

The Cotonou Agreement and economic partnership agreements

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I. Introduction

This chapter examines the right to development in the context of the ongoing negotiations to finalize economic partnership agreements (EPAs) that African, Caribbean and Pacific (ACP) countries are signing with the European Union. EPAs are being negotiated within the framework of the Cotonou Agreement.¹ As an essential part of the Cotonou Agreement, EPAs have the following development objectives: poverty reduction, promotion of sustainable development and facilitation of the integration of ACP countries into the global economy through trade.²

The European Union and ACP countries agreed in 2000 to negotiate EPAs pursuant to article 36 (1) of the Cotonou Agreement with a view to designing trading arrangements that would be compatible with World Trade Organization (WTO) rules by progressively removing “barriers to trade between them and enhancing cooperation in all areas relevant to trade”. The EPA negotiations, in essence, have sought to end non-reciprocal trade preferences that ACP countries

enjoy from the European Union. These preferences have ended since the WTO waiver of the most-favoured-nation norm that allowed their existence expired at the end of 2007, in accordance with article 37 (1) of the original text of the Cotonou Agreement. EPA negotiations have not, however, been concluded in many of the ACP regions.³

The Cotonou Agreement does not specifically incorporate the right to development in its substantive, as opposed to its hortatory, positions. However, the Agreement makes human rights an essential element and one of the five pillars of the European Union-ACP partnership, and it incorporates most of the rights contained in the Declaration on the Right to Development.⁴ While human rights are not explicitly made a part of the other four pillars of the partnership, certain provisions of the Agreement that positively impact human rights could, arguably, be read as cross-cutting all five partnership pillars. These provisions do not provide an explicit basis for assessing the human rights impacts of commitments made under the five pillars of the Cotonou Partnership. That means that new European Union-ACP commitments under the EPAs are not bound by the human rights mandate within the Cotonou Agreement. This is especially true since EPAs are being negotiated as stand-alone agreements

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¹ Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000. The first revision to the Agreement, negotiated in 2004/2005, entered into force in 2008. The second revision, negotiated in 2010, became applicable on a provisional basis in November 2010. The references in the present chapter are to the text as modified in the agreed consolidated text (March 2010) of the second revision of the Agreement, available at http://ec.europa.eu/development/icenter/repository/second_revision_cotonou_agreement_20100311.pdf.

² See at the European Commission website <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/africa-caribbean-pacific>.

³ Articles 35 (2) and 37 (3) of the Cotonou Agreement provide a basis for conducting EPA negotiations within the regions rather than bilaterally as part of the Agreement’s goal of strengthening regionalism as a strategy of integrating ACP countries better within the international trading system.

⁴ The five pillars being: a wide-ranging political dimension; participatory approaches; an increased focus on poverty reduction; a new framework for economic and trade cooperation; as well as a reform of financial cooperation.

that, unlike the four other partnership pillars, will be governed by a separate treaty regime in each of the seven ACP regions.⁵

From a right to development perspective, EPAs are being negotiated under conditions that undermine the full participation of ACP States, preventing them from determining the development objectives set for them in the EPAs, as I explore in section VI of this chapter. For ACP countries, these agreements will result in huge losses in revenue and restricted access to the European Union market. This makes it highly likely that the social and economic human rights of millions will be adversely affected. Other concerns include expanding negotiations into new areas like competition and Government procurement that will impose a heavy cost burden on ACP countries that far outweighs the potential dynamic benefits that the new commitments will create.

EPA negotiations on trade need to take into account the special needs of developing and least developed countries, particularly the need for preferential treatment in trade relations which are increasingly becoming the dominant pillar of European Union-ACP relations. Human rights ought to take centre stage in EPA negotiations and in the European Union-ACP partnership. This is consistent with article 177 (2) of the EC Treaty,⁶ which provides that European Union development cooperation should contribute to respect for human rights and fundamental freedoms. Similarly, article 11 (1) of the Treaty of the European Union provides that one of the objectives of the European Union's foreign and security policy is "to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms".

In section II of the chapter, I will examine the meaning and legal status of the right to development. Section III examines the status and human rights implications of the various EPA negotiations. Section IV deals with the five pillars of the Cotonou Agreement with special reference to the right to development and section V reviews the main obstacles to the incorporation of human rights concerns within the Cotonou Partnership Agreement. Section VI discusses the impact of the EPA negotiations on human rights within ACP

countries from a right to development perspective and section VII examines the potential areas of congruence and synergy between the Cotonou Partnership Agreement, on the one hand, and the right to development, on the other. Before concluding, section VIII proposes recommendations to factor essential elements of the right to development into the Cotonou Partnership Agreement's operational framework.

II. Status of the right to development

The Declaration on the Right to Development holds the human person to be "the central subject of development" and an "active participant and beneficiary of the right to development", both "individually and collectively". It makes the right to development an "inalienable human right" through which all persons can come to enjoy "all human rights and fundamental freedoms" as well as "the right of peoples to self-determination", including "the exercise of their inalienable right to full sovereignty over all their natural wealth and resources". The Declaration also provides that the promotion, implementation and protection of the right to development shall not justify "the denial of other human rights and fundamental freedoms".

Although the legal status of the right to development continues to be debated among States Members of the United Nations as well as in academic circles, its importance continues to be reflected in its reaffirmation and reiteration in subsequent General Assembly resolutions, in the African Charter on Human and Peoples' Rights as well as in the United Nations Millennium Declaration.⁷ As I note below, the European Union has reiterated its "attachment" to the right to development.⁸ The continued relevance of the right to development is also evidenced in the appointment and work of the high-level task force on the implementation of the right to development, and before that in the appointment of an independent expert (who produced eight reports) and an open-ended working group (which held its thirteenth session in 2012) by the Commission on Human Rights. The Human Rights Council has continued to give attention to the recognition of the right to development. In international law, the reiteration of a right is recognized as additional evidence of its existence.⁹ Notwithstanding the

⁵ These regions are: West Africa; Central Africa; East African Community; Eastern and Southern Africa; South African Development Community; Pacific Countries; and Caribbean countries. Of these groups, only the Caribbean one has a finalized EPA. There have been splinters within many of these groups, as I allude to further below.

⁶ Consolidated Versions of the Treaty on European Union and the Treaty Establishing the European Community (25 March 1957), *Official Journal of the European Union*, C 321 (29 December 2006) (hereafter "EC Treaty").

⁷ General Assembly resolution 55/2.

⁸ Statement by the European Union to the Commission on Human Rights at its fifty-eighth session (16 April 2002).

⁹ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1996, p. 14, on how reiteration and elucidation of a norm can affirm its existence in a different context (para. 188).

debate about the legal validity of the right to development, the desire to move vigorously towards the realization of its underlying objectives and principles has remained.¹⁰ Below, the attributes of the right to development that have continued to be reiterated or affirmed as rights or principles are briefly outlined.

The Rome Declaration on World Food Security, adopted at the World Food Summit in 1996, recognized in its opening paragraph “the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free of hunger”. The work of the Food and Agriculture Organization of the United Nations (FAO) in this respect mirrors article 8 (1) of the Declaration on the Right to Development which obliges States to undertake “all necessary measures” to “ensure ... equality of opportunity for all in their access to ... food”.¹¹

The United Nations Millennium Declaration explicitly acknowledges a commitment to “making the right to development a reality for everyone and to freeing the entire human race from want” (para. 11).¹² The adoption of the Millennium Development Goals, which include the elimination of poverty, disease and illiteracy and the elimination of discrimination against women and environmental degradation, demonstrates that States accept the responsibilities set out in the Declaration on the Right to Development to “have the primary responsibility for the creation of national and international conditions favourable for the realization of the right to development” (art. 3 (1)); to take steps “individually or collectively, to formulate international development policies with a view to facilitating the full realization of the right to development” (art. 4 (1))¹³ as well as to formulate, adopt and implement “policy, legislative and other measures at the national and international levels” to realize the “progressive enhancement of the right to development” (art. 10).

