the E.C.J., RACKE, 16/06/1998, Case C-162/96, paragraphs 24-27, 40, 45, 46, 51; See also Conclusions of Advocate General Jacobs in Case RACKE, 4/12/1997, points 76 to 85.

[55] Judgment of the E.C.J, KUBFERBERG & Cie, 26/10/1982, Case 104/81, paragraph 20: "***The mere fact that the Contracting Parties have established a special institutional framework for consultations and negotiations inter se*** *in relation to the implementation of the agreement* ***is not in itself sufficient to exclude all judicial application of that agreement****. The fact that a Court of one of the parties applies to a specific case before it a provision of the agreement involving an unconditional and precise obligation and therefore not requiring any prior intervention on the part of the Joint Committee does not adversely affect the powers that the agreement conferred on that Committee."* (emphasis added)

[56] See in this regard the Judgment of the E.C.J in the case PORTUGAL vs. CONCIL, paragraph 42: *As regards, more particularly, the application of the WTO agreements in the Community legal order, it must be noted that, according to its preamble, the agreement establishing the WTO, including the annexes, is still founded, like GATT 1947, on the principle of negotiations with a view to `entering into reciprocal and mutually advantageous arrangements' and* ***is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations****, or create special relations of integration with the Community, such as the agreement which the Court was required to interpret in Kupferberg.* (emphasis added)

In practice, this means that economic operators should be able to invoke a bilateral trade agreement concluded with a developing country before a European jurisdiction if their business is affected by a regulatory barrier in the EU that would be inconsistent with that Agreement. This argument, of course, applies when the agreement remains silent on the issue of its direct applicability.

It remains to be seen to what extent the non-EU parties to the agreements would handle this issue. One can only regret that in most EU-negotiated agreements the parties have not settled it themselves. This leaves final decision-making to the judiciary of the countries concerned and it maintains an unfortunate uncertainty regarding the implementation of the agreement for all private traders and investors. Yet, it is precisely the purpose of development-oriented agreements to foster growth and investment by providing, among others, a stable and predictable legal environment for the private sector.

In a non-official version of the EU Agreement with Colombia and Peru that was initialed in May 2010, a clause was inserted which explicitly denies direct effect to the Agreement:

> "*Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law.*"[57]

Furthermore, the Agreement also appears to deny direct effect to a ruling of an arbitration panel that would be established by the parties in accordance with the agreement.

> "*Any ruling of the arbitration panel shall be binding for those Parties to the dispute and shall not create any rights or obligations for natural or legal persons.*"[58]

Obviously these new generation clauses protect governments against any liability towards the private sector. Furthermore they undermine the objective of legal certainty and predictability for economic operators, which must still rely on the goodwill of their government to bring a violation case on their behalf before an international arbitration panel.

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[57] See Article 326 of the EU-Colombia-Chile Agreement. This information is drawn from a non-official version of the agreement, the official one still not being available on 16 September 2010. The non-official version was found in http://www.bilaterals.org/spip.php?article17138&lang=en

[58] See Article 305(2) of the non-official version of the EU-Colombia-Chile Agreement.

4. Implementation

Besides the issue of the effect of a bilateral trade agreement in the domestic legal system of the parties, those parties draw rights from the agreement and are subject to its obligations. These are exclusively matters of public international law and concern state-to-state relations.

As indicated above, it is in the interest of the EU to implement the provisions of its agreements and to ensure that its trade partners do the same. However, considering the frustration occasionally caused in developing countries by hastily negotiated agreements and the uncertainty regarding their real benefits, such implementation is not automatic. Furthermore, many countries still lack the institutional capacity and infrastructures to fully implement the agreements and draw all the expected benefits from them. In this context, ensuring the implementation of an agreement cannot rely solely on enforcement techniques, but also on softer methods of encouragement or even renegotiations of its unsustainable provisions.

A. Soft Implementation

1. Development Aspect Of The Agreements

All recent Association and Economic Partnership Agreements contain chapters providing for development cooperation in order to ensure that the agreements produce their expected development benefits. The stated objective of the agreements is indeed to proactively contribute to the sustainable development of the parties. The parties agree that the application of the agreement must "*fully take into account the human, cultural, economic, social, health and environmental best interests of their respective population and of future generations.*" Provisions are included in the agreements requiring that this objective is "*to be applied and integrated at every level of [the] economic partnership."*[59] In practice, therefore, all means must be employed to ensure that the implementation of the agreements does not undermine economic development and social stability in the territory of the parties.

In this context, the parties also agree that "decision-taking methods shall embrace the fundamental principles of ownership, participation and dialogue" and "to work cooperatively

[59] See Article 3 of the EU-Cariforum EPA.

towards the realization of a sustainable development."[60] The emphasis is thus clearly placed on the exercise of all possible soft techniques for the implementation of the agreements as opposed to simple coercion. Furthermore, it more than mere implementation: the parties are expected to develop proactive bilateral policies promoting economic growth and prosperity. This aspect is generally considered as one of the essential components of the agreements.

