

ACP/00/051/07 Rev. 1
Sustainable Economic Development

Brussels, 11 October 2007

**Meeting of the ACP Legal Experts on EPA Negotiations
ACP House 9 – 11 October 2007**

Final Report

Opening

1. The meeting of the ACP Legal Experts was held at ACP house from 9 – 11 October 2007. The meeting was organized following a recommendation of the Sixth Meeting of the ACP Technical Follow-Up Group on EPA negotiations (TFG) which took place in Brussels on 10 to 12 July 2007. In that meeting, the TFG noted that a number of issues surrounding the negotiation, conclusion and implementation of EPAs required legal advice. In that regard, the ACP Secretariat was requested to convene at the earliest possible time a meeting of ACP Legal Experts.
2. The meeting of ACP Legal Experts was Chaired by Dr. Jim Gosselin, Regional Trade Policy Adviser of the Pacific Island Forum Secretariat and was attended by Legal representatives from CARIFORUM; CEMAC; EAC; ESA, PACIFIC FORUM; ECOWAS; UEMOA, SADC and Africa Union Commission. Other participants were drawn from ECDPM; OIF, South Centre and UNCTAD. In addition, representatives from ACP Missions in Brussels also attended. The full list of participants is attached.
3. The meeting was opened by the Sir John KAPUTIN, Secretary-General of the ACP Group of States.
 - 3.1. The meeting considered the following main issues:
 - 3.2. Status of EPA texts in each region;
 - 3.3. Dispute settlement mechanism;
 - 3.4. Relationship between the Cotonou Agreement and EPAs in the areas of the Non-Execution Clause and procedures for delivery of support for EPAs;
 - 3.5. Definition of parties;
 - 3.6. Entry into force - transition measures and ratification process;
 - 3.7. Final provisions – duration; withdrawal; review clause; and exceptions;
 - 3.8. Institutional issues; and
 - 3.9. Notification to WTO;

Status of EPA texts in each region

4. The representatives of each of the six negotiating regions provided an update on the status of EPA texts in their respective regions. The following points emerged:
 - 4.1. ACP regions are at different stages of negotiations. One region indicated that it expected to conclude the negotiations on time. Another region envisaged concluding an Interim Agreement while the majority expressed serious doubt that they will be ready by the deadline of 31 December 2007. All regions expressed commitment to conclude on time but seem to be inhibited by the amount of technical work that is outstanding.
 - 4.2. All the ACP regions have been experiencing difficulties in coming up with market access offers to the EC, particularly when developing the list of sensitive products to be excluded from liberalization. Lack of uniform interpretation of substantially all trade and transition period as provided in Article XXIV of GATT has constrained the work of designating products to be liberalized and calculating the value of trade to reach the agreeable percentages. In some regions, studies have yet to be conducted to determine what should be liberalized and the impact of liberalization.
 - 4.3. Other issues where serious divergences exist include failure to secure from the EC legally binding commitments on capacity building and development support, services and Singapore issues. On the latter, the meeting was informed that while ACP regions called for the building of capacity before making commitments, the EC conditioned its capacity building support to the scope of commitments taken in these areas. Some regions had already identified and quantified their EPA related development needs. However, the EC continues to refuse to make commitments on the basis that development support is the prerogative of the European Union Member States.
 - 4.4. The composition of negotiating configurations has also posed a problem of adopting a uniform regional approach to the negotiations. The overlap of membership and incongruence with regional integration groupings continues to hamper progress in the negotiations.
 - 4.5. The ACP attaches great importance to these negotiations which are receiving attention at the highest political level. In CARIFORUM, Heads of State and Government met on 4 – 5 October 2007 to consider progress in the negotiations while in the Pacific, they are expected to meet in Tonga on 15 October 2007. In Africa, EPAs are a standing item of the agenda during the Summits of the Africa Union. (Indeed they could feature prominently in the EU-Africa Summit in Lisbon in December this year).
 - 4.6. The meeting took note of information provided to the effect that if political commitment to conclude the negotiations is demonstrated by the

ACP regions, the EC is ready to facilitate a roll over of current trading arrangements, but only for a few weeks.