The interdependence and indivisibility of economic, social and cultural rights and civil and political rights was reaffirmed at the Vienna Declaration and

Programme of Action adopted by the World Conference on Human Rights in 1993. The indivisibility and interdependence of human rights is also recognized in the Declaration on the Right to Development. Notably, the Vienna Declaration and Programme of Action also recognizes “all aspects of the right to development” contained in the Declaration on the Right to Development, thereby indicating that the Declaration and the outcome of the 1993 Vienna conference are in harmony with regard to the attributes of the right to development.

It is also important to emphasize that while the Declaration on the right to development frames the various rights by using words like “should” and “shall”, which suggest a heightened obligation to comply, very much like the International Covenant on Civil and Political Rights, the Declaration also recognizes that these rights ought to be realized progressively (art. 10).¹⁴ Progressive achievement in the context of the International Covenant on Economic, Social and Cultural Rights has been interpreted as not indefinitely postponing the realization of the rights in the Covenant. This principle arguably also applies to the Declaration on the Right to Development. However, unlike the Covenant, the Declaration does not contain the stipulation that the rights enshrined in it should be realized within “available resources”. As such, the development policies adopted by States and international financial institutions ought to be directly tied to the realization of the right to development.

III. Status of negotiations of economic partnership agreements

Since reciprocal trading relationships are the defining feature of European Union-ACP negotiations, it is important to be cognizant of the experience of developing countries the last time they assumed broad-ranging trade commitments. In 1994, at the conclusion of the Uruguay Round, several new trade treaties came into effect in the areas of intellectual property and trade in services, among others. Research since then shows that the cost of implementing these new treaties far outweighs the dynamic benefits the treaties would confer on developing countries.¹⁵ Fur-

¹⁰ Stephen P. Marks, “The human right to development: between rhetoric and reality”, *Harvard Human Rights Journal*, vol. 17 (2004), pp. 139-140.

¹¹ There has been and continues to be a Special Rapporteur on the right to food of the Human Rights Council.

¹² See also the report of the Working Group on the Right to Development on its ninth session (A/HRC/9/17).

¹³ See also article 5 (obliging States to “take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings” in certain circumstances); article 6 (enjoining States to promote all rights on the basis of equality); article 7 (obliging States to cooperate in the “establishment, maintenance and strengthening of international peace and security”); article 8 (obliging States to ensure rights to “basic resources, education, health services, food, housing, employment and the fair distribution of income.”).

¹⁴ See also Stephen P. Marks, “Obligations to implement the right to development: political, legal, and philosophical rationales”, in *Development as a Legal Right: Legal, Political and Economic Dimensions*, Bård A. Andreassen and Stephen P. Marks, eds. (Intersentia, 2010), pp. 73-100.

¹⁵ See J. Michael Finger and Philip Schuler, “Implementation of Uruguay Round commitments: the development challenge”, World Bank Working Paper No. 2215 (October 1999), p. 1.

ther, this research shows that the trade-liberalization mandates contained in these new trade treaties were working at cross purposes with the World Bank's poverty reduction programmes.¹⁶ Such an impact on new trade commitments made by ACP States would almost certainly adversely affect poverty elimination programmes and invariably make it harder for ACP countries to meet their social and economic rights obligations to their citizens.

The EPAs are being negotiated by ACP countries on a regional basis, although ratification will be on a bilateral level.¹⁷ EPA negotiations have raised a number of issues including market access commitments in the EPAs; capacity-building and technical support in the EPAs; human rights implications; and the incorporation of what are referred to as the "Singapore issues". Each of these issues is examined briefly below.

A. Market access commitments

ACP countries have difficulty making market access commitments to the European Union because of differing interpretations of the obligation in article XXIV of the General Agreement on Tariffs and Trade (GATT) to liberalize "substantially all trade".¹⁸ ACP States have largely construed this provision to allow them not to make concessions on market access with respect to areas of their economies such as agriculture where they would not be able to compete effectively with the more superior European Union agricultural sector. In their view, they are not ready to compete in these areas unless there is phased implementation of the commitments. The basis for the accommodation that the ACP countries are seeking is the commitment in article 37 (4) of the Cotonou Agreement, which obliges the European Union to "aim at improving current market access for the ACP countries". The European Union has shown little inclination to give ACP countries improved access. Lack of market access or reductions in levels of current market access for ACP countries after the expiry of the non-reciprocal arrangements is going to result in revenue losses and lost export opportunities in a manner that will adversely impact the social and economic rights of those affected.

The West African region, for example, has been unwilling to enter into an agreement that would be

unfavourable to the region, even as it has sought access to the European Union market.¹⁹ In fact, in many regions, the economic benefits of EPA are considered to be very one-sided, favouring the European Union much more than ACP countries.²⁰ Many of the commitments are regarded as unlikely to fulfil the commitment to development which is a central pillar of the Cotonou Agreement.²¹ For example, market liberalization under EPA would result in lost income on import taxes, which is an important source of income for many West African countries. In addition, it is unlikely that African goods will be able to compete favourably in European markets as they will have to compete with brands that already command consumer familiarity, confidence and taste. This may further lower the value of EPA to West Africa.²²

Negotiations in Central Africa have not fared better. The European Union has not been particularly flexible in relation to the concessions sought by Central African States, particularly with regard to the liberalization of trade in goods.²³ Throughout the negotiations, Central Africa offered to raise the percentage of market access liberalization from 60 per cent to 71 per cent over a 20-year period, but the European Union has refused to budge from its position of 80 per cent market access liberalization over a 15-year period.²⁴ In 2009, Cameroon signed an interim EPA with the 80 per cent provision in place.²⁵ None of the other Central African States has signed an interim EPA.²⁶

B. Capacity-building, technical support and Singapore issues

None of the draft or interim EPAs contains binding commitments on capacity-building and technical support, yet "lack of capacity to conduct complex negotiations" within the tight time frame for conclud-

¹⁶ Ibid.

¹⁷ Cotonou Agreement, art. 35 (2) (providing that "[e]conomic and trade cooperation shall build on regional integration initiatives of ACP States. Cooperation in support of regional cooperation and integration ... and economic and trade cooperation shall be mutually reinforcing".)

¹⁸ Meeting of Legal Experts of the ACP on EPA Negotiations, ACP House, 9-11 October 2007: Final Report, document ACP/00/051/07 Rev.1, para. 4.2.

¹⁹ See "We won't sign bogus trade pacts", *Daily Graphic* (Accra), 22 July 2009 (the Minister of Trade and Industry of Ghana, Hannah Tetteh, informed the press of the importance of having access to the European Union market in the horticultural sector, the cocoa processing sector and the canned fish and processed food products sector; and "EPA: a carrot for Africa", *Daily Trust* (Kaduna, Nigeria), 31 July 2009 (Nigeria, constituting two thirds of the continent's market, hesitated to sign a dubious and controversial EPA).

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Platform of Central African Non-State Actors (PANEAC), "Why EPA negotiations have slowed: a Central African perspective", *Trade Negotiations Insights*, vol. 8, No. 2 (March 2009). Available from ictsd.org. PANEAC is a non-governmental organization.

²⁴ Ibid.

²⁵ European Trade Commission, "Negotiations and agreements: the ACP regions".

²⁶ Editor's note: for the "state of play" of EPAs as at June 2012, see trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf.

ing EPA negotiations²⁷ has been a major barrier in various ACP regions.²⁸ The right of ACP States to participate effectively in the EPA negotiations will therefore be undermined by their lack of capacity to effectively participate. This is also inconsistent with the participation principle in formulating policies relating to development as anticipated in the Declaration on the Right to Development (see A/HRC/8/TF/CRP.6).

The European Union has sought to include a set of new-generation issues known as the Singapore issues. These new issues, which are currently not part of the multilateral treaty framework of WTO, are: Government procurement; competition law in WTO; trade facilitation, such as regulations ensuring that ports effectively and efficiently process imports and exports; and liberalizing foreign investment. Developing countries objected to expanding the trade agenda to these new areas before they had fully implemented their previous commitments following the end of the Uruguay Round in 1994. As such, in the context of the Doha Round of negotiations, developing countries managed to secure a commitment that these issues would only be negotiated if there was "explicit consensus" to proceed with negotiations on them. ACP States regard European Union pressure on these issues as an attempt to achieve a trade agenda in the context of EPAs that they cannot achieve in WTO.