There are several techniques used to ensure the EU negotiated agreements produce the expected development benefits. These range from a proactive monitoring of their implementation to the preparation of comprehensive joint development programmes. The EU then facilitates their realization through technical assistance (see Subsection ii (a)). The agreements generally provide for the continuous assessment of progress in their implementation. Assessment should not be limited to a mere political process, as it is too often the case in practice. Ideally, the parties should develop a comprehensive implementation and management monitoring mechanism, which would also assess the agreements' impact on their economy and social development. An effective monitoring mechanism would need to rely on clear development indicators, themselves ideally supported by a clearly defined development programme. The EU strongly encourages the partners to prepare such. A good example is the EPA Programme for Development of the West African Region. It identifies constraints and difficulties in the countries of the region and it provides for proactive sectoral policies, cross-cutting policies, implementation programmes as well as an institutional structure aimed at managing the implementation processes. A comprehensive set of progress indicators is also proposed.

It is obviously in all parties' interest to identify a clear development-oriented implementation programme. Combined with an effective monitoring mechanism, it could be used as a policy tool that would facilitate the parties in taking advantage of the agreements. Such a programme would go beyond the strict legal implementation of the agreements in the countries' domestic legal order. It would facilitate the identification of remedies in case the development objectives are not met. It would also optimize the use of the flexibilities contained in the agreements, for the direct benefit of economic operators. It would also monitor progress of the ongoing reform process in the developing countries concerned, highlight the difficulties and

[60] Idem.

constraints that may arise in this regard and steer the reforms in the direction of the identified bottlenecks.

Furthermore, there should also be provision for a mechanism for the identification of illegal barriers to trade and enabling exporters and public administration to take the necessary action, in the context of a proactive market access strategy.

Taken in this sense, a comprehensive implementation programme would foster better ownership of the agreements themselves and ensure that they are implemented and managed according to the real needs of the parties. Substantial work remains to be done in this respect in all countries involved. It should be kept in mind that the identification of a development-oriented implementation programme, together with its indicators, can also facilitate the identification of relevant technical assistance activities and release more funds for development aid. The agreements themselves generally contain a commitment by the EU to "*take all measures necessary to ensure the effective mobilization, provision and utilization of resources aimed at facilitating the development cooperation activities provided for in this Agreement.*"[61]

2. Aid And Technical Assistance

As indicated previously, in order to encourage its developing trade partners to implement the agreements, the EU promised in the agreements themselves to provide substantial development aid and technical assistance. Every individual chapter of the agreements with developing countries provides for cooperation and technical assistance in the subject addressed. Moreover, regarding the Caribbean countries, the provisions of the Continuo Agreement still apply in relation to development financial cooperation and the financial instruments provided for this regard (i.e., the European Development Fund).

As to the technical assistance itself, capacity-building programmes and projects abound in almost all developing countries.[62] For the Caribbean States for instance, there are several all-ACP programmes such as TradeCom,[63] CDE,[64] Proinvest,[65] and BizClim.[66] There are also

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[61] See, for instance, Article 5 paragraph 4 of the EU-Cariforum EPA.

[62] For a general view of funds the EU member states and the EU Commission disbursed by topic and by region, see European Commission, "EU Donor Profiles", 21 April 2010, http://ec.europa.eu/development/icenter/repository/eu_donors_profiles_2010.pdf

[63] See footnote 22. One of the components of the TradeCom Facility is to facilitate implementation of international trade agreements (see http://www.tradecom-acpeu.org/)

specialised sectoral programmes, such as on fisheries, SPS/TBT issues, water and energy.[67] A dedicated programme was also established for Mexico[68] in order to facilitate the implementation of its Partnership agreement with the EU[69] and promote its exports.[70] All these programmes are managed by outsourced programme management units (PMUs), which operate under the rules and procedures of the European Union.[71] Furthermore, the European Commission is implementing framework contracts[72] and, nearly every day advertises technical assistance activities covering all aspects of the implementation of a trade agreement, including mere monitoring and needs assessments. In addition, the European Union has concluded national and regional indicative programmes for aid with each partner state and regional integration organisation associated with important budgets. The beneficiaries themselves must carry out the programming and management of aid, and they may also have recourse to PMUs for this purpose. The EU's current policy is to increase technical assistance through this channel in order

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[64] The Center for the Development of Enterprises is a joint EC-ACP Institution that was created to contribute to the upgrading of ACP enterprises and facilitating their access to funds for investments.

[65] Proinvest has a budget of 110 million Euros over seven years. Its mandate is "to promote investment and technology flows to enterprises operating within key sectors in ACP countries". It provides support to Intermediary organisations and professional associations, while seeking to develop "north-south and south-south inter-enterprise partnerships" (See http://www.proinvest-eu.org/about-programme).

[66] BizClim has a budget of 20 million Euros over three years. Its mandate is to promote, through targeted technical assistance, the rule of law and an adequate business environment in the ACP states. It will operate until the end 2009, but it will be replaced by a new facility, which is expected to be operational as of July 2010.

[67] See http://ec.europa.eu/europeaid/where/acp/sector-cooperation/economic-growth/index_en.htm

[68] No special technical assistance programme seems to have been established for the implementation of the EU-Chile Association Agreement.

[69] The "Proyecto de Facilitación del Tratado de Libre Comercio entre México y la Unión Europea (PROTLCUEM)" was established. See http://www.protlcuem.gob.mx/protlcuem/index.php. In Chile,

[70] The "Programa Integral de Apoyo a Las Pequeñas y Mediana Empresas" was established. See http://www.cemue.com.mx/apps/sitemgrENG.nsf/portada/1

[71] The rules and procedures of the EU are generally considered to be too burdensome and not always effective. A specific study would be required to assess in detail the functioning and impact of these PMUs; notwithstanding evaluations are usually made by independent consultants recruited by the European Commission.