Recommendations

5. *From the presentations and discussions, some of the recommendations that could be drawn are as follows:*
 - 5.1. *Regions not in a position to conclude a comprehensive EPA may consider focusing on an Interim Agreement that is WTO compatible initially containing trade in goods (goods liberalization schedules, rules of origin and safeguards) and a development chapter. Time permitting, additional chapters could be added. The main benefit of an Interim Agreement is that it would stem the problem of disruption of trade that is imminent if comprehensive negotiations are not concluded on time.*
 - 5.2. *Countries in a region not in a position to immediately determine their liberalization schedules should be allowed to accede to the Interim Agreement at a future date on comparable terms and conditions.*
 - 5.3. *The EC should facilitate a roll over of current trading arrangements, as soon as possible, for regions that will not be in a position to conclude Interim Agreements by 31 December 2007.*
 - 5.4. *Regions should ensure that they obtain adequate transition periods running up to 25 years.*
 - 5.5. *The ACP may welcome the offer for Rules of Origin that allow open sourcing for fishery products and which also facilitate processing of agro products, textile and fisheries. Other improvements in the rules of origin should continue to be explored.*
 - 5.6. *Concerning the access of ACP nationals to enter the European Union for temporary employment, the proposal for a human resource development scheme in place of Mode IV services access, looks attractive and should be explored and studied further.*

Dispute settlement mechanism

6. In introducing this item, the Secretariat recalled the discussion of this subject by the TFG, namely that not much progress had taken place although there was a need for common approach. Furthermore, the TFG had also reiterated that there should be no collective responsibility for the violation of obligations by one member of a region, even where common obligations may apply.

7. It was noted that some regions had developed their own text on dispute settlement mechanism. At the same time, all the regions had received a similar text from the European Commission.
8. Following presentations by regions, a number of observations relating to the EC text on dispute avoidance and settlement mechanism submitted to the regions were made as follows:
 - 8.1. The dispute avoidance and settlement mechanism should be simple, cost effective, equitable and efficient to use.
 - 8.2. The provisions of Article 98 of the Cotonou Agreement on dispute settlement are not adequate to cater for an EPA hence the need to design a new mechanism. The relationship between the two mechanisms should be clarified.
 - 8.3. Under the initiation of arbitration procedure, the text should make reference to *situation* as well as to *measures* which constitute a breach of provisions.
 - 8.4. The requirement of the presence of a representative of each Party in Article 6.5 of the draft EC text on dispute avoidance and settlement mechanism submitted to regions, could be used to block Panels from being formed. This requirement should be re-examined.
 - 8.5. Article 21 on WTO obligations of the EC text may not be a practical provision for ACP regions which have many countries that are not members of WTO.
 - 8.6. There is need to ensure that forms of redress that are available for the ACP would be effective.

Recommendations

9. *In the ensuing discussions, the following recommendations were made;*
 - 9.1. *In view of the need to enhance the partnership, the focus should be more on avoidance of disputes than settlement. One way of addressing this is by strengthening the consultation and notification procedures in the trade defense instruments. The ACP regions should come up with other provisions that meet this objective.*
 - 9.2. *There is need to ensure that the redress available to the ACP States in the negotiations is effective. In this regard, suspension of concessions may not be effective, financial compensation should be permitted as an effective alternative. The financial compensation should either be agreed or set by the panel and should include the litigation costs.*

- 9.3. *Since litigation cost is high and highly prohibitive on the part of the ACP, a legal, financial and technical support facility such as the Advisory Center on WTO law in Geneva, should be negotiated for and made available for use by ACP States to help them to participate in the EPA dispute settlement process.*
- 9.4. *In order to address the legal and technical capacity constraints of ACP regions, the use of "Amicus Curiae", from International Organizations or Non-Governmental Organizations should be permitted.*
- 9.5. *Appropriate measures considered under temporary remedies against ACP regions in case of non-compliance should not affect development assistance.*
- 9.6. *Since EPAs are destined to be development instruments, panel rulings and interpretations should be guided by the impact on development of the ACP region concerned and not made simply to fit compliance with the text of the EPA.*
- 9.7. *There could be need to set up separate dispute settlement arrangements that will apply in other aspects of the EPA, such as rules of origin and trade defense instruments.*
- 9.8. *The dispute settlement process can highlight problems which are similar to those encountered by a State within a region or a state in another region of the ACP. It would therefore be useful to consider the involvement of third parties*
- 9.9. *For cost effectiveness, the dispute settlement procedures should be applied at all ACP level with provisions specific to a region being introduced as necessary. The establishment of the list of panelist should also be made at the all ACP level. This is justified by the fact that Third Parties to a dispute could be within the same region or across regions within the ACP Group in cases where problems experienced are similar. Hence there is a need to establish a mechanism to cater for this situation.*
- 9.10. *The principle of special and differential treatment should apply to dispute settlement as well.*