While negotiations on competition policy are contemplated in article 45 of the Cotonou Agreement, negotiations on Government procurement are not expressly contemplated as a negotiating item in the Agreement. Yet, there are ongoing negotiations on Government procurement in various EPAs. These additional commitments, if included in EPAs, will cost ACP countries much more in the short term than any gains they may reap from these commitments. These additional costs will affect the ability of ACP States to provide budgetary support for sectors like education and health as well as other human rights obligations. Further, commitments in Government procurement will require ACP States to open the procurement process to competition from foreign providers of goods and services they seek to source, thereby undermining their ability to support local companies and, in effect,

²⁷ Jane Kelsey, "Going nowhere in a hurry? The Pacific's EPA negotiations with the European Union", *Victoria University of Wellington Law Review*, vol. 38, Issue 1 (2007), pp. 81, 84.

²⁸ See Meeting of ACP Legal Experts. Notably, capacity-building in trade negotiations is an objective specified in article 34 (3) of the Cotonou Agreement.

keep their revenue to support the domestic economy and local employment. The pressure exerted by the European Union in these negotiations arguably reduces the policy space of ACP over their economies (ibid.).

C. Stakeholder involvement

Stakeholders have not been effectively involved in EPA negotiations, although consultation of all stakeholders, including non-State actors, is anticipated in the Cotonou Agreement. In 2007, a suit, still ongoing, was filed by a small-scale farmers' association and a human rights organization seeking to prevent the Government of Kenya from signing on to the Eastern and Southern Africa (ESA) EPA primarily on the basis that negotiations on the ESA EPA had not widely consulted all stakeholders.²⁹ A stalemate on the ESA EPA continues to date. The European Union has already warned Kenya that it would impose import tariffs on a range of Kenyan exports to the European Union that currently enjoy preferential access unless it signs the EPA.³⁰ East Africa is seeking the European Union's agreement to a lower than 82.6 per cent liberalization of its trade with the East African Community (EAC) with a view to avoiding EAC merely selling primary commodities to the European Union which the European Union would then re-export to EAC once Europe had added value to them, because it "would be difficult, if not impossible under these conditions of competing with Europe ... to develop and economically diversify".³¹

Thus, EPAs would significantly limit the ability of developing countries to earn revenue from their exports by undermining a conventional way of accommodating countries through special and differential treatment, as well as through the built-in flexibilities of the multilateral trading system.³² This is reflected by

²⁹ M. Agutu, "Lobby files suit to stop EU pact", *Daily Nation* (Nairobi), 27 October 2007.

³⁰ Paul Wafula, "Kenya exports to EU face taxation in trade agreement stalemate", *Business Daily* (Nairobi), 28 June 2011.

³¹ Benjamin Mkapa, "EPA a threat to region's industrialisation", *Business Daily* (Nairobi), 23 June 2011.

³² See the Kigali Declaration on the Economic Partnership Agreement Negotiations, adopted by the African Union Conference of Ministers of Trade at its sixth ordinary session (29 October–2 November 2010), document AU/EXT/TD/Decln/2(VI) at para. 3 ("Reiterate our commitment to concluding development-friendly EPAs that will contribute meaningfully to reducing and ultimately eradicating poverty in our countries. In this regard, we urge the EU to dedicate additional, predictable and sustainable resources to specifically address EPA-related adjustment costs and build productive capacities.") and para. 6 ("Further reaffirm our commitment to the proposals by the ACP Group that the objective criteria which form part of the political objectives agreed by the international community, at the multilateral level, are retained to determine the parameters that have to be met to enable the conclusion of the EPAs", implicitly referring to the need for special and differential treatment principles applicable in WTO to apply in EPA negotiations).

the attitude of a European official who argued at an EPA negotiation meeting that “[t]he European Commission’s mandate is to negotiate a trade agreement, not a cooperation for development agreement”.³³ Although one of the primary negotiating pillars of EPAs is development, the European Union has not always regarded development with the seriousness ACP countries have. As result, in the Southern African Development Community (SADC) region, Angola, Namibia and South Africa have emerged as a separate configuration, known as ANSA, in the EPA negotiations, united in their scepticism of the current provisions of EPA.³⁴ Namibia has asked Europe to stop its “bully’ trade negotiations” and declared that it would not sign the interim agreement until contentious issues are resolved and the changes reflected in the agreement.³⁵ Some commentators have argued that EPAs have become a new opportunity for Europe to give its large businesses another go at the African market.³⁶

The process of negotiating EPAs among African countries has also been contentious. For example, the signing of an interim economic partnership agreement by three of the five Southern African Customs Union (SACU) members—Botswana, Lesotho and Swaziland—could tear apart the oldest customs union on the continent.³⁷ The main reasons that these States chose to sign an interim agreement were (a) to diversify trade and investment; and (b) to move away from their dependence on South African subsidies.³⁸ Botswana and South Africa especially do not see eye to eye on issues such as “foreign policy orientation”. This became increasingly evident under the Mbeki administration as tensions escalated regarding the policy toward Zimbabwe.³⁹ The European Union’s insistence on the most favoured nation clause has not helped the situation either. The clause would require South Africa, and other African States, to offer the identical market-access terms that it offers to other emerging markets such as Brazil and India to all EPA signatories as well.⁴⁰ The Deputy Director-General for International Trade and Economic Development in South Africa’s Department of Trade and Industry has argued

that unless differences in the trade regimes, such as tariffs and rules of origin, between the South African free trade agreement with the European Union and the EPA are addressed, “SACU itself, and the coherence of SACU [will be] undermined”.⁴¹

D. Inattention to development issues

ACP States have consistently noted that the European Union has not given adequate attention to the development chapters in the interim EPAs.⁴² Many ACP States have expressed reservations at the heavy pressure from the European Union to sign EPAs even while they may not represent the best interests of ACP countries.⁴³ The EPAs were scheduled to be implemented by 1 January 2008. However, owing to lack of agreement in negotiations between the European Union and ACP, the EPAs were not concluded within the specified period and both parties decided to enter into “interim agreements” instead that conformed to WTO rules on trade in goods.⁴⁴

“Development” remains the major theme of the EPA negotiations for the Economic Community of West African States (ECOWAS) region. When it became clear that an agreement would not be concluded by 31 December 2007, ECOWAS negotiators identified several areas, including “joint definition of the EPA support measures and their funding by the European Commission”, as areas to be negotiated as a precondition for signing the agreement.⁴⁵ West African States argued that they were committed to establishing support measures, such as the EPA Development Programme (PAPED), to enable EPA to become “a tool for development”.⁴⁶ PAPED would focus on the following five strategic areas: diversification and growth of production capacity; developing intraregional trade and facilitating access to international markets; improvement and strengthening of trade-related infrastructure; carrying out necessary adjustments and consideration of other trade-related needs; and implementation and monitoring and assessment of the EPA.⁴⁷

⁴¹ C. van der Merwe, “EU trade agreements undermine regional integration, says SA official”, *Engineering News* (South Africa), 3 August 2009.

⁴² See Addis Ababa Ministerial Declaration on Economic Partnership Agreement Negotiations, adopted by the Conference of Ministers of the African Union at its third extraordinary session (Addis Ababa, 15-16 January 2007, document Ext/Exp/Trade/Decl.(2) III, available from www.uneca.org.

⁴³ Nairobi Declaration on Economic Partnership Agreements, adopted by the African Union Conference of Ministers of Trade at its fourth ordinary session (Nairobi, 12-14 April 2006), document TI/TMIN/MIN/Decl.2 (IV), available from www.africa-union.org.

⁴⁴ European Commission, “Fact sheet on the interim economic partnership agreements: an overview of the interim agreements” (undated).

⁴⁵ “EPA: a carrot for Africa” (see footnote 19).

⁴⁶ CTA Agritrade, executive brief, “EU-West Africa EPA negotiations” (March 2009), p.10, available from www.acp-eu-trade.org.

⁴⁷ Ibid.