[72] These are contracts the EU concluded with private companies for the research of qualified experts to work for beneficiary states, at their request.

to foster ownership of development processes as well as regional integration.[73] For instance, regarding the ACP, most of the budget provided in the 10th Development Fund will be handed to the regions through their local regional organisations, under strict financial control.[74]

Organising development aid and technical assistance activities is a profession in and of itself for both the donor and the recipient. While all best efforts are made on both sides, there remains substantial room for improvement, notwithstanding the positive language[75] used in reports and press releases. The challenges of technical assistance in the context of the implementation of a free trade agreement are as important—if not more—than those related to its negotiation. Yet several stakeholders in developing countries doubt that real development and transfer of knowledge can take place in this way. They would prefer instead to receive the money to build physical infrastructure.[76] Other concerns relate to the fact that the procedures of the European Commission are excessively burdensome and overwhelmed by the fear of improper expenses, due to previous scandals. The effectiveness of technical assistance programmes may thus be seriously impaired for this reason. On the other side, the EU is eager to ensure the capacity of local governments and regional organisations to administer technical assistance and to adequately disburse funds in the context of direct financial assistance. Therefore, substantial efforts remain necessary to build mutual understanding and trust in relation to development aid. Clearly only money and/or experts are not sufficient. Better structures for technical assistance and changes in mentalities are required.[77]

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[73] See San LUI, "The Aid For Trade Agenda and Accompanying Measures for EPAs. Current State of Affairs", ECDPM, Discussion Paper No 86, November 2008, available in http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/7ECDC9FEC659E56EC125758B005C79AA/$FILE/DP86_AidforTradeAgenda_Currentstateofaffairs.pdf; Corinna Braun-Munzinger, "Regionally Owned Funds, Mechanisms for Delivery of EU Aid for Trade in ACP Regions?", ECDPM, Discussion Paper No 90, April 2009, available in http://www.ecdpm.org/Web_ECDPM/Web/Content/Navigation.nsf/index2?readform &http://www.ecdpm.org/Web_ECDPM/Web/Content/Content.nsf/7732def81dddfa7ac1256c240034fe65/bbe8fffcc5a8e8c0c125750f0055f7ae?OpenDocument

[74] 17.766 billion Euros out of the 22 billion of the 10th EDF will be channelled in this way.

[75] Language in line with the recommendations on Aid Effectiveness contained in the Paris Declaration of 2 March 2005.

[76] These issues have been extensively debated in the context of the EPAs.

[77] In the Caribbean, the plan is to establish a Cariforum Regional Fund that the EU can use as a disbursement mechanism for EPA related assistance. However there remain divergences as to the way it would function and no Fund is operational as yet.

In general terms, the assessment of past technical assistance activities is somehow mixed. Developing countries, particularly the ACP states, remain unsatisfied about the EU. They consider the financing effort as insufficient to deliver the necessary infrastructures for growth.[78] They also believe that the technical assistance programmes are not providing the expected results. Their planning, conduct, and supervision are often criticized as being too burdensome and bureaucratic, and not sufficiently focused on relevance, quality, multiplier effects, and ownership by the beneficiaries. Individual projects however, have helped developing countries on punctual issues. In the Caribbean, for instance, they helped negotiators in their preliminary analytical work; they also contributed to develop sectoral adjustments plans and to review laws and legislations so as to make them relevant in a liberalized trade context. However, too many gaps remain in the Caribbean States' infrastructure for trade and development, including in the areas covered by technical assistance projects, such as statistics, customs, sanitary and phytosanitary protection, and institutional development. Furthermore, there does not appear to have been a holistic view of the needs of the region and a coordinated approach of assistance provided by the donors.

The general intuitive perception is that the EU has spent too much for the added value technical assistance generated. It would not be prudent to either confirm or speculate on the reasons at this stage. A comprehensive and documented study on the overall effectiveness of the EU's aid schemes per region and per country would be useful. There might indeed be a dichotomy between the assessments contained in official reports and the realities in the ground. Such a paper would require a solid documentary and empirical research and field missions. It should address all the usual indicators of aid effectiveness in the most rigorous and independent way.

This being said, it should be remembered that technical assistance activities alone cannot make a difference. Only a comprehensive institutional strengthening and the mainstreaming of trade in government policy can lead to the expected developments benefits of an agreement. Defining trade policy, streamlining industrial policy, improving the business environment,

[78] It should be noted that under the Ninth European Development Fund, 13.5 billion Euros were dedicated to the development of ACP states for the period 2002-2007. Under the Tenth European Development Fund, this amount was increased to 22 billion. Financial packages are also been made available to Latin American countries. The amount and the nature of technical assistance programmes vary according to the country involved. See also the reference in footnote 66.

creating an institutional framework that coordinates with all stakeholders to deal with trade, improving statistics, building dialogue, investing in education and research, and so forth is what is required first. In this light, one can only emphasize the need for a political commitment from countries to engage in economic reforms and mainstream trade in government policy. Ideally, as indicated above, this is to be done ahead of negotiations and pursued during them. At the implementation phase, it is an absolute necessity.

3. Revisions And Amendments To The Agreement

Most trade agreements with the EU contain provisions enabling the parties to extend the scope of trade liberalization or suggesting adjustments to the trade cooperation among the parties, taking into account the experience acquired during implementation.[79] The latest trade agreements of the EU even contain revision clauses enabling the parties to propose amendments or adjustments if it is not possible for a party to implement some of their harshest effects.