Relationship between the Cotonou Agreement and EPAs;

Non-Execution Clause

10. Introducing this item, the Secretariat recalled that the EC has in the past signified its intention to have the non-execution clause contained in Articles 11, 96 and 97 of the Cotonou Agreement included in EPAs. The ACP position adopted by Council of Ministers in Botswana in 2004 is that measures to be applied (Articles 96 and 97) in the case of non-execution of obligations in Article 11 of the Cotonou Agreement should not apply to EPAs and must be confined to political cooperation.
11. The adverse impact that sanctions on one country could have on regional trade and integration, particularly, if the country concerned is a key trading partner or an outlet for landlocked neighbouring countries was recalled.
12. In addition, it was re-emphasized that there should be no possibility of collective sanctions, even where countries in a region adopt common obligations. However, the possibility should exist for ACP Group and regions taking collective action against the EC.

Recommendations:

13. *The presentation by regions and discussions that followed brought out the following:*
 - 13.1. *The ACP regions should reject any possible application of the Non-Execution clause by reiterating that the principles for negotiations of EPAs – which is a trade and economic cooperation agreement - are based on Article 37 of the Cotonou Agreement. No reference should be made to Articles 11 , 96 or 97.*
 - 13.2. *Since EPAs are expected to be WTO compatible, the WTO rules have set out what could trigger a trade dispute and this could be a guiding factor. What triggers the application of the non execution clause in the Cotonou Agreement is different.*
 - 13.3. *For precision and as a legal way out, the ACP regions should include an exception clause in the final provisions which states that “For the avoidance of doubt, Articles 11, 96 and 97 of the Cotonou Agreement will not apply to EPAs”.*

Procedures for delivery of support for EPAs

14. The meeting was informed that according to the discussions so far, most of the financial support to EPAs will emanate from the EDF kitty, through national and regional indicative programmes. Hence, the implementation and management procedures for these programmes will follow the provisions contained in Annex IV of the Cotonou Agreement. The linkage between Cotonou Agreement and EPAs was thus to be explored from this angle.
15. It was further noted that, so far, additional funding outside EDF was likely to come from individual EU Member States who have pledged to reach their trade related assistance to € 1 billion per year by 2010. The Member States had indicated that they would allocate around 50 percent of the increased funds to ACP States.
16. The meeting was reminded of the "sunset clause" whereby unutilized funds under the 9th EDF will, unlike past EDFs, not be rolled over to the 10th EDF but will be returned to EU Member States. Further, the funds available under the 10th EDF will not be accessible until the revised Cotonou Agreement is ratified by two-thirds of the ACP, the EU Member States and approved by the EC. So far only 28 ACP States out of the statutory requirement of 53 and 15 EU Member States have ratified.

Recommendations

17. *In the discussions that ensued, the following observations and recommendations were made.*
 - 17.1. *Provisions should be crafted to link the dismantlement of tariffs to the availability of development support so as to ensure that there is no loss in tariff revenue.*
 - 17.2. *Firm commitments should be sought from the EC on the amounts of contribution to be made to the regional EPA funds.*
 - 17.3. *The ACP States and the European Union Member States should be urged to urgently ratify the revised Cotonou Agreement to ensure that funds under the 10th EDF are accessible in a timely manner.*
 - 17.4. *ACP regions should adapt their regional financial procedures and delivery mechanisms to take account of the new implementation and management procedures.*
 - 17.5. *ACP regions should define their EPA related needs to make the case for increased EPA development support.*