³³ PANEAC, “Why EPA negotiations have slowed”.

³⁴ “Namibia caught in stand-off between South Africa and EU”, *Inter Press Service*, 20 August 2009, available at afrika.no/Detailed/18623.html.

³⁵ Muritala Bakare, “Europe’s abusive EPA condemned as it tears Africa apart: now Africans are hitting back at Europe”, *Afrik-News*, 4 June 2009, available at www.afrik.com/article15771.html.

³⁶ Ibid. See also James Gathii, “The neo-liberal turn in regional trade agreements”, *Washington Law Review*, vol. 86, No. 3 (October 2011) and *African Regional Trade Agreements as Legal Regimes* (Cambridge, United Kingdom: Cambridge University Press, 2011).

³⁷ Peter Draper and Nkululeko Khumalo, “The future of the Southern African customs union”, *Trade Negotiations Insights*, vol. 8, No. 6 (August 2009).

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

However, according to the President of the ECOWAS Commission, the EPA negotiations stalled partly because a definite position on the sources of funding for PAPED could not be determined.⁴⁸

As in the West African negotiations, “development” is the central theme around which the Economic and Monetary Community of Central Africa (CEMAC)-European Union EPA negotiations are expected to continue; however, the negotiations have slowed down for several reasons. For one, the European Union has moved back on several development aspects of the partnership agreement.⁴⁹ For example, the European Union has ignored the agreement on a “roadmap for strengthening capacities and developing central African economies”.⁵⁰ The European commissioners and ministers have not signed this agreement either.⁵¹ Additionally, while the two parties have agreed that the Central African countries should be compensated for lost tax revenue following the dismantling of tariff barriers, the European Union has been reluctant to consider the individual economic and political situations of each country, despite Central Africa’s efforts to provide a simplified method that would allow for such considerations.⁵²

E. Interim Economic Partnership Agreement between Eastern and Southern African States and the European Community: an example

The Interim ESA EPA eliminates duties placed on goods originating in ESA States.⁵³ It also allows ESA States to maintain existing duties on goods originating in the European Union.⁵⁴ ESA States are prohibited from instituting any new duties and the European Union shall be granted the same treatment as those of most favoured nations in other trade agreements.⁵⁵ Under the Agreement, the European Union maintains safeguards that allow temporary suspension of preferential treatment to ESA States in the event that increased quantities of ESA goods pose a substantial threat to domestic industries in the European Union.⁵⁶

The Interim EPA has provisions for the removal of any quantitative restrictions on trade.⁵⁷ It seeks to ensure that once European Union goods enter ESA States, they are not subject to any indirect taxation and are granted the same treatment as domestic products.⁵⁸ Administrative cooperation is encouraged.⁵⁹ In the event that the provisions regarding administrative cooperation are not observed, the Interim EPA allows the European Union to temporarily suspend any preferential treatment.

The EPA recognizes that fisheries constitute a key economic resource in ESA States, which it seeks to develop.⁶⁰ The partnership agreement has provisions for special and differential treatment for ESA fisheries and for preferential access into the international market.⁶¹ Similar provisions encourage the development of marine fisheries and inland fisheries.⁶² The agreement also aims to diversify ESA economies. It has provisions to encourage development in other areas of the private sector.⁶³ For example, there are provisions for the development of industry and secure investment climates within ESA States.⁶⁴ It also seeks to promote mining and tourism services in these States.⁶⁵

The Interim EPA does contain some provisions concerning the development of innovation systems and modern standards of environmental protection. It addresses the production of renewable energy sources in ESA States⁶⁶ and seeks to promote information and communications technology development.⁶⁷ Some consideration is given to bringing ESA States up to international standards with regard to environmental issues.⁶⁸

EPA negotiations between the European Union and West Africa (consisting of 16 countries) commenced in 2003. By December 2007, Côte d’Ivoire and Ghana had agreed to an interim EPA with the European Union in order to prevent trade disruption when the Cotonou Agreement expired that month.⁶⁹ The EPA negotiations with West Africa were expected to continue in two phases: in the first phase, an agreement covering trade in goods, some trade rules and

⁴⁸ “EPA: a carrot for Africa” (see footnote 19).

⁴⁹ “Why EPA negotiations have slowed” (see footnote 33).

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern African States, on the one part, and the European Community and its Member States, on the other part, 2007, art. 11. Available at <http://register.consilium.europa.eu/pdf/en/09/st05/st05556.en09.pdf>.

⁵⁴ *Ibid.*, art. 12.

⁵⁵ *Ibid.*, arts. 15-16.

⁵⁶ *Ibid.*, arts. 20-21.

⁵⁷ *Ibid.*, art. 17.

⁵⁸ *Ibid.*, art. 18.

⁵⁹ *Ibid.*, art. 22.

⁶⁰ *Ibid.*, arts. 25-26.

⁶¹ *Ibid.*, art. 29.

⁶² *Ibid.*, arts. 30-35.

⁶³ *Ibid.*, art. 39.

⁶⁴ *Ibid.*, arts. 40-41.

⁶⁵ *Ibid.*, arts. 43-44.

⁶⁶ *Ibid.*, art. 47.

⁶⁷ *Ibid.*, art. 48.

⁶⁸ *Ibid.*, arts. 49-51.

⁶⁹ See European Commission, Trade, The ACP regions. Available at http://ec.europa.eu/trade/issues/bilateral/regions/acp/regneg_en.htm.

development cooperation was expected to be finalized by October 2009, and in the second phase, negotiations covering trade in services and other trade-related issues, to commence in January 2010.⁷⁰

Central Africa consists of the CEMAC trade bloc and Sao Tome and Principe.⁷¹ In February 2009, Cameroon and the European Union entered into an interim EPA.⁷² Negotiations for a full EPA continue at the regional level, but have stalled for a number of reasons.⁷³ EPA negotiations between ESA and the European Union began in 2004 and by April 2009, Seychelles, Zambia, Zimbabwe, Mauritius, Comoros and Madagascar had signed interim agreements with the European Union.⁷⁴ Ethiopia did not sign an IEPA and is still trading with the European Union under the Everything But Arms (EBA) regime. An EPA is not expected to be of any great advantage over the current EBA regime for Ethiopia. However, negotiations for a full EPA with the ESA States were expected to be concluded by the end of 2009, but that had not happened as of June 2012.

The European Union and the East African Community (EAC), consisting of Burundi, Kenya, Rwanda, the United Republic of Tanzania and Uganda, signed an interim agreement in April 2009. Negotiations for a full EPA were expected to be concluded in July 2009; however, they came to a halt when the European Union introduced other voluntary trade-related issues including Government procurement, environment and sustainable development to the negotiations.⁷⁵ EAC is reluctant to enter into a final EPA before these issues are finalized under the WTO talks on trade.⁷⁶ EAC is also dissatisfied with the development aspects of the agreement and is unwilling to proceed before these issues are addressed.⁷⁷

As of June 2012, four of the 15 members of SADC, namely, Botswana, Lesotho, Mozambique and Swaziland, had entered into interim EPAs with the European Union. Namibia had initialed an interim EPA, but it will not sign it until outstanding issues are

ironed out.⁷⁸ Although the European Union has trade regimes with Angola and South Africa in place, namely, the EBA initiative with Angola and the Trade and Development Cooperation Agreement signed in 1999 with South Africa, the European Union is also working with these countries to resolve outstanding issues in order to sign interim EPAs with them.

The European Union-SADC EPA could also potentially remove differences between the Trade and Development Cooperation Agreement and the other SACU members, thus bringing the region closer to a single trade regime with the European Union. Such an outcome would be "conducive to regional integration and economic development".⁷⁹ However, the negotiation process has been a bumpy ride for the European Community and South Africa, with both parties having walked away from the negotiations at critical moments.⁸⁰

At present, the EPA negotiations are taking place in five separate configurations in Southern Africa.⁸¹ The Permanent Secretary in the Namibian Ministry of Finance stated in August 2009 that the European's tried and tested strategy of "divide and rule" had not helped current regional integration efforts in Southern Africa.⁸² Additionally, the separate negotiation configurations had made establishing a common external tariff for the 2010 SADC customs union impossible.⁸³

IV. Human rights and the five pillars of the Cotonou Partnership: where does the right to development fit?

A. European Union and African, Caribbean and Pacific States' commitment to the right to development

The right to development does not appear in the text of the Cotonou Agreement. However, both the European Union and ACP States have affirmed their support for and commitment to the right to development. For example, the European Union Presidency's statement at the fifty-eighth session of the Commission

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part, *Official Journal of the European Union*, L 57, vol. 52 (28 February 2009). Available at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2009:057:SOM:EN:HTML>.