For instance, Article 108 of the EU-SADC Interim Agreement provides that:

1. *Without prejudice to Article 67, **the Parties agree to review this Agreement no later than five years after its entry into force**.*
2. *As regards the implementation of this Agreement, **either Party may make suggestions** oriented towards adjusting trade related cooperation, taking into account the experience acquired during the implementation thereof.*
3. ***The Parties agree that this Agreement may need to be reviewed in light of further developments** in international economic relations and in the light of the expiration of the Cotonou Agreement*". (emphasis added)

Article 246 of the EU-CARIFORUM Agreement provides that:

1. ***The Parties agree to consider extending this Agreement with the aim of broadening and supplementing its scope** in accordance with their respective legislation, **by amending it or concluding agreements on specific sectors or activities in the light of the experience gained** during its implementation. The Parties may also consider revising this Agreement to bring Overseas Countries and Territories associated with the European Community within the scope of this Agreement.*

[79] See for instance Article 201 of the EU-Chile Association Agreement and Article 43 of the EU-Mexico Partnership Agreement.

2. *As regards the implementation of this Agreement,* ***either Party may make suggestions*** *oriented towards adjusting trade related cooperation, taking into account the experience acquired during the implementation thereof.*
3. ***The Parties agree that this Agreement may need to be reviewed*** *in the light of the expiration of the Cotonou Agreement.*[80] (emphasis added)

Furthermore, in relation to the ACP states, it should be noted that with the exception of the EU-CARIFORUM Agreement, the other agreements are Interim Partnership Agreements (IEPAs) only. This means that negotiations are ongoing to settle several issues and complete the agreements, particularly with regards to services, intellectual property, and enhanced development cooperation. In this context, there is room for renegotiating some aspects of the IEPAs, which would be proven to be wrong in light of the experience of provisional application and further analytical studies. However, in practice this flexibility comes at the expense of legal certainty for private operators. There is, therefore, a delicate balancing to be made between a development-friendly attitude and a legal predictability. This requires good technical proficiency and political talent.

While it is too early to assess the EU practice in relation to the EU-CARICOM EPA or the IEPAs, one can observe in relation to the EU-Chile and EU-Mexico agreements the willingness of the European Commission to address specific requests pertaining, for instance, to changes in rules of origin or aspects of sanitary and phytosanitary standards. These requests are channeled through the joint council of the parties and are subject to secondary treaty law.[81] In one instance a change to the Agreement itself was made in relation to a technical issue.[82]

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[80] See also Article 103 of the EU-South Africa Trade and Cooperation Agreement.

[81] See for instance Decision No 1/2007 of the EU-Mexico Joint Committee of 14 June 2007 relating to Annex III to Decision No 2/2000 of the EU-Mexico Joint Council of 23 March 2000, concerning the definition of the concept of originating products and methods of administrative cooperation, O.J.E.U., L279, 23 October 2007, p. 15-20. See also Decision No 1/2006 of the Joint Management Committee set up under the Agreement between the European Community and the Republic of Chile on sanitary and phytosanitary measures applicable to trade in animals and animal products, plants and plant products and other goods and animal welfare of 9 November 2006 amending Appendices IC, IIIA, IIIB and XI to Annex IV to the Agreement, O.J.E.U., L 86, 27 March 2007, p. 20–32.

[82] See the Agreement in the form of an Exchange of Letters between the European Community and the Republic of Chile concerning amendment of Appendix V to the Agreement on Trade in Wines of the Association Agreement between the European Community and its member states, of the one part, and the Republic of Chile, of the other part, O.J.E.U., L 37, 6 February 2009, p. 9–13.

4. Appointment Of Joint Council And Committees

All EU trade agreements that provide for more than mere tariff liberalization require the appointment of a joint council of ministers, which is to be assisted by one or more committees of the parties. The council's mandate is to supervise the implementation of the agreement and facilitate the diplomatic settlement of disputes. Representations regarding implementation difficulties may be made to these bodies which then decide on the best course of action, considering the objectives of the agreement. In particular, when the EU's trade partners are developing states, the development dimension must be taken into account. The joint council and committees may be granted with certain powers to take binding decisions with respect to the parties, including adopting, where relevant and agreed by the parties, secondary treaty law.[83]

The presence and involvement of these councils and committees is of course a key factor to ensure the smooth implementation of the agreement by the parties. It remains to be seen to what extent it is based on trust and real desire to carry on with all aspects of implementation. One may at least note that so far no formal litigation has taken place between the EU and its trade partners regarding the implementation of bilateral agreements. This could suggest that dialogue among the parties has been successful so far.

B. Enforcement

In addition to soft implementation techniques, the use of which is recommended when the agreement aligns with the EU's development policy, the trade agreements of the EU also contain more stringent clauses that enable to parties to suspend their application if certain conditions are not met or in case of unsettled violation. One should also keep in mind that the trade agreements contain an obvious mercantilist component and that they grant additional market access rights to the European enterprises in several markets. The EU repeatedly indicated its resolve to ensure the exercise of those rights for the benefit of its operators.