Definition of parties

18. Introducing this item, the Secretariat said that the question of who will be the parties to the EPAs; the individual countries, the regional economic integration bodies or both, needs careful attention by ACP regions because of the consequent implications. To supplement, Mr Sanoussi Bilal of ECDPM presented a paper covering some legal issues related to EPAs. *(copy enclosed)*.
19. The meeting was reminded that Article 37 (5) of the Cotonou Agreement shows that the parties to the negotiations will be the Member States taking into account the regional integration process within the ACP.
20. As regards the regional integration organisations, their capacity to be part of the EPAs will depend on the mandate entrusted to them by the Member States.
21. It emerged that most regions had not finalized consideration of this issue due to the on-going regional integration process. The issue is complicated by the incongruence between the regional integration groupings and the EPA negotiating configurations.

Recommendations

22. *In considering this issue, the meeting came up with the following recommendations*
 - 22.1. *The definition of parties should be based on international law and jurisprudence particularly the relevant provisions of the Vienna Convention on the Law of Treaties and the WTO rules on rights and obligations.*
 - 22.2. *The meeting agreed that the Parties to an EPA will be, on the European side, the European Community (EC) and the EU Member States, in line with their respective areas of competence (as defined by the Treaty establishing the European Community), and on the ACP side, the ACP States of the EPA regional configuration and, where appropriate, the relevant regional organizations, in their respective areas of competence.*
 - 22.3. *How the parties are defined will have implications on the scope of obligations and rights for example on the calculation of substantially all trade.*
 - 22.4. *The regional integration processes should not be driven by EPAs but instead EPAs should support the existing regional integration processes.*

Entry into force; transition measures; provisional application and ratification process

23. In introducing this item, the Secretariat recalled that the ACP and EC negotiators have expressed a strong desire and given a political commitment to conclude the EPA negotiations within the prescribed timeframe. However, it was clearly evident that most of the ACP regions may not be able to address all issues and sign the Agreements by December 2007. The negotiations had been faced with substantial delays with both parties being partly responsible. The ACP countries and regions have experienced serious constraints in their capacity to prepare for EPA negotiations and implementation. The EC on its part had in most cases not responded expeditiously to ACP requests and positions during the negotiations. This had slowed down the EPA negotiation process thus missing timeframes and deadlines agreed in the respective regional road maps.
24. In light of the above, it was imperative that two aspects of the transition measures be addressed: the transition measures required to ensure continuation of uninterrupted trade in a situation where Parties manage to sign before 31 December 2007, as per the Cotonou Agreement provisions, and transition measures required to stem trade disruption in a case where the Parties, even with the best will in the world, fail to complete and conclude the negotiations on time.
25. The meeting was informed of the EC position that for the agreements to be in force by 1 January 2008, negotiations had to be completed by early November 2007 to allow for finalization, legal procedures and measures to be put in place on the EC side.
26. As concerns ratification, it was observed that Cotonou Agreement took three years when the EU had 15 Members. With the current 27 Member States, there are fears that the ratification process will take an inordinately long time to complete. The ACP States have also been slow to ratify as exemplified by the revised Cotonou Agreement signed on 25 June 2005.
27. The Secretariat's presentation was supplemented by Dr. San Bilal of ECDPM who gave additional information concerning the ratification process on the EC side. (*See attached paper*).
28. The meeting decried the fact that trade is already being disrupted because importers are refusing to take export orders (which should be confirmed up to 3 months before delivery) due to uncertainty about the trade regime that will apply as from 1 January 2008

Recommendations

29. *In the ensuing discussions, the meeting recommended that*

29.1. To stem trade disruption, initial agreements to cover trade in goods and development could be concluded within the legal time frames and provisionally applied, while negotiations in other areas continue.

29.2. The entry into force of the interim agreements and the EPAs will be guided by the constitutional provisions on how international agreements are treated in each Member State within a negotiating region. These should be studied with a view to making preparation for ratification process at the regional level.

29.3. In addition to ratification, a further requirement is the domestication of the Agreements. This refers to change of national legislation, setting up of relevant institutions and in general making necessary preparations for implementing the Agreements. The regions should bear this process in mind.