⁷³ "Why EPA negotiations have slowed" (see footnote 33).

⁷⁴ EPA negotiations—Where do we stand?: East and Southern Africa. Available at www.acp-eu-trade.org/index.php?loc=epa/.

⁷⁵ "East Africa may delay trade pact with EU", *New Vision* (Kampala) (29 July 2009).

⁷⁶ Ibid.

⁷⁷ Editorial, "EAC right on trade deal", *Business Daily* (Nairobi), 4 August 2010.

⁷⁸ Muritala Bakare, "Europe's abusive EPA condemned as it tears Africa apart" (see footnote 35).

⁷⁹ Aurelie Walker, "The EC-SADC EPA: the moment of truth for regional integration", *Trade Negotiations Insights*, vol. 8, No. 6 (August 2009). Available at <http://ictsd.org/i/news/tni/52416/>.

⁸⁰ Ibid.

⁸¹ "Namibia caught in stand-off between South Africa and EU" (see footnote 34).

⁸² Ibid.

⁸³ Ibid.

on Human Rights in 2002 noted that the European Union had in the past repeatedly reaffirmed its attachment to the right to development. In that statement, the European Union Presidency reaffirmed that the human person was the central subject of development and should be the active participant and beneficiary of the right to development. The European Union reiterated its position in 2005, and continues to refer to the need to “fight poverty and achieve the Millennium Development Goals”.⁸⁴ Under the European Union’s strategy, “Trade, growth and world affairs”, adopted by the European Union Commission in November 2010, the Union’s approach to EPAs is based on its commitment “to promoting sustainable development ... outside the [European Union]” and its position that “integrating developing countries into the global economy helps poverty eradication”.⁸⁵

The centrality of the human person as a subject of development is repeated word for word in the preamble to the Declaration on the Right to Development. Similarly, the European Union-ACP Joint Assembly has emphasized the role of the European Union-ACP Group in seeking to change WTO rules to more fully protect the right to development of ACP States.⁸⁶ While these and other European Union and ACP statements acknowledge the importance of the right to development, it is important to emphasize that the commitment to make the right an inalienable one, in which the “equality of opportunity for development is a prerogative both of nations and of individuals who make up nations”,⁸⁷ is not explicitly acknowledged in the Cotonou Agreement. Nevertheless, most of the rights protected in the Declaration are also incorporated in the text of the Agreement, as is elaborated on below.

B. Specific rights incorporated in the Cotonou Agreement

In this section, I outline those rights recognized in both the Declaration on the Right to Development and the Cotonou Agreement. Human rights are incorporated in the Cotonou Agreement as one of the

“essential and fundamental elements” that underpin European Union-ACP relations (art. 2). Article 9 (1) of the Cotonou Agreement, which lays the basis for European Union-ACP political dialogue, provides that “respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development”. Article 9 (2) reiterates the European Union-ACP States’ “deep attachment to human dignity and human rights”, including reaffirming the “equality of men and women”. In the same article, European Union-ACP States also undertake “to promote and protect all fundamental freedoms and human rights”. Article 9 (2) also provides that “[h]uman rights are universal, indivisible and interrelated”. Article 9 (4) further provides that the partnership “shall actively support the promotion of human rights”.

Article 6 (2) of the Declaration on the Right to Development recognizes the indivisibility and interdependence of all human rights and further calls on States to give “equal attention and urgent consideration ... to the implementation, promotion and protection of civil, political, economic, social and cultural rights”. Article 9 (1) of the Declaration also provides that all aspects of development are “indivisible and interdependent and each of them should be considered in the context of the whole”.

Article 96 of the Cotonou Agreement, also known as the non-execution clause, provides for consultations on human rights where political dialogue under articles 8 and 9 (4) of the Agreement have been exhausted.⁸⁸ The 2010 revisions to the Cotonou Agreement make “child labour, or discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (art. 8 (4)) part of the political issues of mutual concern and dialogue between the European Union and ACP States. Failure to “fulfil an obligation stemming from respect for human rights” triggers European Union-ACP States to enter into “consultations that focus on the measures taken or to be taken by the Party concerned to remedy the situation”. If consultations fail, “appropriate measures” such as aid suspension could follow (art. 96 (2) (a)).

The same article provides that in “cases of special urgency” which involve “exceptional cases of

⁸⁴ Council of the European Union, “Council conclusions on ‘First annual report to the European Council on EU development aid targets’”, 3091st Foreign Affairs Council Meeting, Brussels (23 May 2011). Available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/122163.pdf.

⁸⁵ European Commission, “Trade, growth and world affairs: trade policy as a core component of the EU’s strategy”, document COM(2010)612, p. 8. Available at http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146955.pdf.

⁸⁶ ACP-EU Joint Parliamentary Assembly, resolution on cotton and other commodities, document ACP-EU 3668/04/fin. Available at http://www.europarl.europa.eu/intcoop/acp/60_07/pdf/resolution04_en.pdf.

⁸⁷ Declaration on the Right to Development, preamble.

⁸⁸ See also article 4 of annex VII, Political dialogue as regards human rights, democratic principles and the rule of law.

particularly serious and flagrant violation" (art. 96 (2) (b)) of human rights, "appropriate measures may be taken" (art. 96 (2) (c)). This provision allows the suspension of the partnership between the European Union and a particular ACP member country. In such cases, the Cotonou Agreement is not regarded as having been abrogated but rather remains operational,⁸⁹ though arguably suspended between the European Union and the country subject to a suspension of commitments pursuant to action taken under article 96 of the Agreement.⁹⁰ This happened with the Sudan in 1990 and Zaire (now the Democratic Republic of the Congo) in 1992.⁹¹ Similarly, under the European Union Common Position on Burma/Myanmar of 1996, the European Union imposed sanctions on Myanmar, which suspended all non-humanitarian assistance and banned visas for Government officials from that country under the non-execution clause of the Cotonou Agreement.⁹²

This consultation procedure reflects the duties imposed on States in the Declaration on the Right to Development in articles 3 and 10. Article 3 requires that "States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development". The consultation procedure also certainly reflects the obligation in article 10 of the Declaration which provides that States have an obligation to formulate, adopt and implement "policy, legislative *and other measures* [emphasis added] at the national and international levels" to "ensure the full exercise and progressive enhancement of the right to development". In short, the Declaration on the Right to Development anticipates States having policy space over their economic policies so that they can ensure the existence of conditions that are consistent with their ability and duties to protect, respect and fulfil their human rights obligations and to provide remedies in the event of their violation.

Finally, article 8 (4) of the Cotonou Agreement makes non-discrimination on the basis of ethnicity, religion or race as well as respect for human rights part of the European Union-ACP political dialogue. Article 5

⁸⁹ See Communication Com (95) 216 of 23 May 1995 on the inclusion of respect for democratic principles and human rights in agreements between the Commission and third countries, p. 3. Available at www.eulib.com/documents/com95_216_en.pdf.

⁹⁰ Moussounga I. Mbadinga, "The non-execution clause in the relationship between the European Union (EU) and the African, Caribbean and Pacific States (ACP)", *German Law Journal*, vol. 3, No. 11 (2002), para. 17.

⁹¹ *Ibid.*, para. 19.

⁹² See "The EU's relations with Burma/Myanmar". Available at www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/dase20050419_003/dase20050419_003en.pdf (complete background, including efforts to support civil society).

of the Declaration on the Right to Development also obliges States to eliminate "all forms of racism and racial discrimination". Article 6 (1) of the Declaration requires States to promote, encourage and strengthen all "human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion".