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[83] See for instance Articles 3 to 10 and 193 of the EU-Chile Association Agreement; Articles 45 and following of the EU-Mexico Partnership Agreement; Articles 73 and following of the EU-Egypt Association Agreement; Article 93 of the EU-South Africa Trade and Cooperation Agreement; Articles 227-232 of the EU-CARIFORUM EPA; Articles 93-96 of the EU-SADC Interim EPA. For an example, see Decision No 1/2008 of the EU-Mexico Joint Council of 15 January 2008 implementing Article 9 of Joint Council Decision No 2/2001 of 27 February 2001 on the establishment of a framework for the negotiation of mutual recognition agreements, O.J.E.U., L31, 5 February 2008, p.32-33.

1. The Non-Execution Clause

Non-execution clauses are based on two ideas. The first is that trade preferences and privileges should only be granted by the EU to countries that abide by fundamental human rights and democratic principles; the second is that preferences and privileges should not contribute to any violations of fundamental human rights. Therefore, the EU insists on integrating in its trade agreements clauses that enable it to take action should these conditions not be met.

There has been an evolution in the language used though, from a straight unilateral right to suspend the agreement to softer consultations techniques that may lead, if the problem persists, to the suspension of the Agreement. In the EU-CARIFORUM EPA, the right of suspension of the agreement has even been eliminated.

First generation clauses, labelled "Baltic Clauses" provide that human rights and democracy constitute an "essential element" of the agreement. There is an automatic right to suspend the agreement if a serious violation occurs of these essential provisions.[84]

A second generation of clauses, the "Bulgarian Clauses" are much softer. They contain the requirement to supply to the relevant joint council all information required for a thorough examination of the situation with a view to seeking a solution mutually acceptable for the parties. Appropriate measures can be taken only in the absence of a solution. In the selection of measures, priority must be given to those which least disturb the functioning of the agreement. These measures must be notified immediately to the joint council and must be the subject of consultations within the joint council if the other party so requests.[85]

The recent agreements with the ACP states contain even softer clauses. For instance, in the EU-CARIFORUM Agreement, there are clauses protecting the environment and social rights (Title IV, Ch. 4 - environment and Ch. 5 - social aspects). In case of implementation difficulties, consultations and monitoring processes are foreseen, with the possibility for seeking advice from

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[84] Ex. Articles 1 .1 and 200.3 of the EU-Chile Association Agreement.

[85] For instance, Article 96 of the Cotonou agreement provides that, in relation to human rights, democratic principles and the rule of law, consultations with a view to find a solution must begin within 30 days and last no longer than 120 days. Only in case of failure "appropriate measures may be taken". These measures must then be revoked as soon as the reasons for taking them no longer prevail. The appropriate measures must be taken in accordance with international law, and be proportional to the violation. Priority must be given to the measures which least disrupt the application of the agreement. The suspension of the agreement is a measure of last resort. Urgent measures are possible "in exceptional cases of particularly serious and flagrant violation." In this case, the measures must be notified and consultations started right away.

relevant international bodies. The provisions also require the parties to engage into intense regulatory and policy cooperation. Finally, while the standard dispute settlement provisions are applicable to these clauses, unilateral suspension is not possible, but *"[t]he complaining Party may adopt the appropriate measures 10 days after the date of the notification.*" (Article 213 § 2 of the Agreement).

This evolution confirms the realization by the EU that in the trade agreements that involve a strong development component and other political objectives, strict unilateral enforcement disciplines against developing countries are not the most appropriate response.

2. Dispute Resolution

Should diplomatic activity not be successful to solve implementation problems, the trade agreements provide for a dispute settlement procedure among the parties. This procedure is in general very similar, albeit somehow simpler, in its principle and philosophy to the one of the WTO. It provides for consultations and mediation, an arbitration step, a compliance procedure and remedies.

As an example, the procedure provided in the EU-CARIFORUM EPA[86] entails the following:

(i) Obligatory consultations and possibility to ask for mediation;

(ii) Arbitration procedure: a Panel of Arbitrators is selected within five days of the request (20 days in the EU-SADC Interim EPA). The Arbitrators are selected from a list of arbitrators nominated by the parties. Specialized arbitrators are required if the issue is relating to environment or labor standards;

(iii) The Rules of procedure must be established by the Joint Council;

(iv) The procedure is to last 150 days, in principle. Maximum 180 days. In case of urgency, it is to last 75 days, maximum 90 days. Preliminary ruling regarding urgency must be issued within 10 days;

(v) The Panel must make an independent assessment regarding the violation of the Agreement, in accordance with the customary rules of Treaty interpretation. The Panel's standard of review is nevertheless unclear and there is no provision

[86] Articles 202 and foll. of the EU-CARIFORUM EPA.

equivalent to Article 11 of the WTO Dispute Settlement Understanding. The Panel's ruling can include a recommendation on how to ensure compliance (this is obligatory for environment and labor issues).

It should be noted that the EU-SADC Interim Agreement also provides for the issuance of an Interim ruling.

(vi) By contrast with the WTO procedure, no appeal is possible.

(vii) The party, the measure of which was found to be inconsistent with the agreement, must comply with the Panel's ruling. This must be done in a reasonable period of time and, like in the WTO, arbitration may be requested to determine such period. Furthermore, the Panel may be reconvened again should a dispute arise in relation to compliance. This new procedure must be completed within 90 days (45 days in case of urgency).

(viii) Finally, remedies are also provided for. Like in the WTO, the losing party may offer compensation instead of compliance. The complaining party may also take "appropriate measures," including suspension. In this case, the measures should "least affect the attainment of the objectives of the Agreement and shall take into consideration their impact on the economy of the Party complained against and on the individual States."