29.4. The consequences of one member in a regional grouping not signing or not ratifying should be taken into account.

Final provisions – duration; denunciation; review clause; exemptions

30. Introducing this item, the Secretariat made reference to the final provisions contained in the Cotonou Agreement, namely, possible conflict between EPA Agreements and other treaties (Article 91 of the Cotonou Agreement), scope of territorial application; accession; duration of the agreement and revision clause; exceptions; denunciation clause and status of the texts.

Recommendations

31. The meeting recommended that

31.1. Negotiators should take account of these provisions which are standard elements in international agreements hence they should be guided by the international practice.

31.2. The relationship between the Cotonou Agreement and EPAs should be clarified. In particular the meaning derived from the proposals in the EC text, namely that the provisions of the Cotonou Agreement and EPAs will be interpreted in a complementary and reinforcing manner should be examined.

- 31.3. *Exceptions in trade agreements are provided for in Article 20 and 21 of the GATT/WTO Agreements. They should include generally accepted principles as relates to security, protection of public morality, protection of artistic and historic sites and products that can not be traded in a normal manner (arms, nuclear material).*
- 31.4. *Ambiguous provisions should be avoided. For example, reference to an "emergency situation" is not clear as interpretation could be subjective.*
- 31.5. *There was a need to provide for "rendezvous clauses" (a built in mechanism for review) so that if regions experience difficulties in complying with the provisions, then possibility is provided for review of the Agreements.*
- 31.6. *The issues of languages of the text and obligations that go with it need careful study.*
- 31.7. *The implication of EPAs being of indefinite duration should be explored further.*
- 31.8. *Review or revision clauses should be inserted to take account of the possible negative implications of EPAs.*
- 31.9. *The implications of the revision clause as proposed by the EC should be examined thoroughly*

Institutional issues

32. Introducing this item, the Secretariat recalled that in the report on the joint review of the EPA adopted by the Council of Ministers, the ACP and the EU agreed on the need to agree on and reinforce the institutional and monitoring mechanisms for the effective implementation of EPAs.
33. The Secretariat further introduced **Document ACP/00/049/07** which explores the institutional arrangements, and in particular the role of the ACP Group and ACP Secretariat in Brussels, in the follow-up and implementation of EPAs. The document also examines the representation of ACP Group at the international and WTO levels.
34. A Representative of ECDPM complemented by introducing the summary of study on EPA monitoring as contained in his paper referred to above. He noted that EPA monitoring although recommended by the European Parliament had not seriously been addressed by the EC side.

Recommendations

35. *The meeting noted that these issues had not been addressed in detail in the regions as well and hence recommended that:*

35.1. *The document from the ACP Secretariat and the paper from ECDPM contain useful positive elements and deserve further consideration.*

35.2. *All ACP level information sharing and strategizing during the implementation process was emphasized and considered very important.*

Notification to WTO

36. The meeting was presented with the WTO provisions on transparency mechanism in regional trade agreements as contained in document WT/L/671 and WT/REG/16. A further more detailed presentation was made by a representative of South Centre.

Recommendation

37. *The timing of the notification should be noted and observed by the regions. This should be discussed during the negotiations*

37.1. *The WTO transparency rules on regional trading agreements adopted on 1 December 2006 have hardly been used and therefore, regions should study and become familiar with them. All efforts should be made to comply with the new provisions.*

37.2. *For purposes of notification to the WTO, a distinction should be made between the an Interim Agreement as defined in the WTO Agreement on Regional Trading Arrangements and that which is aimed at ensuring there is no disruption of trade between an ACP region and the European Union.*

37.3. *Careful study of the emerging practice in WTO on the relationship between trade liberalization and development should be seriously considered since a strong link has lately been established.*

Other business

38. Under other business, the meeting decried the fact that despite agreement reached at the ACP Technical Follow-up Group of EPA negotiations to share

negotiating texts with the other regions; this had not been possible because only two regions had supplied their texts to the ACP Secretariat.

Recommendations

39. The importance of the role of the Legal Experts in the negotiation and implementation of the EPAs was emphasised especially in drafting, finalization of the texts and interpreting the agreements. Additional meetings of Legal Experts should be held.

40. The meeting reiterated the importance of sharing information and experiences in the negotiations. This practice should be continued in the remaining negotiating period and into the implementation phase.