V. Obstacles to the incorporation of human rights into the Cotonou Partnership Agreement

As noted, the Cotonou Agreement explicitly incorporates human rights as an essential element of the European Union-ACP partnership. However, the Agreement does not explicitly incorporate the right to development. More significantly, the Cotonou Agreement primarily restricts the scope of human rights to political dialogue and to consultations where dialogue fails. This is so because human rights concerns are not explicitly included in the other four pillars of the European Union-ACP partnership as contained in the Agreement. These are: involvement of civil society, the private sector and other non-State players; poverty reduction within the context of objectives and targets agreed at the international level such as the Millennium Development Goals; the economic and trade cooperation framework; and the rationalization of financial instruments and a system of flexible programming. However, as I will note below, other provisions of the Cotonou Agreement could be construed to suggest that at least some human rights are intended to be cross-cutting concerns within the other pillars of the European Union-ACP cooperation under the Agreement.

Since the main text of the Cotonou Agreement does not explicitly make the human rights provisions in articles 8, 9 and 96 cross-cutting issues within the other pillars of the partnership, those human rights specifically incorporated in the Agreement may be regarded as having no operational relationship to the other pillars of the partnership. In other words, it does not appear that there is any consequence contemplated under the Cotonou Agreement to remedy the situation where a specific European Union-ACP economic and trade cooperation programme undermines the observance of human rights. Should this occur, the Agreement does not contemplate invoking either the political dialogue or consultation procedures. Therefore, political dialogue and consultation procedures may only be regarded as frameworks for European

Union-ACP collaboration on human rights issues unrelated to the other pillars of the partnership.

However, such an interpretation is contrary to what is contemplated in the Declaration on the Right to Development. Under the Declaration, in order to promote development, States are urged to give “equal attention and urgent consideration ... to the implementation, promotion and protection of civil, political, economic, social and cultural rights and ... promotion of, respect for and enjoyment of certain human rights and fundamental freedoms”.⁹³

Further, the criteria identified in the Cotonou Agreement for allocation of resources within the European Union-ACP partnership are insufficient from the human rights perspective, for two reasons. First, the criteria do not include consideration of human rights, but are based exclusively on needs and performance indicators and criteria.⁹⁴ Some of these indicators and criteria are closely related to issues of human rights, like poverty alleviation and reduction.⁹⁵ However, some of the other criteria, such as allocations for macroeconomic support,⁹⁶ may not necessarily be consistent with human rights, especially if macroeconomic support is used to support economic programmes that reduce public spending that might undermine “access to basic resources, education, health services, food, housing, employment and the fair distribution of income”.⁹⁷ Fortunately, the Financial Cooperation section of the Cotonou Agreement provides that European Union-ACP countries “shall ensure that adjustment is economically viable and socially and politically bearable” (art. 67 (1)). Although this provision does not provide an explicit basis to assess macroeconomic programmes against human rights norms, it arguably suggests that such reforms should not undermine social and economic conditions in a manner that may be inconsistent with the protection of social and economic rights.

Second, the criteria and indicators of resource allocation do not limit allocation of resources in the European Union-ACP partnership on the basis that a beneficiary ACP State has engaged in human rights abuses. Article 5 (7) of the Cotonou Agreement’s Implementation and Management Procedures pro-

vides that reviews of resource allocations may be made in the light of “current needs and performance of the ACP State concerned” (annex IV, art. 5 (7)). This emphasis on using criteria and indicators that do not include human rights in allocating resources indicates that human rights are not an important priority as compared to other criteria specified in the Cotonou Agreement in determining resource allocations.

Political dialogue under article 9 and consultations that may lead to resources being suspended or cut off under article 96 of the Cotonou Agreement are the only ways in which the European Union-ACP partnership explicitly requires human rights to be taken into account. This does not, of course, prevent human rights from being seen as a cross-cutting issue among all the pillars of the European Union-ACP partnership, since article 9 refers to human rights as an essential element of the relationship. However, the European Union-ACP approach of leaving political dialogue and consultations outside the other equally important programmatic areas of partnership arguably formally relegates human rights to the sidelines within the other four pillars of the partnership.

Another potentially adverse effect of the European Union-ACP partnership on human rights is that new mandates of European Union-ACP relations, such as those relating to EPAs, are currently not independently funded under the European Development Fund. As such, resources that previously may have been designated for existing pillars and programmes of European Union-ACP cooperation, such as the Governance Initiative, which more explicitly embraces human rights, could receive a relatively smaller monetary allocation since there is no additional allocation of resources in the partnership to fund the EPA mandate. The European Union has indicated to Pacific countries that unless they sign an EPA on time, programmed assistance for the period 2008-2014 would be reprogrammed. Thus, the European Union is now conditioning access to committed aid on signing an EPA.⁹⁸

Another issue on which ACP States have long expressed concern is the continuation of the European Union’s Common Agricultural Policy, in particular providing subsidies to agricultural products for which ACP farmers would otherwise have a comparative advantage. ACP States, together with other developing countries, have not been successful at the World Trade Organization in getting European Union concessions

⁹³ Declaration on the Right to Development, tenth preambular paragraph. Note also mention in the same paragraph that the promotion of “certain human rights ... cannot justify the denial of other human rights and fundamental freedoms”.

⁹⁴ See Cotonou Agreement, annex IV, Implementation and management procedures, art. 3.

⁹⁵ *Ibid.*, art. 3 (1) (b).

⁹⁶ *Ibid.*, art. 3 (2) (a).

⁹⁷ Declaration on the Right to Development, art. 8 (1).

⁹⁸ “EU, Pacific clash over EPA funds”, *Trade Negotiations Insights* (September 2007), pp. 10-11.

on agriculture that will remove trade-distorting subsidies and other farm-support measures even though they are detrimental to ACP farmers.⁹⁹ One example of European Union subsidies having an adverse impact on the comparative advantage of ACP farmers is sugar.¹⁰⁰ Though the European Union has a Sugar Protocol that addresses this issue, the subsidies continue to have a negative impact on the ability of ACP farmers to compete with the cheaper subsidized European Union sugar that ends up being dumped in ACP countries. This is a good example of how the social and economic rights of ACP farmers and the poor are directly affected by European Union trade policy.¹⁰¹ The European Union has committed to remedying the imbalance. Current economic conditions have created greater demand for raw sugar, which places ACP countries in an advantageous position.¹⁰² However, in 2012, price guarantees ended and prices will be determined by the market.¹⁰³ How that change will impact ACP countries may depend on the European Union working more closely with ACP countries to create food supply chain transparency.¹⁰⁴ Another issue on which the Doha Round of talks has failed to make substantial progress on is cotton. Ten million farmers in Central and West Africa depend on the income generated from cotton. However, although these farmers are the lowest-cost producers of cotton, huge subsidies in the United States in particular have taken African cotton off the world market. Brazil has already won an important victory against the United States at WTO, which found that United States subsidies were in violation of WTO rules.¹⁰⁵ A final settlement on African cotton in the ongoing negotiations has yet to be reached.¹⁰⁶

Another example of how European Union policies adversely affect social and economic rights of ACP countries is the extremely stringent sanitary and phytosanitary measures (SPS) that are imposed on access to the European Union market by products from ACP countries.¹⁰⁷ Given the huge dependence of ACP countries on agriculture and the importance of agriculture to the rural economies in which the majority of people in poor countries live, the continuation of subsidies and non-tariff measures, including SPS measures, that make it difficult for farmers to access world markets at competitive prices not only exacerbates their poverty but also contributes to the deterioration of their social and economic rights. The impact of these subsidies and distortions is actually much broader: they also adversely affect the poor populations in the rural areas that rely on the incomes that farmers otherwise connected to world markets earn in the absence of such distortions.¹⁰⁸

Some ACP States are very vulnerable to pressures from the European Union since their budgets are heavily dependent on European Union programme assistance. This is particularly so since the indicators used in European Union budget support for ACP countries do not necessarily reflect the concerns of the right to development and are not explicitly required to take human rights considerations into account. The indicators used in budget support programmes are primarily of a quantitative rather than a qualitative nature, especially insofar as they do not specifically include human rights considerations. Further, the European Union has not been particularly transparent in designing the criteria for its budget support programmes. The participation of ACP countries in decisions on budget support has, therefore, not reflected the commitment in the Cotonou Agreement to underpin European Union-ACP relations on the basis of the principle of "equality of the partners and ownership of the development strategies" (art. 2). This is also incon-

⁹⁹ See, generally, James Gathii, "The high stakes of WTO reform", *Michigan Law Review*, vol. 104, No. 6 (2006), pp. 1361, 1370 (discussing Western countries' unwillingness to make concessions on agriculture issues in international agreements).