Remedial measures must be temporary, to ensure compliance, and they are subject to review. The EU-SADC Interim Agreement explicitly provides that "*[t]he EC Party shall exercise due restraint in asking for compensation or adopting appropriate measures."*

A Panel may be convened to assess the legal consistency of "appropriate measures" and that procedure should not last longer than 45 days.

In the more recent agreements, forum shopping with WTO Dispute Settlement Procedure is authorized. However, the two procedures cannot be initiated at the same time.

In the author's knowledge, the bilateral dispute settlement procedures have never been tested so far and therefore there is no practice or case law on which to rely for an assessment of their effectiveness. As indicated earlier, the parties realize that having recourse to such

procedures may not be the best political response to implementation difficulties.[87] Furthermore, trade intensity between the parties may not be sufficiently high to undertake a full legal dispute, and the private sector may, itself, not exercise strong enough pressure to see benefits accruing from the agreement enforced. This situation may change, however, with the expected increased awareness of the private sector of the existence of the agreements and of their important legal implications for its business.

3. The Eu's Market Access Strategy

The European Union, in the meantime, provides to its own enterprises an array of tools and instruments to take advantage of the preferential market access rights resulting from the agreements. This is in the context of the EU's market access policy that was launched soon after the entry into force of the WTO Agreements, on 14 February 1996.[88] In a Communication to the EC Council, Parliament and Consultative Committees, the Commission referred to globalization of the economy and the resulting need for increased competitiveness of the EC industry. Improved market access for the EC industry in non-EC countries was considered one of the main elements for the achievement of this objective. Community enterprises were thus encouraged to invest in new markets outside the borders of the European Union and all support of the European Commission promised in this respect.[89] This policy is still proactively pursued[90] and it evolves around three aspects: a multilateral aspect, bilateral negotiations, and flanking policies.

Multilaterally, the policy refers to the EU's proactive participation in WTO activities with a view to increase market access rights for its products and services. Bilateral policies

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[87] The dispute settlement model entails a strong political component anyway, which may actually also provide limited added value to the recourse to it. See Ramírez Robles, E., "Political & Quasi-Adjudicative Dispute Settlement Models in European Union Free Trade Agreements, Is the quasi-adjudicative model a trend or is it just another model?", WTO Staff Working Paper, ERSD-2006-09, November 2006, available in: http://www.wto.org/english/res_e/reser_e/ersd200609_e.pdf , 43p

[88] See P. Vander Schueren and D. Luff, "The Trade Barriers Regulation and the Community's Market Access Policy", *European Foreign Affairs Review*, 1996, 2, p. 215-221.

[89] European Commission, Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, "*The Global Challenge of International Trade: A Market Access Strategy for the European Union*", COM5 (96) 53 final, Brussels, 14 February 1996.

[90] The EU' Market Access Strategy was confirmed and adapted in 2007 to become the EU's "Partnership Policy". While the idea behind the adaptation was to launch bilateral partnerships with several countries, the fundamental objective of market access remains valid. See http://ec.europa.eu/trade/creating-opportunities/trade-topics/market-access/global-europe/

consist in doing the same with specified trade partners and using all possible persuasion means in the framework of bilateral negotiations (general or sectoral) for the conclusion of trade agreements. Bilateral policies may also imply the negotiation of mutual recognition agreements in the areas of technical regulations, standards and SPS measures, as provided by the TBT and SPS Agreements and include the conclusion of investment treaties. Flanking policies, finally, are those that actually enable the EU to effectively conduct those multilateral and bilateral policies and exercise its international trade rights. They provide the tools for the systematic identification and elimination of specific obstacles to trade in non-EC countries through the determination of a coordinated action in partnership with the private sector.

4. Database Of Barriers To Trade

In this context, the EU developed a sophisticated Market Access Database containing a wealth of information about non-EC countries' markets and the barriers encountered there. For instance, it provides information on applied tariffs, import formalities, and trade barriers in those countries. It also contains a Statistical Database of trade flows between the EU and non-EU countries, as well as several studies concerning selected market access issues. The Commission analyses obstacles to trade brought to its attention and inserts them in the database. It also posts progress reports of the community's action on each identified obstacle. The Commission also regularly invites businesses to provide information about any trade restrictions not yet included on the database: "The more information you give us about a market access problem, including its economic impact, the more effectively we can formulate a policy aimed at resolving it." (see http://mkaccdb.eu.int) Such information then constitutes the basis of the trade diplomacy of the Commission towards its trade partners and may entail, when needed, formal requests to accelerate implementation of their agreement.

5. The Trade Barriers Regulation

The Trade Barriers Regulation (TBR)[91] is the strongest instrument made available to the private sector in the context of the EU's trade offensive policy. Its provides individuals and companies, their associations, or even member states with a lever to move the EC Commission towards the initiation of a dispute settlement procedure in the context of the WTO or bilateral trade agreements. The TBR provides for the lodging of a complaint by the European industry requesting the initiation of an investigation when trade barriers ("obstacles to trade") exist in violation of the EU's international rights, which either inflict injury on the European market or create adverse trade effects on export markets outside the European Community.