¹⁰⁰ Nsongurua J. Udombana, "A question of justice: the WTO, Africa, and countermeasures for breaches of international trade obligations", *The John Marshall Law Review*, vol. 38, No. 2 (2005), pp. 1153, 1173.

¹⁰¹ See World Bank, *Global Economic Prospects and the Developing Countries 2003* (Washington, D.C., 2004), chap. 4, International agreements to improve investment and competition for development, especially pp. 117, 134 (noting that though subsidies have on the whole been reducing, they have effectively been on the rise because of increases in domestic support measures).

¹⁰² Agritrade, executive brief, "Sugar: trade issues for the ACP", sect. 3.2, update, March 2010, available at <http://agritrade.cta.int/Agriculture/Commodities/Sugar/Sugar-Trade-issues-for-the-ACP>.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ The WTO Appellate Body found United States cotton subsidies to be inconsistent with that country's WTO obligations. As a countermeasure, Brazil settled for technical assistance and capacity-building assistance to the cotton sector in Brazil worth \$147 million annually. See press release, "U.S., Brazil agree on memorandum of understanding as part of path forward toward resolution of cotton dispute", April 2010. Available at www.ustr.gov/about-us/press-office/press-releases/2010/april/us-brazil-agree-memorandum-understanding-part-path-f.

¹⁰⁶ WTO, Sub-Committee on Cotton, "Implementation of the development assistance aspects of the cotton-related decisions in the 2004 July package and paragraph 12 of the Hong Kong Ministerial", document TN/AG/

SCVC/W/12-WT/CFMC/28 (21 May 2010). The Group of Twenty (G20) developing country negotiating bloc within WTO was "disappointed by the fact that no progress has been achieved in discussion of the trade aspects of cotton during the July 2008 Ministerial. The G20 was also concerned that current substantive negotiations on cotton seemed to be deadlocked and even back-tracking in the consultations of the Special Session on Agriculture. Developing country producers and exporters of cotton, particularly the poorest among them, continued to face unfair competition from developed country subsidies. The G20 urged developed countries, which accounted for the bulk of trade-distorting subsidies in cotton to live up to the mandate" (para. 29).

¹⁰⁷ Denise Prévost, *Sanitary, Phytosanitary and Technical Barriers to Trade in the Economic Partnership Agreements between the European Union and the ACP Countries*, Programme on EPAs and Regionalism, Issue Paper No. 6 (Geneva, International Centre for Trade and Sustainable Development, 2010), p. 28. Available at <http://ictsd.org/i/publications/84277/?view=document>.

¹⁰⁸ See, generally, James Gathii, "Process and substance in WTO reform", *Rutgers Law Review*, vol. 56 (2004), p. 885 (discussing the bias against agriculture and other developing country concerns).

sistent with requirement in the Declaration on the Right to Development that “States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States” (art. 3 (3)).

VI. Impact of the negotiations on economic partnership agreements on human rights within African, Caribbean and Pacific countries from a right to development perspective

In 2000, the European Union-ACP countries agreed to negotiate EPAs pursuant to article 36 of the Cotonou Agreement. One objective of negotiating EPAs was to design trading arrangements that were compatible with WTO rules by “removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade” (art. 36 (1)). EPAs ended non-reciprocal trade preferences that ACP countries enjoyed from the European Union in 2007; a WTO waiver of the most favoured nation norm allowed the European Union’s trade preferences to come to an end in that year.¹⁰⁹ The current negotiations on Economic Partnership Agreements are incomplete but ongoing, as we saw in section III above.¹¹⁰

In accordance with the Cotonou Agreement, the other objectives of enacting EPAs are to integrate ACP States into the world economy while promoting sustainable development and contributing to poverty eradication (art. 34 (1)); “to enable the ACP States to play a full part in international trade”, in part by ensuring that they “manage the challenges of globalisation” and “adapt progressively to new conditions of international trade” (art. 34 (2)); and finally to strengthen ACP States’ “trade and investment policies and ... improv[e] [their] capacity to handle” trade issues (art. 34 (3)).

One of the major concerns with regard to the current EPA drafts is that none of them explicitly incorporates human rights, either as stand-alone entitlements or as cross-cutting concerns. It may be argued that the provisions of articles 8, 9 and 96 of the Cot-

onou Agreement would apply to EPAs. Yet, EPAs will, in an important respect, recast European Union-ACP relations within a trading framework without, simultaneously, explicitly making human rights norms an essential element. Thus, while the objectives of EPAs, such as poverty eradication, are laudable, the Cotonou Agreement does not explicitly make human rights an objective to be met within or to be promoted by EPAs. When poverty is induced by trade policies such as the heavy agricultural subsidies in Western markets that displace cheaper produce from developing countries, the ability of Governments to safeguard social and economic rights is undermined. This is because such Governments may not be able to generate revenue or foreign exchange from trading relationships they previously enjoyed. As a consequence, budgetary allocations to support education and health, which are social and economic rights, would be undermined.

A danger that must be avoided is EPAs appearing to be like a bill of rights for investors, as has been the case of the North American Free Trade Agreement (NAFTA). In addition, it is unlikely that investor and trade rights would be widely respected in a context where there is no simultaneous commitment to the respect for human rights.

Article 37 (4) of the Cotonou Agreement contemplates one method for safeguarding human rights concerns within EPAs by providing for monitoring their “socioeconomic impact” on ACP countries. In addition, the Agreement anticipates that negotiations should take into account “the current level of development” of ACP countries (art. 34 (2)). Indeed, the Agreement provides for flexibility in the commitments that ACP countries may assume in a variety of ways. First, as noted above, an objective of economic and trade cooperation is poverty eradication in ACP States (art. 34 (1)).¹¹¹ Second, economic and trade cooperation is to take into account “the current level of development of ACP countries” so that they can “adapt progressively to the new conditions of international trade” (art. 34 (2)).¹¹² This provision anticipates that EPAs will not lead to sudden revenue losses for ACP States since the new commitments are required to be adapted over time rather than all at once. Third,

¹⁰⁹ According to article 37 (1) of the original text of the Agreement (providing that EPAs “shall be negotiated during the preparatory period which shall end by 31 December 2007”).

¹¹⁰ See Cotonou Agreement, arts. 35 (2) and 37 (3) (providing a basis for conducting EPA negotiation with the regions rather than bilaterally as part of the Agreement’s goal of strengthening regionalism as a strategy of better integrating ACP countries within the international trading system).

¹¹¹ See Uwe Holtz, “Poverty reduction strategy papers and country strategy papers and their relationship to the combat against desertification: the role of parliaments” (Bonn, 26 May 2003), p. 12 (discussing the complexity of poverty reduction where the population lives in rural areas).

¹¹² This mandate may not be executed unless the ACP countries have resources to meet the demands of international trade. Edward Anderson and Christopher Stevens, “The ‘development dimension’: matching problems and solutions”, Overseas Development Institute, Briefing Paper 6 (June 2006), p. 4. Available at www.odi.org.uk/resources/docs/1798.pdf.

the Cotonou Agreement also requires the inclusion of special and differential treatment and taking into account the respective levels of development of the different countries (art. 34 (4)). These provisions do not suggest the inevitability of reciprocal free trade; rather, they contemplate a phased and gradual easing of ACP States into a new trading relationship with the European Union that is sensitive to their levels of development and in particular to the social and human rights impacts of such a relationship. This principle of flexibility is further contained in article 39 (3) of the Cotonou Agreement, which notes the “importance of flexibility in WTO rules to take into account the ACP’s level of development as well as the difficulties faced in meeting their obligations”.