EC enterprises or any association acting on their behalf, which consider that they have suffered, individually or collectively, adverse trade effects on the market of a non-EC country can file a complaint. The latter must contain prima facie evidence of a right of action of the EC before an international forum (whether multilateral, plurilateral or bilateral) and prima facie evidence of the existence of an injury or a threat of injury incurred by the Community industry in the market of the Community, or of an adverse trade effect in a non-EC country, caused by the obstacle to trade. The complaint must also provide prima facie evidence of the unfavorable impact of the obstacle to trade on the economy of the whole of the community or of a region of the community or on a sector of economic activity therein. Thus, it is not sufficient to establish that the complainant alone suffered from negative effects. In practice, considering the Commission's market access strategy, this requirement is interpreted widely by the Commission and seems only to concern complaints whose impact would be too limited.

The EC Commission has then 45 days from the filing of the complaint to decide, after consultation of an advisory committee composed of representatives of member states, to launch a formal examination procedure. It will do so if the complaint contains sufficient evidence of the existence of an obstacle to trade that violates the EU's international trade rights and causes injury or adverse effects and to decide if this is in the interest of the community. The initiation of the

[91] Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the Common Commercial Policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation, O.J.E.U L 349, 31 December 1994, page 71, as amended by Council (EC) Regulation 356/95, O.J.E.U L 41, 23 February 1995, page 3 and Council Regulation (EC) No 125/2008 of 12 February 2008, O.J.E.U L 40/1, 14 February 2008.

investigation is published in the official journal and the representatives of the non-EC countries concerned are officially notified.

The requirement that the investigation should be in the community interest could constitute an important loophole in the procedure. However, realizing the risk that enterprises may not use the instrument in the absence of sufficient legal guarantees of objectivity, the Commission decided to apply this condition in a flexible way. It seems to recognize that the community interest merely lies in the abidance by its trade partners to their commitments under international trade rules.

Upon initiation of the investigation, all interested parties may make their views known, including the complainant, who will be informed of the arguments developed by the other parties through non-confidential versions, which must be kept available in the Commission's file. The Commission often sends questionnaires to the interested parties and verifies the information provided in the responses. Authorities of the non-EC countries concerned with the investigation may assist the Commission.

The Commission's examination procedure is normally to be concluded within five months of its initiation, but in no event more than seven months after its initiation. Within that deadline, a report must be presented to the Advisory Committee about the Commission's proposal. If the result of the investigation is that the complaint is not justified or if no Community action is required in the interest of the Community, the investigation will be terminated. Where the non-EC country targeted by the investigation takes corrective action, such as the removal of the incriminated practice, the investigation may be suspended for the period necessary for the Commission to be satisfied that the obstacle to trade and the harmful effects thereof are effectively corrected. The investigation may also be suspended if at any time the conclusion of an agreement with the non-EC country appears more appropriate.

Where the EC Commission comes to the conclusion, following examination, that the complaint is grounded, and that action is necessary in the interest of the Community with a view to removing the obstacle to trade or the negative effects thereof, it initiates an international dispute settlement procedure, after consultation of the Advisory Committee. The TBR clearly provides in this respect that no retaliatory measure may be taken outside the relevant international procedures (bilateral treaty or the WTO).

It should be noted that prior to the conclusion of the EU-CARIFORUM EPA and the IEPAs, single enterprises could only file a complaint under the TBR in relation to alleged violations of the WTO agreements. In February 2008, the TBR was amended to include the right to file a complaint in relation to bilateral trade agreements.[92] This indicates the resolve of the EU to pursue implementation of these agreements when its private sector so requires. It also confirms that the trade policy of the EU towards developing countries remains somehow hybrid, characterized both by a classical mercantilist approach and a development-oriented attitude. It is undoubtedly the EU's right to do so and its trade partners would be advised to also consider developing a proactive market access strategy while giving the tools to their enterprises to take advantage of the agreements.

The European Commission has handled around 24 investigations under the TBR so far. Twelve targeted developing, mostly Latin American, countries.[93] Allegations were based on violations of the WTO Agreements. No investigation has yet involved an alleged violation of a bilateral agreement.

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[92] Council Regulation (EC) No 125/2008 of 12 February 2008, O.J.E.U L 40/1, 14 February 2008.

[93] See Notices of initiation of an examination procedure concerning obstacles to trade within the meaning of Council Regulation (EC) No 3286/94, consisting of

- measures imposed and practices followed by India affecting trade in wines and spirits, *O.J. C 228,* 17 September 2005, p. 6–8*;*
- measures imposed and practices followed by the Eastern Republic of Uruguay affecting trade in Scotch whisky, *O.J. C 261* , 23 October 2004, p. 3 – 5*;*
- trade practices maintained by Brazil in relation to imports of retreaded tyres, *O.J. C 003* , 07 January 2004, p. 2 – 3*;*
- trade practices maintained by Colombia in relation to the imports of motor vehicles, *O.J. C 236*, 18 August 2000, p.4 – 5;
- Brasilian Export Financing Programme (PROEX), *O.J. C108*, 17 April 1999, p.33 – 35*;*
- trade practices maintained by Brazil in relation to the imports of Sorbitol, *O.J. C 361* , 24 November 1998, p. 13 – 14*;*
- trade practices maintained by Chile in relation to the transit and transhipment of swordfish in Chilean ports, *O.J. C 215* , 10 July 1998, p. 2 – 3*;*
- trade practices maintained by Brazil in relation to trade in textile products, *OJ C 063* , 27 February 1998, p. 2 – 4*;*
- Brazilian import licensing regime for steel plates, *O.J C 197* , 27 June 1997, p. 2 – 3*;*
- trade obstacles maintained by Brazil concerning trade in Cognac, *O.J. C 103* , 02/04/1997 p. 3 – 4*;*
- obstacles to the export of raw hides and skins and to the import of finished leather maintained by the Republic of Argentina, *O.J. C 059* , 26 February 1997, p. 6 – 8*;*
- piracy of Community sound recordings in Thailand and its effects on Community trade in sound recordings, *OJ L 11,* 16. January 1996.

5. Conclusion

This paper has highlighted the many challenges in implementation of bilateral trade agreements in favor of developing countries and the responses provided by the European Union in this regard.

It has argued that implementation challenges start at the negotiation phase. Indeed, the EU insists that its trade agreements with developing countries are a tool for their sustainable development. Therefore, they go beyond the mere search for a negotiated balance of reciprocal trade benefits between the parties. They must contain all the elements that would effectively contribute to those countries' economic development. Defining those elements, however, is not an easy task. Reality indicates that not all parties have either the capacity or diligence to carry out such a definition. This document argues that the classical negotiating approach, grounded on the idea that successful negotiations are based on a balance of reciprocal trade benefits and concluded when all negotiators agree on a final compromise, may be based on false assumptions. Not only do all the parties lack a proper understanding of what their optimal trade benefits are, but several have not initiated the reforms required to prepare for the negotiations and take advantage of the expected trade benefits. The risk is that a trade agreement may miss its development objective and suffer from a lack of legitimization among the stakeholders in the countries involved. This may jeopardize implementation. While the EU is now sensitized to these issues and offers substantial help and support through technical assistance activities, delivery of these activities must be improved.

Other implementation challenges exist upon signing of the agreements. Indeed should parties still doubt that a signed agreement fully matches their interests and development needs, they may be tempted to refuse or at least delay its ratification in order to obtain a renegotiation of its terms. In the EU the ratification process is not straightforward and it involves substantial political scrutiny and participation of all its institutions. With respect to developing countries, the EU has developed an array of tools to avoid ratification failure, from the request that the parties agree to a provisional application, to suspension of the benefits of that provisional application should there be a refusal to ratify or an "unreasonable delay" to do so. The EU counts on the fact

that the benefits of provisional application are obvious in the very short term for the developing countries.[94]

Another implementation issue concerns the status of the bilateral trade agreements under domestic law. In the EU, they integrate the EU legal order upon ratification. Yet, the possibility for private businesses to make direct use of them before domestic courts (the "direct effect" issue) remains somehow uncertain. One could regret that in most EU-negotiated agreements the parties did not clarify this issue in the text of the agreements themselves. However, considering current case law, direct effect is likely in the EU in relation to bilateral trade agreements concluded with developing countries. This clearly supports the enforcement of the agreements in the EU by the economic operators themselves. It remains to be seen to what extent similar treatment would be offered in the judiciary of the EU's trade partners. Lack of recognition of direct effect by the Courts in these countries is more likely considering the overall level of distrust caused by what are perceived to be "hastily" negotiated agreements. The consequence is a reduced implementation opportunity in these countries, to the detriment of the European enterprises seeking market access there and local importers of EU products and users of EU services. Furthermore, the EU agreement with Peru and Colombia, which was initialed in May 2010, expressly denies direct effect to the detriment of all economic operators. This can be seen as a step backwards in the implementation capability of the agreement and it remains to be seen whether this prefigures a new approach in the drafting of the EU trade agreements in general.

Other implementation challenges arise in relation to the application of the terms of the agreements in the legal order and the practice of the parties. The parties may not wish to or are unable to implement all the provisions of an agreement. Developing countries in particular may lack the political consensus to do so or are confronted with some of the agreement's harsh effects in the short term. Such countries may lack the capacity to implement the agreement and may not be sufficiently prepared to take advantage of it. The EU realizes these challenges and it offers substantial technical assistance and budgetary support to overcome them. Substantial improvements should be made, however, in the way technical assistance is managed, received, and supervised. The EU also supports the adoption of adequate implementation management monitoring mechanisms and development-oriented implementation programmes. These should

[94] Indeed, full market access in the EU takes immediate effect, while this is gradual in the market of the other parties.

be established to ensure the agreements produce their intended benefits and to facilitate the determination of relevant remedies if the development expectations are not met. In addition, the agreements themselves provide for institutions that facilitate dialogue and adjustment to difficulties. Renegotiation of the agreement is also possible in some cases. Dispute settlement procedures leave substantial room for negotiated settlement. Furthermore, while sanctions are possible, in the form of the suspension of the agreement, they can only be imposed as a last resort. Preference is therefore clearly for dialogue, cooperation, and negotiated settlement of disputes.

Trade agreements, however, are also mercantilist and offer additional market access opportunities to the economic operators in the territories of the parties. The European enterprises may wish to take advantage of these opportunities and request full support of the EU in this regard. The EU has indicated its intention to provide this support and enables individual actions under the Trade Barriers Regulation. The EU is thus playing a double game: on the one hand it pledges full support to the economic development of its trade partners and on the other it is committed to support its own enterprises in the context of a proactive market access strategy. While some may consider this as blatant hypocrisy and distrust the whole process, actually this is not necessarily incoherent or impossible if trade strategies on both sides are well engineered and negotiations are well prepared and handled. Developing countries may also eventually develop their own offensive strategies. Finding the right "win-win" approach and establishing trust requires patience and a strong political talent on both sides. Beyond law and procedures, this is probably the highest challenge ahead.