VII. Potential areas of congruence and synergy of the Cotonou Partnership Agreement with the right to development

One of the most significant areas in which there is potential congruence and synergy between the right to development and the Cotonou Agreement is the incentive tranche that the European Union uses to reward countries that observe certain human rights standards.¹¹³ Under the incentive tranche, those countries that, for example, ratify the core conventions of the International Labour Organization (ILO) get more money.¹¹⁴ Such positive incentives have potential to have greater influence on human rights observance than negative pledges such as those contained in the political dialogue and consultation procedures of the European Union-ACP relationship or aid suspension. At the moment, the European Union takes into account a governance profile that includes human rights criteria.

Another potential area of synergy between the Cotonou Agreement and the Declaration on the Right to Development is the recognition of the requirement in the Agreement to “integrate a gender-sensitive approach and concerns at every level of development cooperation including macro-economic policies,

strategies and operations” (art. 31 (a)). This provision was reinforced by the 2005 revision to the Cotonou Agreement by adding “the protection of sexual and reproductive health and rights of women” (art. 25 (d)). In addition, the Agreement provides that the promotion of “human dignity, social justice and pluralism” requires “systematic attention” in all aspects of European Union-ACP cooperation (art. 33 (1) (a)). Even more directly, article 33 (1) (b) of the Agreement provides that cooperation shall support efforts to “promote and sustain universal and full respect for and observance and protection of all human rights and fundamental freedoms” in all aspects of European Union-ACP relations. These and similar provisions provide an ample opportunity for a more robust presence of human rights within European Union-ACP relations.

The European Union requires sustainability impact assessments of its programmes, including those funded by the European Union-ACP partnership. This provides additional space for taking human rights into account more systematically and as an integral element in the European Union-ACP partnership. The use of independent monitors with a human rights background has potential to highlight human rights in the context of European Union-ACP relations.

The Cotonou Agreement further provides that cooperation on social sector development shall encourage “respect for basic social rights” (art. 25 (1) (g)). This provision is consistent with the call in the Declaration of the Right to Development for “effective international cooperation ... to foster ... comprehensive development” (art. 4 (2)).

VIII. Recommendations to enhance the right to development in the operational framework of the Cotonou Partnership Agreement

There are a number of ways in which the right to development can fit within the operational framework of the Cotonou Partnership. One of the most significant is to find ways to reform the European Union’s Common Agricultural Policy insofar as it adversely affects ACP States within the ambit of the Cotonou Agreement’s EPA negotiation mandate. Currently, the Common Agricultural Policy falls outside of the Agreement’s objectives and omits the possibility of questioning how the Policy adversely affects ACP countries. There is, therefore, an assumed element of unevenness in the obligations. Reform via the negotiation mandate

¹¹³ Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on governance in the European Consensus on Development: towards a harmonised approach within the European Union (Brussels, 30 August 2006), document Com(2006) 421 final, p. 12, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0421en01.pdf, specifically providing incentives for good governance, which includes “respect of human rights and fundamental freedoms” (ibid., p. 5).

¹¹⁴ See Governance Profile, annex 1, Aid allocation criteria for the geographic cooperation with the ACP countries in the framework of the 10th European Development Fund covering the period 2008-2013, p. 21 (listing ratification of the ILO conventions as a criterion for receiving incentives). Available at www.oecd.org/dataoecd/13/27/40099520.pdf.

would create the appearance of equality between the European Union and the ACP States while in reality, the EPAs would contain obligations applying to both the European Union and the ACP countries in an even-handed manner.

Trade negotiations need to take into account the special needs of developing and least developed countries, especially the need for preferential treatment in trade relations, which are increasingly becoming the dominant pillar of European Union-ACP relations.¹¹⁵ As noted above, article 39 of the Cotonou Agreement emphasizes the principle of special and differential treatment, suggesting that though full reciprocity is the ultimate goal of the European Union-ACP relationship, flexibility in getting there is a primary principle moving forward. Trade between industrialized countries with economically vulnerable countries like least developed countries (LDCs), which dominate the ACP group, can hardly be conducted on the basis of reciprocity since the share of LDCs in international trade is very limited; LDCs hardly have the market power the European Union has to impose its economic interests on ACP States. Furthermore, impoverished populations tend to be more dependent on natural resources which can be threatened by land degradation if development is not properly managed.¹¹⁶ Thus, without effective reciprocity, EPAs are likely to merely open up ACP countries to European Union goods and services without giving any corresponding benefits to LDCs and adversely impact impoverished populations.¹¹⁷

Fortunately, LDCs¹¹⁸ will continue to enjoy duty- and quota-free access as under the EBA initiative.¹¹⁹ For all ACP States, final EPAs ought to come with generous trade-related adjustment assistance, trade-related development and infrastructure support, support to build production capacity, and the financing of trade law and policymaking in ACP States. Such aid-for-trade measures may offset some of the losses that would accompany ending preferential agreements when EPAs come into effect.

It would also be important to ensure that human rights take primacy within the negotiation of EPAs. In the Pretoria Declaration on Economic, Social and Cultural Rights in Africa,¹²⁰ adopted by the African Commission on Human and Peoples' Rights in 2004, States were urged to make human rights a priority in negotiating trade treaties.¹²¹ This is consistent with article 177 (2) of the Treaty Establishing the European Community which provides that European Union development cooperation should contribute to the respect for human rights and fundamental freedoms. Similarly, article 11 of the Treaty on European Union provides that one of the objectives of the European Union's foreign and security policy is "to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms". These human rights concerns ought to take centre stage in EPA negotiations.

IX. Conclusions

While human rights are an essential element in European Union-ACP relations, the Cotonou Agreement does not explicitly make them binding on the operationalization of the other pillars of the Cotonou Partnership. Thus, even though elements of the right to development are evident in the partnership's definition of human rights, the Agreement cannot be persuasively read to protect human rights across all the areas of the Partnership. This is particularly worrisome in view of the fact that negotiations on EPAs are recasting the Partnership within a trade and economic framework which has become a major, if not the most significant, aspect of European Union-ACP relations. In this respect, the measurement of the Partnership in general and EPAs in particular against the criteria developed by the high-level task force on the implementation of the right to development could play a crucial role in giving human rights a central place in European Union-ACP relations. The more significant the role human rights plays in European Union-ACP relations, the more likely it is that the right to development will be realized. This would also be consistent with Millennium Development Goal 8 insofar as it aims at addressing the needs of least developed countries, which comprise 40 of the 77 ACP States.¹²²

¹¹⁵ See Cosmas Milton Obote Ochieng, "The EU-ACP economic partnership agreements and the 'development question': constraints and opportunities posed by article XXIV and special and differential provisions of the WTO", *Journal of International Economic Law*, vol. 10, No. 2 (2007), p. 363.

¹¹⁶ Holtz, "Poverty reduction strategy papers", p. 13.

¹¹⁷ Aadiya Mattoo and Arvind Subramanian, "The WTO and the poorest countries: the stark reality", *World Trade Review*, vol. 3, No. 3 (2004), p. 385. For proposed solutions, see Dominique Njinkeu, "Uniform treatment for Africa in the DDA [Doha Development Agenda]", *ibid.*, p. 433.

¹¹⁸ See European Commission, Negotiations and agreements, at http://ec.europa.eu/trade/wider-agenda/development/economic-partnerships/negotiations-and-agreements/#_esa.

¹¹⁹ See European Commission, Everything But Arms, at <http://ec.europa.eu/trade/wider-agenda/development/generalised-system-of-preferences/everything-but-arms/>.

¹²⁰ Available at www.achpr.org/instruments/pretoria-declaration.

¹²¹ Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa (17 September 2004), adopted by the African Commission on Human and Peoples' Rights at its thirty-sixth ordinary session (Dakar, 23 November–7 December 2004) (ACHPR/Res.73(XXXVI)04).

¹²² Cotonou Agreement, arts. 84-90 (providing for special measures for LDCs, landlocked countries as well as small island developing ACP States); see also annex VI to the Agreement, List of the least developed, landlocked and island ACP States.

